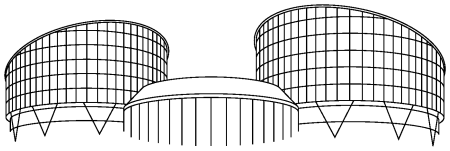

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF MAGYAR HELSINKI BIZOTTSÁG v. HUNGARY

(Application no. 18030/11)

JUDGMENT

STRASBOURG

8 November 2016

This judgment is final but it may be subject to editorial revision.

In the case of Magyar Helsinki Bizottság v. Hungary,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
András Sajó,
Işıl Karakaş,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Angelika Nußberger,
Boštjan M. Zupančič
Nebojša Vučinić,
Kristina Pardalos,
Ganna Yudkivska,
Linos-Alexandre Sicilianos,
Helen Keller,
André Potocki,
Aleš Pejchal,
Ksenija Turković,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*

and Lawrence Early, *Jurisconsult,*

Having deliberated in private on 4 November 2015 and 1 September 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 18030/11) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a non-governmental organisation registered under Hungarian law, Magyar Helsinki Bizottság ("the applicant NGO"), on 14 March 2011.

2. The applicant NGO was represented by Mr T. Fazekas, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by Mr Z. Tallódi, Agent, Ministry of Justice.

3. The applicant NGO alleged under Article 10 of the Convention that the Hungarian courts' refusal to order the disclosure of the information to which it had sought access amounted to a breach of its right to freedom of expression.

4. The application was assigned to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 4 December 2012 the application

was communicated to the Government. On 26 May 2015 a Chamber of the Second Section, composed of Işıl Karakaş, András Sajó, Nebojša Vučinić, Helen Keller, Egidijus Kūris, Robert Spano, Jon Fridrik Kjølbro, judges, and Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment within the time allowed (Article 30 of the Convention and Rule 72 § 1).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the final deliberations, Boštjan M. Zupančič and Ksenija Turković, substitute judges, replaced Egidijus Kūris and Iulia Antoanella Motoc, who were prevented from sitting (Rule 24 § 3).

6. The applicant NGO and the Government each filed further written observations (Rule 59 § 1) on the merits.

7. On 2 September 2015 the United Kingdom Government were granted leave by the President of the Grand Chamber to intervene as a third party in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 3). They filed their written observations on 18 September 2015.

8. In addition, on 21 September 2015 third-party comments were received from the following organisations, which had been granted leave by the President of the Grand Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2): Media Legal Defence Initiative, Campaign for Freedom of Information, ARTICLE 19, Access to Information Programme and the Hungarian Civil Liberties Union, acting jointly, and also Fair Trials.

9. A hearing took place in public in the Human Rights Building, Strasbourg, on 4 November 2015 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Mr Z. TALLÓDI, *Agent*,
Ms M. WELLER, *Co-Agent;*

(b) for the applicant NGO

Mr T. FAZEKAS,
Mr T.L. SEPSI,
Mr CS. TORDAI, *Counsel*,
Ms N. NOVOSZÁDEK, *Adviser*;

(c) for the United Kingdom Government

Mr J. COPPEL, QC, *Counsel*,
Ms A. MCLEOD, *Agent*,
Ms A. MAHMOOD, *Adviser*.

The Court heard addresses by Mr Tallódi, Mr Sepsi and Mr Coppel, as well as their replies to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant, Magyar Helsinki Bizottság (*Hungarian Helsinki Committee*), is a non-governmental organisation (NGO) that was founded in 1989. It monitors the implementation of international human-rights standards in Hungary, provides legal representation to victims of alleged human-rights abuses and promotes legal education and training both in Hungary and abroad. Its main areas of activity are protecting the rights of asylum seekers and foreigners in need of international protection, and monitoring the human-rights performance of law-enforcement agencies and the judicial system. In particular, it focuses on access to justice, conditions of detention, and the effective enforcement of the right to defence.

A. Background to the case

11. Between 2005 and 2007 the applicant NGO conducted a project "Model Legal Aid Board Programme" aimed at developing and testing a model to overcome shortcomings in the system for the *ex officio* appointment of defence counsel. The study summarising the outcome of the project was published in 2007 under the title "Without Defence", suggesting that there should be a standard set of criteria developed to assess the quality of defence counsel's work.

12. In 2008, as a follow-up to its 2005-2007 survey, the applicant NGO launched a new project entitled "The Right to Effective Defence and the Reform of the *ex-Officio* Appointment System". Together with the Ministry of Justice and Law Enforcement and various bar associations, the applicant NGO developed a questionnaire aimed at evaluating the performance of defence counsel. It also assessed the quality of legal representation provided by *ex officio* appointed and retained defence counsel, by examining the case files in 150 closed criminal cases. In parallel, the applicant NGO made a contribution in respect of Hungary to the comparative research project "Effective Defence Rights in the European Union and Access to Justice: Investigating and Promoting Best Practices" carried out in nine European countries and funded by the European Commission and the Open Society Justice Initiative.

The results of the two projects were presented at a conference in April 2009, the conclusions of which were summarised in the report "In the

Shadow of Suspicion: A critical account of enforcing the right to an effective defence".

13. In addition, the applicant NGO carried out continuous advocacy activities for reform of the *ex officio* appointments system; in cooperation with the Budapest Bar Association, it also drew up recommendations for a proposed code of professional ethics for *ex officio* defence counsel.

14. In the applicant NGO's assessment, its research showed that the system of *ex officio* appointed defenders did not operate adequately, essentially because the investigative authorities, in particular the police, were free to choose defence counsel from a list compiled by the relevant bar associations. This gave rise to distrust on the part of defendants. Furthermore, according to the applicant NGO's findings, many police departments had recourse to the same lawyers or law firms in the majority of cases, resulting in defence counsels' dependency on *ex officio* appointments to earn their living. The applicant NGO also concluded that the selection system lacked transparency.

15. In 2009, in the framework of the project "Steps Towards a Transparent Appointment System in Criminal Legal Aid", an experimental method was put in place, in cooperation with the applicant NGO, the county bar associations and certain county police departments. A key facet of this method was replacement of the existing system of discretionary appointments by a randomised computer-generated one.

16. As a feature of the project, the applicant NGO requested the names of the public defenders selected in 2008 and the number of assignments given to each lawyer from a total of twenty-eight police departments, situated in the seven Hungarian regions. The aim of the data request was to demonstrate whether there existed discrepancies in police departments' practice in appointing defence counsel from the lists provided by the bar associations. These requests were made under section 20 (1) of Act no. LXIII of 1992 ("the Data Act"). The applicant NGO maintained that the number of defence counsel appointments was public-interest data (*közérdekű adat*) and that thus the names of defence counsel were data subject to disclosure in the public interest (*közérdekből nyilvános adat*).

17. Seventeen police departments complied with the request; a further five police departments disclosed the requested information following a successful legal challenge by the applicant NGO.

18. On 18 August 2009 the applicant NGO addressed the same request to the Hajdú-Bihar County Police Department, seeking access to information concerning the names of defence counsel appointed in the police department's area of jurisdiction and the number of appointments given to each defence counsel.

19. In its response of 26 August 2009 the Hajdú-Bihar County Police Department refused the applicant NGO's request, stating that "the names of the defence counsel are not public-interest data nor information subject to

disclosure in the public interest under section 19(4) of the Data Act, since defence counsel are not members of a body performing State, municipal or public duties. Thus their names constitute private data, which are not to be disclosed under the law". The police department also referred to the disproportionate burden the provision of the data would impose on it.

20. A similar request by the applicant NGO was rejected by the Debrecen Police Department on 27 August 2009.

B. Civil proceedings instituted by the applicant organisation

21. On 25 September 2009 the applicant NGO brought an action against these two police departments, arguing that *ex officio* defence counsel performed a duty in the interest of the public which was financed from public funds. Data concerning them thus qualified as information subject to disclosure in the public interest.

22. In its counter-claim, the Hajdú-Bihar County Police Department maintained its view that the names of defence counsel constituted personal data rather than information subject to disclosure in the public interest, since they neither carried out their tasks within the scope of the duties and competences of the police departments, nor were they members of those bodies. It further maintained that processing the data requested by the applicant NGO would entail a prohibitive workload.

23. The Debrecen Police Department requested the discontinuation of the proceedings.

24. The Debrecen District Court joined the two cases. On 21 October 2009 the District Court found for the applicant NGO, ordering the respondents to release the relevant information within 60 days.

25. The court found that although defence counsel did not qualify as persons performing public duties, they were also not employees or agents of the respondent police departments, and the question whether defence was an activity of a public-interest nature was a matter which should be assessed with reference to its aim and role. Referring to Article 46 of the Code of Criminal Procedure on mandatory defence and to Article 48 of the same Code on the investigative authorities' duty to appoint defence counsel under certain conditions, the court observed that the duties of the investigative authorities also included giving effect to the constitutional right to defence. The court concluded that measures concerning the exercise of mandatory defence qualified as public-interest activities, and any related data were of great importance for society and were not to be considered as a matter of personality rights or subject to the protection of private interests. The names of defence counsel and the number of their respective appointments did not therefore constitute information of a private nature, in relation to which disclosure would only be possible with the approval of the person concerned. The court went on to state that, given the public-interest nature

of mandatory defence, the interest in informing society seemed to be stronger than the need to protect privacy, which in any case was not infringed since the role of defence counsel was public from the moment of indictment. The court ordered the respondents to surrender the information requested.

26. Both police departments appealed, reiterating in essence their argument that the names and number of appointments of defence counsel did not represent information subject to disclosure in the public interest, but personal data, since those persons did not perform State, municipal or public duties. They also maintained that the transfer of the requested information would cause an undue burden.

27. In its judgment of 23 February 2010, the Hajdú-Bihar County Regional Court, acting as a second-instance court, overturned the first-instance judgment and dismissed the applicant NGO's claim in its entirety. The court rejected the applicant NGO's argument that *ex officio* defence counsel exercised public functions within the meaning of the Data Act. In the court's view, the provisions of the Code of Criminal Procedure relied on by the applicant NGO provided for equal recognition before the law and for the right to defence and imposed a duty on the State to ensure these rights. However, the provisions did not prescribe that the activities of *ex officio* defence counsel were public duties, irrespective of the fact that they were financed by the State. The court held that the duty of the police to appoint defence counsel in certain cases was to be distinguished from the latter's activities. It noted that personal data could only be processed under section 5(1) of the Data Act for a well-defined purpose in the exercise of a right or in fulfilment of an obligation, and that personal data processed by the police departments could only be transferred with the permission of the person concerned.

28. The applicant NGO sought review of the second-instance judgment, maintaining that although the names of the defence counsel and the number of their respective appointments were personal data, this was nevertheless information subject to disclosure in the public interest as being related to the public duties carried out by *ex officio* defence counsel.

29. The Supreme Court dismissed the applicant NGO's petition for review on 15 September 2010. It upheld the Regional Court's judgment in substance, partly modifying its reasoning.

30. The Supreme Court held as follows:

> "... [W]hat needs to be examined is whether defence counsel are to be considered 'other persons performing public duties'. The Supreme Court considers, in compliance with Recommendation no. 1234/H/2006 of the Parliamentary Commissioner for Data Protection, that the question of whether an individual was a person performing public duties has to be determined solely on the basis of the provisions of the Data Act. Only a person vested with independent powers and competences is to be considered a person performing public duties.

In answering this question [of interpretation of the notion of 'persons performing public duties'], the applicant's argument concerning Article 137(2) of the Criminal Code is irrelevant, since that provision only prescribes that defence counsel were to be regarded as persons performing public duties for the purposes of the Criminal Code itself, but not for the purposes of the Data Act or for any other legal relationship.

Under Article 57 § 3 of the Constitution, the State has a duty to secure the right to defence. The courts, the prosecution services and the investigative authorities perform this task by, in particular, ensuring the right to defence (Article 5 § 3 of the Code of Criminal Procedure) and by appointing defence counsel when required under Articles 46 and 48 of the Code of Criminal Procedure. In so doing, these bodies accomplish their public duties, which are thus terminated with the appointment of defence counsel. Following his or her appointment, a defence counsel's activities constitute private activities although they are performed in pursuance of a public goal.

The court has thus found that defence counsel cannot be regarded as 'other persons performing public duties', since no powers or competences defined by law are vested in them. The mere fact that procedural laws specify rights and obligations in respect of persons performing the task of defence counsel in criminal proceedings cannot be interpreted as constituting powers and competences defined by law. In respect of the right to defence, the Code of Criminal Procedure prescribes obligations only for authorities, not for defence counsel. The wording of Article 1 of the Code of Criminal Procedure, which states that prosecution, defence and adjudication are separate tasks, also supports this view.

Thus, the names and number of appointments of defence counsel constitute personal data under section 2(1) of the Data Act. Accordingly, under section 19(4) of the Data Act, the respondent police departments cannot be obliged to surrender such personal data. It follows that the second-instance court was right to dismiss the applicant's action."

II. RELEVANT DOMESTIC LAW

31. The Constitution, as in force at the material time, provided as follows:

Article 59

"(1) In the Republic of Hungary everyone has the right to reputation, to privacy of the home and to protection of secrecy in private affairs and of personal data."

Article 61

"(1) In the Republic of Hungary everyone has the right freely to express his opinion, and to access and impart information of public interest."

32. Act no. LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest (the "Data Act"), as in force at the material time, provided, in so far as relevant:

Definitions
Section 2

"(1) 'Personal data' means any information relating to an identified or identifiable natural person (hereinafter referred to as 'data subject') and any reference drawn, whether directly or indirectly, from such information. In the course of data processing, such information shall be treated as personal data as long as the data subject remains identifiable through it. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, psychological, economic, cultural or social identity. ...

(4) 'Data of public interest' (*közérdekű adat,* hereinafter *'public-interest data'*) means any information or knowledge, other than personal data, processed by an authority or a person performing State or municipal duties, or other public duties defined by law, including those data pertaining to the activities of the given authority or person, irrespective of the method or format in which it is recorded, and its individual or collective nature;

(5) 'Data subject to disclosure in the public interest' (*közérdekből nyilvános adat*) means any data, other than public-interest data, that are prescribed by law to be published or disclosed for the benefit of the general public; ..."

The purpose of data processing
Section 5

"(1) Personal data may be processed only for specified and explicit purposes, where this is necessary for guaranteeing certain rights or fulfilling certain obligations. This purpose must be satisfied at all stages of the data-processing operations."

Data transfer, combination of data management
Section 8

"(1) Personal data may be transferred, whether in a single operation or in a set of operations, if the data subject has given his or her consent or if the transfer is legally permitted, and if the safeguards for data processing are satisfied with regard to each and every component of the personal data.

(2) Subsection (1) shall also apply where data are shared between various filing systems of the same processor, or between those of government and local authorities."

Access to information of public interest
Section 19

"(1) Authorities and persons performing State or municipal duties or other public duties defined by law (hereinafter jointly referred to as 'the agency/agencies') shall provide the general public with accurate and speedy information concerning the matters under their competence, such as the budgets of the central government and local governments and the implementation thereof, the management of assets controlled by the central government and by local governments, the appropriation of public funds, and special and exclusive rights conferred upon market actors, private organisations or individuals.

(2) The agencies specified in subsection (1) shall regularly publish by electronic means or otherwise make available – including, upon request, the means specified in section 20 – all information of importance concerning their competence, jurisdiction, organisational structure, professional activities, the evaluation of such activities

(including their effectiveness), the categories of data they process, the legal regulations that pertain to their operations, and their financial management. The manner of disclosure and the data to be disclosed may be prescribed by legal regulation.

(3) The agencies defined in subsection (1) shall allow free access to data of public interest held on file by them to any person, with the exception of information classified by an agency vested with proper authorisation or if classified by virtue of commitment under treaty or convention, or if access to specific information of public interest is restricted by law in connection with:

(a) defence;

(b) national security;

(c) prevention, investigation, detection and prosecution of criminal offences;

(d) central financial or foreign-exchange policy;

(e) external relations, relations with international organisations;

(f) court or administrative proceedings.

(4) Unless otherwise prescribed by law, the personal data of any person acting in the name and on behalf of the agencies specified in subsection (1), to the extent that they relate to his or her duties, and the personal data of other persons performing public duties shall be deemed to be data subject to disclosure in the public interest. Access to such data shall be governed by the provisions of this Act pertaining to information of public interest.

(5) Unless otherwise prescribed by law, any data, other than personal data, that are processed by bodies or persons providing services prescribed mandatory by law or under contract with any central or local governmental agency, if such services are not available in any other way or form and to the extent that such processing is necessary for their activities, shall be deemed to be information subject to disclosure in the public interest.

(6) Access to business secrets within the context of access to and publication of information of public interest shall be governed by the relevant provisions of the Civil Code.

(7) The availability of public information may also be limited by European Union legislation in respect of any important economic or financial interests of the European Union, including monetary, budgetary and tax policies."

Section 19/A

"(1) Any data compiled or recorded by an agency referred to in subsection (1) of section 19 as part of and in support of a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date on which they were compiled or recorded. Access to these data may be authorised – in the light of the content of subsection (1) of section 19 – by the head of the agency that controls the data in question.

(2) A request for disclosure of data underpinning a decision may be rejected after the decision is adopted, within the time-limit referred to in subsection (1), if disclosure is likely to jeopardise the agency's legal functioning or the discharging of its duties without any undue influence, such as, in particular, the freedom to express

its position during the preliminary stages of the decision-making process on account of which the data were required in the first place.

(3) The time-limit for restriction of access as defined in subsection (1) to certain specific data may be reduced by law."

Section 20

"(1) Information of public interest shall be made available to any person upon a request that is submitted verbally, in writing or by electronic means.

(2) The agencies processing information of public interest must comply with requests for information without delay, and shall provide it within not more than 15 days.

(3) The applicant may also be provided a copy of the document or part of a document containing the data in question, regardless of the form of storage. The agency controlling the information in question may charge a fee covering only the costs of making the copy, and shall communicate this amount in advance when requested.

(4) If a document that contains information of public interest also contains any data that cannot be disclosed to the applicant, these data must be eliminated or rendered unrecognisable on the copy.

(5) Data shall be supplied in a readily intelligible form and by way of the technical means requested by the applicant, provided this does not entail unreasonably high costs. A request for data may not be refused on the grounds that they cannot be made available in a readily intelligible form.

(6) When a request for information is refused the applicant must be notified in writing within 8 days, or by electronic means if the applicant has conveyed his or her electronic mailing address, and the reasons for refusal must be given.

(7) A request for information of public interest by an applicant whose native language is not Hungarian may not be refused on the ground that it was written in his or her native language or in any other language he or she understands.

(8) State or local public authorities and agencies and other bodies carrying out the public duties specified by law shall adopt regulations governing the procedures for satisfying requests for information of public interest.

(9) The agencies specified in subsection (1) of section 19 shall notify the data protection commissioner once a year about refused requests, including the reasons for refusal."

Section 21

"(1) Where a person's petition for public information is refused, he or she may file a court action.

(2) The burden of proof with regard to compliance with the law shall lie with the agency processing the data.

(3) Proceedings are to be brought within 30 days from the date of refusal, or from the last day of the time-limit specified in subsection (2) of section 20 if the refusal was not communicated, against the agency which has refused to disclose the information.

..."

(7) If a decision is taken in favour of the plaintiff, the court shall order the agency processing the data to provide the information."

Section 21/A

"(1) The agencies specified in subsection (1) of section 19 may not render access to public information contingent upon the disclosure of personal identification data. The processing of personal data for access to information of public interest that have been published by electronic means is permitted only to the extent required for technical reasons, after which such personal data must be erased without delay.

(2) The processing of personal identification data in connection with any disclosure upon request is permitted only to the extent absolutely necessary, including the collection of payment of any charges. Following the disclosure of data and upon receipt of the said payment, the personal data of the applicant must be erased without delay.

(3) Provisions may be prescribed by law in derogation from what is contained in subsections (1) and (2)."

33. Act no. XIX of 1998 on the Code of Criminal Procedure, in its relevant part, provides as follows:

Right to defence
Article 5

"(1) Defendants shall have the right to defend themselves..."

Article 46

"The involvement of defence counsel in the criminal proceedings is mandatory where:

(a) the offence is punishable under the law by imprisonment of 5 years or more;

(b) the defendant is detained;

(c) the defendant is deaf, mute, blind or – irrespective of his or her legal responsibility – is of unsound mind;

(d) the defendant does not speak Hungarian or the language of the proceedings;

(e) the defendant is unable to defend himself or herself in person for any other reason;

(f) it is expressly stipulated in this Act."

Article 48

"(1) The court, the prosecutor or the investigating authority shall appoint defence counsel where defence is mandatory and the defendant has no defence counsel of his or her own choice ...

(2) The court, the prosecutor or the investigating authority shall also appoint defence counsel where defence is not mandatory but the defendant requests for the appointment of defence counsel because of his or lack of adequate means to provide his or her own defence.

(3) The court, the prosecutor or the investigating authority shall ... appoint defence counsel where they find this to be necessary in the interests of the defendant.

...

(5) The appointment of defence counsel shall not be subject to appeal but the defendant may – on submission of valid reasons – request the appointment of another defence counsel. Such requests shall be determined by the court, prosecutor or investigating authority before which the proceedings are pending.

(6) Where valid grounds exist, the defence counsel appointed may ask to be released from the appointment. Such requests shall be determined by the court, prosecutor or investigating authority before which the proceedings are pending.

...

(9) The appointed defence counsel shall be entitled to a fee and to his or her costs for appearing before the court, the prosecutor or the investigating authority when he or she is summoned or notified, for studying the case file and for advising a detained defendant in the detention premises."

34. Recommendation no. 1234/H/2006 of the Parliamentary Commissioner for Data Protection on the harmonisation of laws applicable to the disclosure of personal data related to the functions of persons performing public duties reads, in its relevant part, as follows:

Interpretation of section 19 (4), aspects to be taken into consideration in its application

"...

(b) In determining the notion of "*other person performing public duties*", an autonomous interpretation taking into account the internal logic of this provision of the Data Act should be made, independently of the use of the term in other laws. For example, the interpretative provision of the Criminal Code on the notion of "a person performing public duty" (Article 137 (2) of the Criminal Code) cannot be used, because in the light of the other rules of the Data Act, one part of the content of that provision falls under the first phrase of the Data Act, whereas other parts of its content fall outside the scope of the Data Act.

Therefore, in the context of the above subsection the notion of "*other person performing public duties*" includes State and municipal officials (for example, the President of the Republic, the Speaker of Parliament, the President of the Constitutional Court, the President of the Supreme Court, the President of the State Court of Audit, the President of the Hungarian National Bank, the Prime Minister, government ministers) who have independent functions and competences and operate as one-person institutions. The persons entrusted with State and municipal tasks and competences are the specific individuals who hold such offices, and they are personally responsible for disclosing the data relevant to them."

III. RELEVANT INTERNATIONAL AND COMPARATIVE LAW MATERIAL

A. United Nations

35. The Vienna Convention of 1969 on the Law of Treaties provides as follows:

Article 31
General rule of interpretation

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

Article 32
Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

36. Article 19 of the Universal Declaration of Human Rights provides:

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

37. Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which was adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, came into force on 23 March 1976 and was ratified by Hungary on 17 January 1974, provides as follows:

"1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of

frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

38. In its General Comment no. 34 on Article 19 of the ICCPR (Freedoms of opinion and expression), published on 12 September 2011, the United Nations Human Rights Committee stated as follows:

"Right of access to information

18. Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output."

39. In the case of *Gauthier v. Canada* (Communication No. 633/1995, 5 May 1999), the Human Rights Committee stated as follows:

"13.3 The issue before the Committee is thus whether the restriction of the author's access to the press facilities in Parliament amounts to a violation of his right under article 19 of the Covenant, to seek, receive and impart information.

13.4 In this connection, the Committee also refers to the right to take part in the conduct of public affairs, as laid down in article 25 of the Covenant, and in particular to General Comment No. 25 (57) which reads in part: 'In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.' General comment No. 25, paragraph 25, adopted by the Committee on 12 July 1996. Read together with article 19, this implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members. The Committee recognizes, however, that such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access. However, any restrictions imposed by the State party must be compatible with the provisions of the Covenant.

13.5 In the present case, the State party has restricted the right to enjoy the publicly funded media facilities of Parliament, including the right to take notes when observing meetings of Parliament, to those media representatives who are members of a private organisation, the Canadian Press Gallery. The author has been denied active (i.e. full) membership of the Press Gallery. On occasion he has held temporary membership which has given him access to some but not all facilities of the organisation. When he

does not hold at least temporary membership he does not have access to the media facilities nor can he take notes of Parliamentary proceedings. The Committee notes that the State party has claimed that the author does not suffer any significant disadvantage because of technological advances which make information about Parliamentary proceedings readily available to the public. The State party argues that he can report on proceedings by relying on broadcasting services, or by observing the proceedings. In view of the importance of access to information about the democratic process, however, the Committee does not accept the State party's argument and is of the opinion that the author's exclusion constitutes a restriction of his right guaranteed under paragraph 2 of article 19 to have access to information..."

40. In the case of *Toktakunov v. Kyrgyzstan* (Communication No. 1470/2006, 28 March 2011), the Human Rights Committee stated:

"6.3...The Committee further notes that the reference to the right to 'seek' and 'receive' 'information' as contained in article 19, paragraph 2, of the Covenant, includes the right of individuals to receive State-held information, with the exceptions permitted by the restrictions established in the Covenant. It observes that the information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The Committee also recalls its position in relation to press and media which includes a right for the media actors to have access to information on public affairs and the right of the general public to receive media output. It further notes that among the functions of the press and media are the creation of forums for public debate and the forming of public or, for that matter, individual opinions on matters of legitimate public concern, such as the use of the death penalty. The Committee considers that the realisation of these functions is not limited to the media or professional journalists, and that they can also be exercised, for example, by public associations or private individuals. With reference to its conclusions in Communication *S.B. v. Kyrgyzstan*, the Committee also notes that the author in the present case is a legal consultant of a human rights public association, and as such, he can be seen as having ... special 'watchdog' functions on issues of public interest. In light of the considerations listed above, in the present communication, the Committee is satisfied, due to the particular nature of the information sought, that the author has substantiated, for purposes of admissibility, that he, as an individual member of the public, was directly affected by the refusal of the State party's authorities to make available to him, on request, the information on use of the death penalty.

...

7.4 In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realisation of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals (see paragraph 6.3). When, in the exercise of such 'watchdog' functions on matters of legitimate public concern, associations or private individuals need to access State-held information, as in the present case, such requests for information warrant similar protection by the Covenant to that afforded to the press. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and

expression that must be guaranteed simultaneously by the State. In these circumstances, the Committee is of the opinion that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant."

41. In the case of *Rafael Rodríguez Castañeda v. Mexico* (Communication No. 2202/2012, 29 August 2013), the Human Rights Committee held:

"7.6 The Committee observes the author claims that he requested access to the ballot papers to analyse how accurately their contents had been recorded in the polling station records and to identify any discrepancies that may have arisen during that process, merely with the intention of ensuring the transparency of public administration and evaluating the to access the ballot papers. The Institute did, however, place at his disposal the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts. According to the national legislation, those accounts list the number of votes cast for each candidate, the number of spoilt ballot papers and the number of unused ballot papers. By law, votes are scrutinized in the presence of representatives of the political parties, as well as by accredited election observers in some cases, and the results returned by each polling station may be challenged and submitted for review by higher authorities, as indeed occurred in the 2006 presidential election when the initial results were partially reviewed by the Electoral Tribunal.

7.7 Given the existence of a legal mechanism for verifying the vote count, which was used in the election in question; the fact that the author was provided with the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts; the nature of the information and the need to preserve its integrity; and of the complexity of providing access to the information requested by the author, the Committee finds that the denial of access to the requested information, in the form of physical ballot papers, was intended to guarantee the integrity of the electoral process in a democratic society. This measure was a proportionate restriction by the State party necessary for the protection of public order in accordance with the law and to give effect to electors' rights, as set forth in article 25 of the Covenant. In the circumstances, the Committee therefore considers that the facts before it do not reveal a violation of article 19, paragraph 2, of the Covenant."

42. Relevant extracts from the Report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression to the General Assembly on the right to access information, published on 4 September 2013 (A/68/362), read as follows:

"18. The right to seek and receive information is an essential element of the right to freedom of expression...

19. The right to access information has many aspects. It encompasses both the general right of the public to have access to information of public interest from a variety of sources and the right of the media to access information, in addition to the right of individuals to request and receive information of public interest and information concerning themselves that may affect their individual rights. As noted previously, the right to freedom of opinion and expression is an enabler of other rights

(A/HRC/17/27, para. 22) and access to information is often essential for individuals seeking to give effect to other rights."

43. The Joint Declaration of 6 December 2004 made by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe and the Special Rapporteur on Freedom of Expression of the Organization of American States contains the following passage:

"The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."

B. Council of Europe

1. The drafting history of Article 10

44. The text prepared by the Committee of the Consultative Assembly of the Council of Europe on legal and administrative questions provided, in what became Article 10 of the Convention, as follows:

"In this Convention, the Member States shall undertake to ensure to all persons residing within their territories: ... freedom of opinion and expression, in accordance with Article 19 of the United Nations Declaration."

45. The preliminary draft Convention prepared by the Committee of Experts at its first meeting (2-8 February 1950) provided in Article 2 § 6 (which was almost identical to Article 19 of the Universal Declaration) as follows:

"Everyone has the right of freedom of opinion and expression: this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

46. At the second meeting of the Committee of Experts (6-10 March 1950), the United Kingdom representative suggested replacing Article 2 § 6 of the preliminary draft with an Article 11, worded as follows:

"Everyone shall have the right to freedom of thought and to freedom [of] expression without governmental interference; these rights shall include freedom to hold opinions and to receive and impart information and ideas without governmental interference regardless of frontiers, either orally, in writing or in print, in the form of art or by duly licensed visual or auditory devices..."

47. The draft Convention submitted to the Committee of Ministers by the Committee of Experts at the end of its work contained two Articles corresponding to the present Article 10 of the Convention. In the alternative drafted following the method of enumeration of the rights and freedoms to be safeguarded, Article 2 § 6 was almost an exact repetition of Article 2 § 6

of the preliminary draft of the Committee of Experts and of Article 19 of the Universal Declaration. On the other hand, Article 10, in the alternative drafted following the method of precise definition of the rights and freedoms to be safeguarded, closely followed the wording of Article 11 suggested by the United Kingdom.

48. The Conference of Senior Officials (8-17 June 1950) convened by the Committee of Ministers adopted the method of precise definition as the basis of its work, and reached an agreement on a text of Article 10 worded as follows:

> "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority regardless of frontiers, either orally, in writing or in print, in the form of art or by duly licences visual or auditory devices..."

49. Article 10 received its final form on the basis of the above text.

2. Other Council of Europe materials related to the interpretation of Article 10

50. Recommendation No. 582 on Mass communication media and Human Rights adopted by the Council of Europe Parliamentary Assembly on 23 January 1970 recommended instructing the Committee of Experts on Human Rights to consider and make recommendations on:

> "... the extension of the right of freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (which is included in Article 19(2) of the United Nations Covenant on Civil and Political Rights); there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations."

51. At its 44th meeting, held from 10 to 14 November 1975, the Committee of Experts on Human Rights appointed a Sub-Committee to make an exploratory study of the question of extending the human rights covered by the European Convention on Human Rights and its Protocols with reference to the United Nations Covenant on Civil and Political Rights. The Steering Committee for Human Rights (CDDH) adopted a preliminary draft final activity report containing Draft Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms and a draft Explanatory Report on the draft Protocol on 28 November 1980 (doc. CDDH (80) 28). The relevant part of the draft Protocol reads as follows:

Article 6

> "The right to freedom of expression referred to in Article 10 of the Convention shall include, in addition to the freedoms specified in the second sentence of paragraph 1 of that Article, freedom to seek information. The provisions of paragraph 2 of Article 10 and of Article 16 of the Convention shall also apply to freedom to seek information."

The relevant part of the Explanatory Report on the Protocol reads as follows:

Article 6

"1. According to both Article 10 of the Convention and Article 19 (2) of the International Covenant on Civil and Political Rights, freedom of expression includes freedom to receive and impart information and ideas regardless of frontiers. However, Article 19 (2) of the Covenant also refers to freedom to "seek" information and ideas, which is not referred to in Article 10 of the Convention. To dispel any doubts which might arise in this connection, Article 6 of the Protocol brings the Convention in line with the Covenant on this point.

2. This Article brings within the scope of Article 10 of the Convention the right to freedom to seek information. The right to freedom to seek information imposes no obligation on the authorities of a State to supply the information which may be sought.

3. The freedom may be made subject to restrictions of the kind permitted by Article 10, paragraph 2, and Article 16 of the Convention, including for example restrictions under /existing/national laws relating to the protection of official secrets."

The European Commission of Human Rights set out its observations on the draft Protocol as follows (doc. DH (81) 3):

Article 6

"19. This article is a good illustration of the danger referred to in para 2. above that an amendment intended to clarify an existing provision can provide an argument in favour of a restrictive interpretation of the provision in question.

20. It is true that the present wording of Article 10 of the Convention does not mention the freedom to seek information, but it cannot be excluded that such a freedom is included by implication among those protected by that article. In this context the Commission recalls that in its *Sunday Times* judgment (para 66) the European Court of Human Rights found that Article 10 guarantees the public's right to adequate information. The Commission for its part has stated that although this Article is primarily intended to guarantee access to general sources of information it cannot be excluded that in certain circumstances it includes a right of access to documents which are not generally accessible (No. 8383/78, DR 17, p. 227, at pp. 228 and 230).

It would therefore be wiser to forgo the formal enunciation which Article 6 of the draft seeks to make and leave the possibility of development to judicial interpretation of Article 10 in its present wording.

Furthermore, the second sentence of Article 6 appears superfluous in view of the provision of Article 13 (1) of the draft."

The observations of the Court (doc. Court (81) 76) contain the following:

Article 6

"15. The Court considers that the freedom to receive information, guaranteed by Article 10 of the Convention, implies freedom to seek information. Further, it appears self-evident to the Court that the search for information (and indeed its receipt and communication) must in any event be effected by lawful means. The Court would also

observe, as does the explanatory report (second sentence of paragraph 2), that the freedom to seek information does not imply any obligation to supply it on the part of the authority; it is a right to receive and not a right to be given information."

The Request for an Opinion from the Committee of Ministers on an additional Protocol to the European Convention on Human Rights extending the list of civil and political rights set forth in the Convention, addressed to the Parliamentary Assembly (Doc. 5039, 7 February 1983), contains the following explanation:

"Lastly, the CDDH discussed the principle of the 'freedom to seek information', whose inclusion in Article 10, paragraph 1, of the Convention had already been authorised by the Committee of Ministers. The CDDH pointed out that a provision to that effect had been included in a preliminary draft of the Protocol but that, on reconsidering it in the light of the various observations submitted, notably by the European Commission and Court of Human Rights, it had finally decided not to retain the said provision because it could reasonably be considered that the 'freedom to seek information' was already comprised in the freedom to receive information guaranteed in Article 10, paragraph 1, of the Convention. That viewpoint seems to be confirmed by the case-law of the Commission and the Court, and particularly in the judgment given in the *Sunday Times* case."

The Rapporteur for the Parliamentary Assembly's Report on the draft Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms extending the list of political and civil rights set forth in the Convention (Doc. 5106, 9 September 1983) stated, in the Explanatory Memorandum on the freedom to seek information, as follows:

"21. The Steering Committee raised the question of the 'freedom to seek information', which the Committee of Ministers had already agreed should be included in Article 10, paragraph 1, of the Convention. In the light of observations by the European Commission and Court of Human Rights, it was decided not to include such a provision in the Protocol. The Commission and the Court decided that the freedom to seek information may reasonably be construed as already included in the freedom to receive information guaranteed by Article 10, paragraph 1, of the Convention. The case-law of the Commission and Court confirms this point of view.

22. In the light of the foregoing, I consider that this right should not be formally included in Article 10 of the Convention and that the organs of the Convention should be left every opportunity to expand the interpretation of this article."

3. Council of Europe materials related to access to official documents and protection of personal data

52. On 21 February 2002 Recommendation Rec(2002)2 of the Committee of Ministers to the member States on Access to Official Documents was adopted. The relevant part of the Recommendation reads as follows:

"The Committee of Ministers...

Bearing in mind, in particular, Article 19 of the Universal Declaration of Human Rights, Articles 6, 8 and 10 of the European Convention on Human Rights and Fundamental Freedoms, the United Nations Convention on Access to Information,

Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted in Aarhus, Denmark, on 25 June 1998) and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No. 108); the Declaration on the freedom of expression and information adopted on 29 April 1982; as well as Recommendation No. R (81) 19 on the access to information held by public authorities, Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes and Recommendation No. R (2000) 13 on a European policy on access to archives;

...

Recommends the governments of member states to be guided in their law and practice by the principles set out in this recommendation.(...)"

III. General principle on access to official documents

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

IV. Possible limitations to access to official documents

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

i. national security, defence and international relations;

ii. public safety;

iii. the prevention, investigation and prosecution of criminal activities;

iv. privacy and other legitimate private interests;

v. commercial and other economic interests, be they private or public;

vi. the equality of parties concerning court proceedings;

vii. nature;

viii. inspection, control and supervision by public authorities;

ix. the economic, monetary and exchange rate policies of the state;

x. the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.

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

53. The Council of Europe Convention on Access to Official Documents (opened to signature on 18 June 2009), which has so far been ratified by seven member States (Bosnia and Herzegovina, Finland, Hungary, Lithuania, Montenegro, Norway and Sweden) and which will enter into force on the first day of the month following the expiration of three months

after the date on which ten member States of the Council of Europe express their consent to be bound by the Convention, contains the following:

Article 2 – Right of access to official documents

"1. Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.

2. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.

3. These measures shall be taken at the latest at the time of entry into force of this Convention in respect of that Party."

Article 3 – Possible limitations to access to official documents

"1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

a. national security, defence and international relations;

b. public safety;

c. the prevention, investigation and prosecution of criminal activities;

d. disciplinary investigations;

e. inspection, control and supervision by public authorities;

f. privacy and other legitimate private interests;

g. commercial and other economic interests;

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

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

j. environment; or

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

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

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

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

Article 4 – Requests for access to official documents

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

...”

Article 5 – Processing of requests for access to official documents

“1. The public authority shall help the applicant, as far as reasonably possible, to identify the requested official document.

2. A request for access to an official document shall be dealt with by any public authority holding the document. If the public authority does not hold the requested official document or if it is not authorised to process that request, it shall, wherever possible, refer the application or the applicant to the competent public authority.

3. Requests for access to official documents shall be dealt with on an equal basis.

4. A request for access to an official document shall be dealt with promptly. The decision shall be reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand.

5. A request for access to an official document may be refused:

i. if, despite the assistance from the public authority, the request remains too vague to allow the official document to be identified; or

ii. if the request is manifestly unreasonable.

6. A public authority refusing access to an official document wholly or in part shall give the reasons for the refusal. The applicant has the right to receive on request a written justification from this public authority for the refusal.”

54. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (which entered into force on 1 October 1985) contains the following relevant passages:

Article 2 – Definitions

“For the purposes of this convention:

‘personal data’ means any information relating to an identified or identifiable individual (“data subject”);

...”

Article 5 – Quality of data

“Personal data undergoing automatic processing shall be:

a. obtained and processed fairly and lawfully;

b. stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

c. adequate, relevant and not excessive in relation to the purposes for which they are stored;

d. accurate and, where necessary, kept up to date;

e. preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored.”

Article 9 – Exceptions and restrictions

"1. No exception to the provisions of Articles 5, 6 and 8 of this convention shall be allowed except within the limits defined in this article.

2. Derogation from the provisions of Articles 5, 6 and 8 of this convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

...

b. protecting the data subject or the rights and freedoms of others."

C. European Union

55. The Charter of Fundamental Rights of the European Union provides as follows:

Article 11
Freedom of expression and information

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

Article 42
Right of access to documents

"Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium."

56. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents provides, in so far as relevant, as follows:

Article 2
Beneficiaries and scope

"1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

2. The institutions may, subject to the same principles, conditions and limits, grant access to documents to any natural or legal person not residing or not having its registered office in a Member State.

3. This Regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union."

Article 4
Exceptions

"1. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data."

57. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on protection of individuals with regard to the processing of personal data provides as follows:

Article 2
Definitions

"For the purposes of this Directive:

(a) 'personal data' shall mean any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

(b) 'processing of personal data' ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction;

..."

Article 9
Processing of personal data and freedom of expression

"Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."

58. The Court of Justice of the European Union (Grand Chamber), in its judgment of 9 November 2010, in *Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke Gbr and Hartmut Eifert v. Land Hessen,* held as follows:

"48. 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...

85. ... It is necessary to bear in mind that the institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognised by Articles 7 and 8 of the Charter. No automatic priority can be conferred on the objective of transparency over the right to protection of personal data ..., even if important economic interests are at stake."

59. In its judgment of 29 June 2010, the Court of Justice of the European Union (Grand Chamber) held, in *Case C-28/08 P, Commission v. the Bavarian Lager Co. Ltd* regarding the company's claim to have full access to the minutes of a meeting, as follows:

> "76. This Court finds that, by releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness.
>
> 77. By requiring that, in respect of the five persons who had not given their express consent, Bavarian Lager establish the necessity for those personal data to be transferred, the Commission complied with the provisions of Article 8(b) of Regulation No 45/2001.
>
> 78. As Bavarian Lager has not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, the Commission has not been able to weigh up the various interests of the parties concerned. Nor was it able to verify whether there was any reason to assume that the data subjects' legitimate interests might be prejudiced, as required by Article 8(b) of Regulation No 45/2001.
>
> 79. It follows from the above that the Commission was right to reject the application for access to the full minutes of the meeting of 11 October 1996."

D. Inter-American Court of Human Rights

60. Article 13 (Freedom of Thought and Expression) of the American Convention on Human Rights establishes, *inter alia*, that:

> "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

61. In the case of *Claude Reyes et al. v. Chile* (judgment of 19 September 2006), the Inter-American Court found that:

> "... by expressly stipulating the right to 'seek" and "receive' 'information,' Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."

E. African system of human-rights protection

62. Article 9 of the African Charter on Human and Peoples' Rights provides as follows:

"1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law."

63. The Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights and published on 23 October 2002 reads, in its relevant part, as follows:

I.
The Guarantee of Freedom of Expression

"1. Freedom of expression and information, including the right to seek, receive and impart information and ideas... is a fundamental and inalienable human right and an indispensable component of democracy.

2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."

IV.
Freedom of Information

"1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies;
- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;
- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;
- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;
- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and
- secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies."

F. Comparative law

64. It follows from the materials available to the Court on the legislation of member States of the Council of Europe that all of the thirty-one member States surveyed, save for Luxembourg, recognise the right of access to information and/or official documents held by public bodies. It would also appear that in most member States the right of access to information and/or documents appears not to be limited to the executive branch of power but extends to information and/or documents held by the legislative or judicial branches of power and even to State-owned companies and private bodies which perform public functions or receive substantial public funding. All access-to-information laws set out categories of information that can be withheld from release. Some countries have enacted a public-interest test which requires the public authorities and the supervisory bodies to balance the interest in withholding information against the public interest in disclosure.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

65. The applicant NGO complained that the authorities' denial of access to the information sought by it from certain police departments represented a breach of its rights as set out in Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

66. The Government contested that argument.

A. The Government's preliminary objection concerning compatibility *ratione materiae* with the provisions of the Convention

1. The parties' submissions to the Grand Chamber

67. The Government contested the applicability of Article 10 of the Convention to the applicant NGO's complaint and invited the Court to declare the application inadmissible as being incompatible *ratione materiae* with the provisions of the Convention. In their view, Article 10 of the Convention covered only the freedom to receive and impart information, while any reference to "freedom to seek" information had been deliberately omitted from Article 10 during the drafting process, in contrast to Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights.

68. The applicant NGO contended that, in view of the Court's case-law, Article 10 was applicable in the circumstances of the present case. In the applicant NGO's view, unless access to information was included in the right to receive and impart information and the right to freedom to hold opinions, States could easily render these rights devoid of substance by denying access to important data on matters of public interest. Access to information was a *conditio sine qua non* for the effective exercise of the right to freedom of expression, just as without access to a court, the right to a fair trial would be meaningless (see *Golder v. the United Kingdom*, 21 February 1975, § 35, Series A no. 18). The applicant NGO argued that access to information was inherent in the right to freedom of expression, since rejecting access to data impeded the realisation of that freedom.

69. The Government of the United Kingdom, intervening in the proceedings, submitted that Article 10 of the Convention was not applicable in the circumstances of the present case. They requested the Court to take into account the *travaux préparatoires* and the case-law following the judgment in *Leander v. Sweden* (26 March 1987, Series A no. 116).

70. Media Legal Defence Initiative, the Campaign for Freedom of Information, ARTICLE 19, the Access to Information Programme and the Hungarian Civil Liberties Union took the view that the right to freedom of expression included a right of access to information, rendering Article 10 applicable in the present case.

2. The Court's assessment

71. The core question to be addressed in the present case is whether Article 10 of the Convention can be interpreted as guaranteeing the applicant NGO a right of access to information held by public authorities. The Court is therefore called upon to rule on whether the denial of the applicant's request for information resulted, in the circumstances of the

case, in an interference with its right to receive and impart information as guaranteed by Article 10.

The question whether the grievance of which the applicant NGO complained falls within the scope of Article 10 is therefore inextricably linked to the merits of its complaint. Accordingly, the Court holds that the Government's objection should be joined to the merits of the application.

72. The Court further finds that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions to the Grand Chamber

(a) The Government

73. The Government maintained that Article 10 of the Convention was not applicable, since the findings in the case of *Társaság a Szabadságjogokért v. Hungary* (no. 37374/05, § 14, April 2009, hereinafter referred to as "*Társaság*") could not be decisive in the present application. In that case, in the absence of an objection from the Government, the Court had not been required to examine the applicability of Article 10. They added that their concession with regard to the applicability of Article 10 in the *Társaság* case had been based exclusively on domestic-law considerations and could not serve as a basis for expansion of the Convention into areas which it had not been intended to cover.

74. They further observed that the Committee of Ministers had adopted a separate, specific, Convention on the right of access to official documents, thus indicating that the drafters of Article 10 had not intended to include in the Convention on the Protection of Human Rights and Fundamental Freedoms the right to seek information from public authorities.

75. The mere fact that High Contracting Parties had established in their domestic legislation the right to seek information did not justify the same right being interpreted as falling within the guarantees of Article 10, since States were free to adopt a higher level of protection of human rights in their domestic legal system than that afforded by the Convention.

76. The right of access to information was an autonomous right aimed at enhancing transparency and good governance and was not simply auxiliary to the right to freedom of expression. In their view, neither the "living instrument" approach, nor the existence of a European consensus reflected in the adoption of freedom of information acts in the domestic legal systems could justify such a right being read into Article 10 of the Convention.

77. According to the Government, no public debate had been hindered by the lack of disclosure of the requested personal data, since the

information sought was not necessary in order for the applicant NGO either to express its opinion on an issue of public interest or to draw conclusions on the efficiency of the appointment system of public defenders.

78. Should the Court find that Article 10 was applicable in the circumstances of the present case, the Government maintained that the interference with the applicant's right to freedom of expression had in any event been justified under Article 10 § 2 of the Convention.

79. The names of *ex officio* defence counsel constituted personal data and such data could only be disclosed if authorised by law. They endorsed the Supreme Court's finding that defence counsel did not exercise public powers either in the name of the law-enforcement authorities which had appointed them or on their own behalf and could not be qualified as "other persons performing public duties" under section 19 (4) of the Data Act. They also pointed out that the interpretation given by the Supreme Court in the present case had been foreseeable in the light of the recommendation of the Parliamentary Commissioner for Data Protection and that this interpretation had been consistently applied in all subsequent similar cases.

80. Therefore, in their view, there was no legal basis for authorising disclosure of information about the appointment of public defenders; in other words, the refusal to make public the requested information was prescribed by law.

81. The Government were of the opinion that the restriction on access to the requested information had served the legitimate aim of the protection of the rights of others. The protection of personal data constituted a legitimate aim in itself, irrespective of whether the reputation of the person concerned had also been at stake. The measure could also be regarded as necessary for the protection of the reputation of others within the meaning of Article 10, since the research carried out by the applicant NGO was critical of the professional activities of *ex officio* defence counsel.

82. On the question of proportionality, the Government emphasised that even if the Court were to find that there was a positive obligation on the part of the State to facilitate the exercise of the freedom of expression, States should enjoy a wide margin of appreciation in granting access to the requested information. This margin was limited only by an applicant's overriding interest in supporting his or her statements with facts in order to fend off civil or criminal liability for statements concerning the exercise of public power and when there were no alternative means for an applicant to obtain the necessary information.

83. Moreover, there was no obligation on the State to impart information consisting of personal data when the disclosure of that information was not justified by a pressing social need. Any positive obligation under Article 10 ought to be construed in the light of the authorities' obligation to respect and ensure the enjoyment of other rights enshrined in the Convention and to strike a fair balance not only between private and public interests but also

between competing private interests – in the present case the applicant NGO's right to receive information under Article 10 and defence counsel's right to respect for private life under Article 8. In addition, any restriction on public defenders' rights under Article 8 ought to be construed narrowly. In contrast, the interpretation of the expression "other persons exercising public duties" suggested by the applicant NGO would create an extremely vague exception to the right to protection of personal data, which would not be justified under Article 8 of the Convention.

84. Furthermore, the applicant NGO had had available to it alternative means of obtaining the necessary information without insisting on the disclosure of the personal data. It could have requested anonymous statistical data or had recourse to other means, for example by liaising with the National Police Headquarters in order to evaluate police practices concerning the appointment of legal-aid defence counsel.

85. The Government argued that the press and non-governmental organisations could not be afforded the same level of protection, since the former were bound by professional rules, whereas the latter could not be held liable for the accuracy of their statements. In any case, they expressed doubts as to whether the applicant NGO had been acting in the role of public watchdog or whether it had had other ulterior motives, given that it was an association which had a network of lawyers who also provided legal aid in criminal cases, and was thus a potential competitor to *ex officio* appointed defence counsel.

(b) The applicant NGO

86. The applicant NGO requested the Grand Chamber to confirm the applicability of Article 10 to the case. It contended that although the Convention used the specific terms "receive" and "impart", Article 10 also covered the right to seek information, as first acknowledged by the Court in the *Dammann v. Switzerland* case (no. 77551/01, § 52, 25 April 2006). It referred to the Court's case-law in *Sdruženi Jihočeské Matky v. the Czech Republic* ((dec.), no. 19101/03, 10 July 2006), *Társaság* (cited above), *Youth Initiative for Human Rights v. Serbia* (no. 48135/06, 25 June 2013), and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (no. 39534/07, 28 November 2013, hereinafter referred to as "*Österreichische Vereinigung"*) to demonstrate that the Court had departed from its previous case-law in *Leander* (cited above) and *Gaskin v. the United Kingdom* (7 July 1989, § 57, Series A no. 160), and had clearly taken the stance that the right of access to information held by public authorities fell within the ambit of Article 10.

87. The applicant organisation further argued that this approach was corroborated by international instruments and case-law, among others Article 19 of the International Covenant on Civil and Political Rights and General Comment No. 34 of the Human Rights Committee, showing a

widespread acceptance that the right to seek information was an essential part of free expression.

88. In *Guerra and Others v. Italy* and *Roche v. the United Kingdom*, the Court had held that the freedom to receive information could not be construed as imposing on a Contracting Party to the Convention positive obligations to collect and disseminate information of their own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 172, ECHR 2005-X).

89. However, in the present case the data requested were readily available to the authorities. This was demonstrated by the fact that seventeen police departments had provided the requested data without delay, apparently without having to make disproportionate efforts to obtain them.

90. The applicant NGO submitted that the Convention, as a "living instrument" should be interpreted in the light of present-day conditions, taking into account sociological, technological and scientific changes as well as evolving standards in the field of human rights.

91. The denial of access to the relevant information was, in the applicant NGO's opinion, to be analysed as an issue of failure to comply with the respondent State's negative obligation not to interfere without justification with the rights protected by Article 10. By denying access to the requested information, the domestic authorities had prevented the applicant NGO from exercising a fundamental freedom, which amounted to an unjustifiable interference with the right protected under Article 10.

92. The interference with the applicant NGO's rights under Article 10 had not been in compliance with the relevant domestic legal provisions, in particular the Data Act. It had requested access to information subject to disclosure in the public interest under section 19 (4) of the Data Act. Under the terms of the Data Act, personal data concerning "other persons performing public duties" constituted information subject to disclosure in the public interest under the same conditions as information of public interest. When a claimant requested the personal data of persons performing public duties, and where those data were related to the exercise of their public duties, the right to protection of personal data could not be relied on to dismiss the request.

93. The applicant NGO pointed out that the main question in the domestic proceedings had been whether *ex officio* appointed defence counsel were to be regarded as "other persons performing public duties". The domestic law did not provide a definition of public duties. The Government's interpretation, to the effect that only persons vested with independent powers and competences were to be considered as persons performing public duties, did not stand up to scrutiny. The applicant NGO argued that defence counsel performed a public duty in the course of

criminal proceedings and that their activities were not of a private nature. Furthermore, the fees and expenses of *ex officio* appointed defence counsel were paid from public funds and their activities were supervised by the State. The applicant NGO also relied on the Court's case-law in *Artico v. Italy* (13 May 1980, Series A no. 37), *Kamasinski v. Austria*, (19 December 1989, Series A no. 168) and *Czekalla v. Portugal* (no. 38830/97, ECHR 2002-VIII), where it was found that in certain circumstances the State could be held responsible for certain shortcomings in the *ex officio* defence counsel system. Finally, the names of *ex officio* appointed defence counsel were not anonymised when court judgments were published, and a number of police departments and courts had found that the applicant NGO had a right of access to the requested information.

94. In conclusion, the domestic authorities had wrongly found that defence counsel did not exercise public duties and that their appointment and activities constituted personal data. This consideration removed the domestic legal basis for the interference complained of.

95. As regards the proportionality of the measure, the applicant NGO maintained that the requested information had concerned an issue of public interest. It was aimed at providing background data for the public debate on the functioning of the *ex officio* appointed defence counsel system and, in particular, the distribution of appointments favouring certain defence counsel, leading to inadequate legal representation of defendants. The research for which it sought access to certain information was aimed at a fact-based public debate on the realisation of the right to an effective defence, enshrined in Article 6 of the Convention. In particular, the right to legal aid was recognised as a cornerstone of justice, and the data obtained from other police departments proved that there were indeed structural deficiencies which would have merited further inquiry. However, this had been hindered by the decision of the domestic authorities to deny access to the information in question. Thus, given the public-interest nature of the issue on which it sought to obtain information, its activities as a public watchdog warranted a high level of protection, similar to that afforded to the press.

96. According to the applicant NGO, the requested data were otherwise inaccessible, which had given the two police departments an effective information monopoly over the appointment of defence counsel within their respective jurisdictions. Thus, the denial of access to the requested information had constituted an exercise of censorial power.

97. The applicant NGO further considered that the restriction on its right of access to information had not been necessary for the protection of defence counsel's right to respect for their private life. The information sought did not concern their private sphere but only their public duties. It did not relate to the actual exercise of their role as defence counsel, but merely to their appointment. Thus, in the applicant NGO's view, the

domestic authorities had failed to strike a fair balance between its right under Article 10 and defence counsel's right under Article 8.

98. The applicant NGO invited the Court to find that the interference with its right to receive information had not been necessary in a democratic society within the meaning of Article 10 § 2 of the Convention.

(c) The third parties

(i) The Government of the United Kingdom

99. Relying on Article 31 § 1 of the Vienna Convention on the Law of Treaties 1969, the Government of the United Kingdom argued that the ordinary meaning of the language used by the Contracting States ought to be the principal means of interpreting the Convention. In their view the clear object of Article 10 was to impose negative obligations on organs of the State to refrain from interfering with the right of communication. A positive obligation of Contracting States to provide access to information was not warranted by the language of Article 10 § 1. This was confirmed by the *travaux préparatoires*, since the right to "*seek*" information had been deliberately omitted from the final text of Article 10.

100. Reading the right to freedom of information into Article 10 would amount to constructing a "European freedom of information law" in the absence of the normal consensus. In the understanding of the intervening Government, there was no European consensus as to whether there should be access to State-held information, demonstrated by the fact that the Council of Europe Convention on Access to Official Documents had only been ratified by seven member States.

101. They also referred to the Court's judgment in the *Leander* case, in which the Court had held that Article 10 did not "confer on the individual a right of access to a register containing information on his personal position, nor [did] it [embody] an obligation on the Government to impart such information to the individual" (see *Leander*, cited above, § 74). This ruling was subsequently confirmed by the Court in the case of *Guerra and Others*, where the information was not in itself private and individual (see *Guerra and Others*, cited above, §§ 53-54) and by the Grand Chamber in *Roche* (cited above, §§ 172-73). Finally, in the case of *Gillberg*, the Court reaffirmed that [the right to receive and impart information] basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see *Gillberg v. Sweden* [GC], no. 41723/06, § 83, 3 April 2012).

102. The intervening Government also maintained that in the recent cases of *Kenedi v. Hungary* (no. 31475/05, 26 May 2009), *Gillberg* (cited above), *Roşiianu v. Romania* (no. 27329/06, 24 June 2014), *Shapovalov v. Ukraine* (no. 45835/05, 31 July 2012), *Youth Initiative for Human Rights* (cited above), and *Guseva v. Bulgaria* (no. 6987/07, 17 February 2015) the

Court had recognised that the applicants had had a right of access to information under Article 10 by virtue of domestic court orders. In their view the non-enforcement of domestic court orders fell more naturally to be considered in the context of Article 6. According to the intervening Government, the cases of *Társaság*, *Sdruženi Jihočeské Matky* and *Österreichische Vereinigung* (all cited above) were not explicable on the basis of a domestic-law right to information. In their view these judgments failed to provide a cogent basis for ignoring the previous line of case-law. The Grand Chamber should therefore find that Article 10 was not applicable and that there had been no violation of the applicant's right to freedom of expression.

103. At the hearing the intervening Government submitted that in previous cases where the Court had found it necessary to update its case-law, this had been to ensure that it reflected contemporary social attitudes. No such need existed in the case of freedom of information. If the Court were to recognise a right of access to information held by the State, this would far exceed the legitimate interpretation of the Convention and would amount to judicial legislation.

(ii) Media Legal Defence Initiative, the Campaign for Freedom of Information, ARTICLE 19, the Access to Information Programme and the Hungarian Civil Liberties Union

104. The interveners jointly relied on four arguments, namely the text of Article 10 itself, the underlying principle of freedom of expression, the Court's evolving case-law and comparative material, to argue that the right to freedom of expression included a right of access to information held by public bodies.

105. In their opinion, the wording of Article 10 expressly supported a conclusion that a right of access to information fell within the scope of Article 10, since the right to impart information and the right to receive information were two distinct rights. Seeking information from the State was an expression of the wish to receive it.

106. An understanding of freedom of expression as conferring a right of access to information also accorded with the general principles underlying the protection of the right. Free speech was integral to the discovery of "truth". An individual was unable to reach a view of truth if he or she could not have access to potentially relevant information held by the State. Moreover, freedom of expression was essential to allow informed participation in a democracy, and such participation was ensured by access to State-held information. Furthermore, restrictions on freedom of expression undermined public trust. Finally, freedom of expression had been justified by the Court as an aspect of self-fulfilment. Without access to information, citizens were less likely to receive and impart information and ideas on their own terms.

107. As to the Court's case-law, the interveners acknowledged that the right of access to information had not been recognised in the Court's early case-law. Nonetheless, they maintained that the Convention was to be treated as a "living instrument" and that the Court had in the past attached less importance to the lack of evidence of a common European approach than to the clear and uncontested evidence of a continuing international trend (see *Rantsev v. Cyprus and Russia*, no. 25965/04, § 277, ECHR 2010 (extracts)). The Grand Chamber could not interpret the Convention solely in accordance with the intentions of its authors as expressed several decades ago, at a time when only a minority of the present Contracting Parties were Member States of the Council of Europe. Thus, in their opinion the Grand Chamber was not bound to follow its previous judgments, but ought to interpret the Convention as a living instrument in the light of present-day conditions.

108. The interveners also noted that in the cases of *Leander*, *Gaskin*, *Guerra and Others* and *Roche* (all cited above), the Court had derived a right of access to information through the interpretation of Article 8, which contained no textual basis for proclaiming such a right.

109. It emerged from the Court's recent case-law that the right of access to information was expressly recognised as falling within the scope of Article 10. Access to information contributed to the free exchange of opinions and ideas and the efficient administration of public affairs. The collection of information was an essential part of journalism and there was an obligation on the part of the State not to impede the flow of information. It was in the general public interest that information held by a public body be made accessible. The function of acting as a watchdog, that is generating and contributing to a public debate, was not restricted to professional journalists, but encompassed NGOs, researchers and individual activists. The right of access to information was not restricted to cases where the applicant had a domestic court judgment in his, her or its favour requiring a public body to provide the information and that body had been unable or unwilling to enforce it.

110. The interveners also argued that a Convention right ought not to be restricted to a particular category of persons; the role of a particular requester as a public watchdog was better suited for consideration at the justification stage.

111. Where the domestic legislation provided a right of access to information, that right ought to be implemented in a manner which was compatible with Article 10, a provision which, in the interveners' view, included the right of access to information.

112. The interveners understood the denial of access to information as an interference under Article 10, rather than a failure by the State to fulfil any positive obligations, as interpreted under Articles 2, 6 and 8 of the Convention.

113. As to the striking of a fair balance between the competing interests of the protection of private life and freedom of expression, the interveners submitted that there was little scope for restrictions on freedom of expression on matters of public interest, and the right to protection of personal data was not an absolute right, but ought to be considered in relation to its function in society.

(iii) Fair Trials

114. Fair Trials submitted that a "watchdog" scrutiny of police appointments of legal-aid lawyers was an essential guarantee of fair trial rights. There was an important public interest attached to information on the making of such appointments, which called for utmost protection under Article 10.

115. The right to legal aid was recognised as a cornerstone of justice by, among others, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings. Concerns as to the independence of police-appointed lawyers had been raised by a number of organs, among others, the Court in its judgment in the case of *Martin v. Estonia* (no. 35985/09, 30 May 2013), the United Nations ("Early access to legal aid in criminal justice processes: a handbook for policy-makers and practitioners") and their own study presented in 2012 on "The practical Operation of Legal Aid in the EU". For that reason, external scrutiny of police appointments of legal-aid lawyers was an essential guarantee of ensuring fair-trial rights under Article 6 of the Convention.

116. In balancing the interest of public defenders to their right to privacy under Article 8 and the competing interest of NGOs in scrutinising the operation of the legal-aid system under Article 10, it was important to distinguish between the role of a lawyer as an agent of the public justice system and the privacy of the client-lawyer relationship. Lists of public defenders were widely available to the public, thereby showing that lawyers providing legal aid had waived, to some extent, their privacy rights. Furthermore, the publication of information concerning appointments did not encroach upon the confidentiality of lawyer-client relationships. If a national authority categorised information as private rather than public-interest information, it had to justify such a decision by reference to the countervailing interests protected by Article 10. Without such a balancing exercise, national authorities could not be viewed as having struck a fair balance between the relevant interests at issue. If such a balancing exercise was carried out, it should necessarily favour the disclosure of information on the appointments of lawyers, since access to information ensured external oversight and thereby safeguarded compliance with Article 6 of the Convention, an interest far more important than the protection of the identities and commercial activities of lawyers.

2. The Court's assessment

(a) Applicability of Article 10 and the existence of an interference

117. The first question which arises in the present case is whether the matter complained of by the applicant organisation falls within the scope of Article 10 of the Convention. The Court observes that paragraph 1 of this Article provides that the "right to freedom of expression ... shall include the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority". It does not specify, unlike comparable provisions in other international instruments (see paragraphs 36-37, 60 as well as 63 above and 140 and 146-47 below), that it encompasses a freedom to *seek* information. In order to determine whether the impugned refusal by the national authorities to grant the applicant organisation access to the requested information entailed an interference with its Article 10 rights, the Court must embark on a more general analysis of this provision in order to establish whether and to what extent it embodies a right of access to State-held information as claimed by the applicant NGO and the non-governmental third-party interveners, but which is disputed by the respondent and intervening third-party Governments.

(i) Preliminary remarks regarding the interpretation of the Convention

118. The Court has emphasised that, as an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties (see *Golder*, cited above, § 29; *Lithgow and Others v. the United Kingdom*, 8 July 1986, §§ 114 and 117, Series A no. 102; *Johnston and Others v. Ireland*, 18 December 1986, §§ 51 et seq., Series A no. 112; and *Witold Litwa v. Poland*, no. 26629/95, §§ 57-59, ECHR 2000-III).

119. Thus, in accordance with the Vienna Convention, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see *Johnston and Others*, cited above, § 51, and Article 31 § 1 of the Vienna Convention quoted above in paragraph 35).

120. Regard must also be had to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, §§ 47-48, ECHR 2005-X, and *Rantsev*, cited above, § 274).

121. The Court emphasises that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which

renders its rights practical and effective, not theoretical and illusory (see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161).

122. Furthermore the Convention comprises more than mere reciprocal engagements between Contracting States (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 100, ECHR 2005-I, and *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25).

123. Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 134, 21 June 2016); the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, for instance, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; *Hassan v. the United Kingdom* [GC], no. 29750/09, §§ 77 and 102, ECHR 2014; and Article 31 § 3 (c) of the Vienna Convention quoted above in paragraph 35).

124. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic-law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision (see *Opuz v. Turkey*, no. 33401/02, § 184, ECHR 2009). The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 102 and §§ 108-10, ECHR 2011, finding that an objection to military service fell within the ambit of Article 9; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §§ 104-109, 17 September 2009, on the principle of retrospectiveness of the more lenient criminal law under Article 7; and *Rantsev*, cited above, §§ 278-82, on the applicability of Article 4 to human trafficking).

125. Finally, recourse may also be had to supplementary means of interpretation, including the preparatory work (*travaux préparatoires*) of the treaty, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure, or manifestly absurd or unreasonable (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 62, ECHR 2008, and Article 32 of the Vienna Convention quoted above in paragraph 35). It can be seen from the case-law that the *travaux préparatoires* are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if the existence of such a right was supported by the growing measure of common ground that had emerged in the given area (see, for example *Sigurður A. Sigurjónsson v. Iceland*, 30 June 1993, § 35, Series A no. 264).

(ii) The Convention case-law

126. It is in the light of the above-mentioned principles that the Court will consider whether and to what extent a right of access to State-held information as such can be viewed as falling within the scope of "freedom of expression" under Article 10 of the Convention, notwithstanding the fact that such a right is not immediately apparent from the text of that provision. The respondent and the intervening Governments both argued, in particular, that the authors of the Convention had omitted to mention a right of access to information in the text of the Convention precisely because they did not intend that Contracting Parties should assume any such obligation (see also paragraphs 69 and 101 above).

127. The Court reiterates that the question whether – in the absence of an express reference to access to information in Article 10 of the Convention – an applicant's complaint that he was denied access can nevertheless be regarded as falling within the scope of this provision is a matter which has been the subject of gradual clarification in the Convention case-law over many years, both by the former European Commission of Human Rights (see, most notably, *Sixteen Austrian Communes and Some of Their Councillors v. Austria*, nos. 5767/72 etc., Commission decision of 31 May 1974, Yearbook 1974, p. 338; *X. v. Federal Republic of Germany*, no. 8383/78, Commission decision of 3 October 1979, Decisions and Reports (DR) 17, p. 227; *Clavel v. Switzerland*, no. 11854/85, Commission decision of 15 October 1987, DR 54, p. 153; *A. Loersch and Nouvelle Association du Courrier v. Switzerland*, nos. 23868/94 and 23869/94, Commission decision of 24 February 1995, DR 80, p. 162; *Bader v. Austria*, no. 26633/95, Commission decision of 15 May 1996; *Nurminen and Others v. Finland*, no. 27881/95, Commission decision of 26 February 1997; and *Grupo Interpres SA v. Spain*, no. 32849/96, Commission decision of 7 April 1997, DR 89, p. 150) and by the Court, which in paragraph 74 of its 1987 judgment in the *Leander* case set out the approach which was to become the standard jurisprudential position on the matter in later years:

> "[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."

128. Thus, the plenary Court in *Gaskin* (cited above, § 52) in 1989 and the Grand Chamber in *Guerra* in 1998 confirmed this approach, the Grand Chamber adding in the latter judgment that freedom to receive information "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion" (see § 53 of the *Guerra* judgment, cited above; see also *Sîrbu and Others v. Moldova*, nos. 73562/01, 73565/01,

73712/01, 73744/01, 73972/01 and 73973/01, §§ 17-19, 15 June 2004). In 2005 the Grand Chamber followed the same line of reasoning in *Roche* (cited above, § 172), it being noted that the Court had previously done so in *Eccleston v. the United Kingdom* ((dec.), no. 42841/02, 18 May 2004) and *Jones v. the United Kingdom* ((dec.), no. 42639/04, 13 September 2005).

129. The cases mentioned in the previous paragraph are similar in that the applicants sought access to information which was relevant to their private lives. Whilst the Court stated, with reference to the specific circumstances of the given cases, that the right of access to information was not provided under Article 10, it found that the information requested related to the applicants' private and/or family life in such a way that it fell within the ambit of Article 8 of the Convention (see *Gaskin*, cited above, § 37) or rendered Article 8 applicable (see *Leander*, § 48; *Guerra and Others*, § 57; and *Roche*, §§ 155-56, all cited above).

130. Later, in *Dammann* (cited above, § 52), the Court held that the gathering of information was an essential preparatory step in journalism and an inherent, protected part of press freedom (see also *Shapovalov*, cited above). This consideration was, without much discussion, further developed in *Sdruženi Jihočeské Matky* (cited above). The Court first referred to the principles set out in *Leander*, *Guerra* and *Roche* and observed that "it is difficult to derive from the Convention a general right of access to administrative data and documents (see *Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)". Then, referring to *Grupo Interpres SA* (cited above), it went on to hold that the impugned refusal of the public authority to grant access to the relevant administrative documents, which were readily available, constituted an interference with the applicant's right to receive information guaranteed by Article 10 of the Convention. As in the situation in the *Grupo Interpres SA* case, the Convention complaint in the *Dammann* case related to the application of a duty, imposed by national law, to provide access to the requested documents, subject to certain conditions. Having satisfied itself that the impugned restriction had not been disproportionate to the legitimate aim pursued, the Court subsequently declared the complaint inadmissible as being manifestly ill-founded.

131. Subsequently, in a series of judgments following the above-mentioned *Sdruženi Jihočeské Matky* decision, the Court found that there had been an interference with a right protected by Article 10 § 1 in situations where the applicant was deemed to have had an established right to the information under domestic law, in particular based on a final court decision, but where the authorities had failed to give effect to that right. In finding an interference, the Court moreover had regard to the consideration that access to the information in question was an essential element of the exercise of the applicant's right to freedom of expression, or that it formed part of the legitimate gathering of information of public interest with the

intention of imparting that information to the public and thereby contributing to public debate (see *Kenedi*, 26 May 2009, § 43; *Youth Initiative for Human Rights*, 25 June 2013, § 24; *Roşiianu,* 24 June 2014, § 64; and *Guseva*, 14 February 2015, § 55; all cited above, and all referring in this context to *Társaság*, described in more detail below). Dealing with comparable circumstances in *Gillberg* (judgment of 3 April 2012, cited above), the Grand Chamber adopted a similar approach (see § 93 of that judgment, cited above), whilst reiterating the *Leander* principle that Article 10 "basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him" (ibid., § 83). With hindsight the Court considers that this line of case-law did not represent a departure from, but rather an extension of, the *Leander* principles, in that it referred to situations where, as described by the intervening Government, one arm of the State had recognised a right to receive information but another arm of the State had frustrated or failed to give effect to that right.

132. Concurrently with the aforementioned line of case-law there emerged a closely related approach, namely that set out in the *Társaság* and *Österreichische Vereinigung* judgments (respectively of 14 April 2009 and 28 November 2013, both cited above). Here the Court recognised, subject to certain conditions – irrespective of the domestic-law considerations prevailing in *Kenedi, Youth Initiative for Human Rights, Roşiianu* and *Guseva* – the existence of a limited right of access to information, as part of the freedoms enshrined in Article 10 of the Convention. In *Társaság* the Court emphasised the social "watchdog" role of the applicant organisation and observed, using reasoning which was confirmed in *Kenedi, Youth Initiative for Human Rights, Roşiianu* and *Guseva*, that the applicant organisation had been involved in the legitimate gathering of information on a matter of public importance (a request by a politician for review of the constitutionality of criminal legislation concerning drug-related offences) and that the authorities had interfered in the preparatory stage of this process by creating an administrative obstacle. The Constitutional Court's monopoly of information had thus amounted to a form of censorship. Furthermore, given that the applicant organisation's intention had been to impart to the public the information gathered from the constitutional complaint, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information had been clearly impaired (see *Társaság*, §§ 26 to 28). Comparable conclusions were reached in *Österreichische Vereinigung* (see § 36 of that judgment).

133. The fact that the Court has not previously articulated in its case-law the relationship between the *Leander* principles and the more recent developments described above does not mean that they are contradictory or inconsistent. The dictum that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving

information that others wish or may be willing to impart to him" was, it appears, based on what may be considered a literal reading of Article 10. It was repeated in the plenary and Grand Chamber rulings in *Guerra and Others*, *Gaskin* and *Roche* (and also in *Gillberg*). However, whilst holding that Article 10 did not, in circumstances such as those at issue in *Guerra and Others*, *Gaskin* and *Roche*, confer on the individual a right of access to the information in question or embody an obligation on the Government to impart such information, the Court did not, however, exclude the existence of such a right for the individual or a corresponding obligation on the Government in other types of circumstance. The above-mentioned recent case-law (including *Gillberg*) may be viewed as illustrating the types of circumstance in which the Court has been prepared to recognise an individual right of access to State-held information. For the purposes of its examination of the present case, the Court finds it useful to take a broader look at the question of the extent to which the right of access to information can be gleaned from Article 10 of the Convention.

(iii) Travaux préparatoires

134. The Court notes from the outset the United Kingdom Government's submission, relying on Article 31 § 1 of the Vienna Convention on the Law of Treaties 1969, that the ordinary meaning of the language used by the Contracting States is to be the principal means of interpreting the Convention (see paragraph 99 above). In the UK Government's view, the clear object of Article 10 was to impose negative obligations on organs of the State to refrain from interfering with the right of communication. A positive obligation on the State to provide access to information was not warranted by the language of Article 10 § 1, which was confirmed by the *travaux préparatoires*, since the right to "seek" information had been deliberately omitted from the final text of Article 10.

135. As regards the preparatory work on Article 10, the Court observes that it is true that the wording of the preliminary draft Convention, prepared by the Committee of Experts at its first meeting on 2-8 February 1950, was identical to Article 19 of the Universal Declaration and contained the right to seek information. However, in later versions of the text, the right to seek information no longer appeared (see paragraphs 44-49 above). There is no record of any discussions entailing this change or indeed on any debate on the particular elements which constituted freedom of expression (compare and contrast *Young, James and Webster v. the United Kingdom*, 13 August 1981, §§ 51-52, Series A no. 44).

The Court is not therefore persuaded that any conclusive relevance can be attributed to the *travaux préparatoires* as regards the possibility of interpreting Article 10 § 1 as including a right of access to information in the present context. Nor is it convinced that there are no circumstances in which such an interpretation could find support in the ordinary meaning of

the words "receive and impart information and ideas without interference by a public authority" or in the object and purpose of Article 10.

136. On the contrary, it is noteworthy that the drafting history of Protocol No. 6 reveals a common understanding between the bodies and institutions of the Council of Europe that Article 10, paragraph 1 of the Convention, in its wording as originally drafted, could reasonably be considered as already comprising the "freedom to seek information".

In particular, in its Opinion on Draft Protocol No. 6 the Court considered that the freedom to receive information, guaranteed by Article 10, did imply a freedom to seek information, but not, as pointed out in the Explanatory Report, any obligation on the part of the authority to supply it. Also, the Opinion of the European Commission of Human Rights on the same Draft Protocol stated that although Article 10 did not mention freedom to seek information, it could not be ruled out that such a freedom was included, by implication, among those protected by that article and that, in certain circumstances, Article 10 included the right of access to documents which were not generally accessible. For the Commission, it was necessary to leave the possibility of development to judicial interpretation of Article 10 (see paragraph 51 above).

137. In the same vein, for the reasons set out below, the Court considers that, in certain types of situations and subject to specific conditions, there may be weighty arguments in favour of reading into this provision an individual right of access to State-held information and an obligation on the State to provide such information.

(iv) Comparative and international law

138. As already stated (in paragraph 123) above, the Convention cannot be interpreted in a vacuum and must, in accordance with the criterion contained in Article 31 § 3(c) of the Vienna Convention (see paragraph 35 above), be interpreted in harmony with other rules of international law, of which it forms part. Moreover, bearing in mind the special character of the Convention as a human-rights instrument containing substantive rules of a domestic-law nature imposing obligations on States *vis-à-vis* individuals, the Court may also have regard to developments in domestic legal systems indicating a uniform or common approach or a developing consensus between the Contracting States in a given area (see, in this regard, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31, and *Stafford v. the United Kingdom* [GC], no. 46295/99, §§ 67-68, ECHR 2002-IV).

139. In this regard, the Court observes that in the great majority of the Contracting States, in fact in all the thirty-one States surveyed with one exception, the national legislation recognises a statutory right of access to information and/or official documents held by public authorities, as a self-standing right aimed at reinforcing transparency in the conduct of public affairs generally (see paragraph 64 above). Although this aim is

broader than that of advancing the right to freedom of expression as such, the Court is satisfied that a broad consensus exists within the Council of Europe member States on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society.

140. A high degree of consensus has also emerged at the international level. In particular, the right to seek information is expressly guaranteed by Article 19 (the provision corresponding to the free speech guarantee in Article 10 of the Convention) of the 1966 International Covenant on Civil and Political Rights, which instrument has been ratified by all of the forty-seven Contracting Parties to the Convention, including Hungary (and all of which, except for Switzerland and the United Kingdom, have accepted the right of individual petition under its Optional Protocol). The same right is enshrined in Article 19 of the UN Universal Declaration.

141. In this connection, it is of importance to observe that the existence of a right of access to information has been confirmed by the United Nations Human Rights Committee (UNHRC) on a number of occasions. The Committee has emphasised the importance of access to information in the democratic process, and the link between the author's access to information and his or her opportunity to disseminate information and opinions on matters of public concern to citizens. It considered that freedom of thought and expression included protection of the right of access to State-held information. It pointed out in one case that, whilst the right to seek information could be exercised without the need to prove direct interest or personal involvement, the author association's functions as a special watchdog and the particular nature of the information sought warranted the conclusion that the author had been directly affected by the refusal in question (see paragraphs 39-41 above).

142. The Court further notes that, in the view of the UN Special Rapporteur on freedom of opinion and freedom of expression, the right to seek and receive information is an essential element of the right to freedom of expression, which encompasses the general right of the public to have access to information of public interest, the right of individuals to seek information concerning themselves that may affect their individual rights and the right of the media to access information (see paragraph 42 above).

143. Admittedly, the above conclusions were adopted in regard to Article 19 of the Covenant, the wording of which is different from that of Article 10 of the Convention. For the Court, however, their relevance in the present case derives from the findings that the right of access to public-interest data and documents was inherent in freedom of expression. For the UN bodies, the right of public watchdogs to have access to State-held information in order to discharge their obligations as public watchdogs, that is, to impart information and ideas was a corollary of the public's right

to receive information on issues of public concern (see paragraphs 39-42 above).

144. Furthermore, Article 42 of the European Union's Charter of Fundamental Rights as well as Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 guarantee to citizens a right of access to documents held by the EU institutions, subject to the exceptions set out in Article 4 of the Regulation (see paragraphs 55-56 above).

145. The right of access to public documents has moreover been recognised by the Committee of Ministers of the Council of Europe in Recommendation Rec (2002) 2 on access to official documents, which declares that member States should, with some exceptions, guarantee the right of everyone to have access, on request, to official documents held by public authorities (see paragraph 52 above). Furthermore, the adoption of the Council of Europe Convention on Access to Official Documents, even though it has to date been ratified by only seven member States, denotes a continuous evolution towards the recognition of the State's obligation to provide access to public information (for other examples where the Court has previously taken into account international instruments not ratified by all or the majority of State Parties to the Convention, see *Glass v. the United Kingdom*, no. 61827/00, § 75, ECHR 2004‑II, and *Öneryıldız v. Turkey* [GC], no. 48939/99, § 59, ECHR 2004‑XII; or that were not binding at the material time, see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002‑VI; *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, ECHR 2007‑II; and *Marckx,* cited above, §§ 20 and 41). Thus, even if the present case does not raise an issue of a fully-fledged right of access to information, the above Convention, in the Court's view, indicates a definite trend towards a European standard, which must be seen as a relevant consideration.

146. It is also instructive for the Court's inquiry to have regard to the developments concerning the recognition of a right of access to information in other regional human-rights protection systems. The most noteworthy is the Inter-American Court of Human Right's interpretation of Article 13 of the American Convention on Human Rights, as set out in the case of *Claude Reyes et al. v. Chile,* which expressly guarantees a right to seek and receive information. The Inter-American Court considered that the right to freedom of thought and expression included the protection of the right of access to State-held information (see paragraph 61 above).

147. Mention may also be made of the Declaration of Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002. While Article 9 of the African Charter on Human and Peoples' Rights does not refer to the right to seek information, the Declaration of Principles explicitly states that "[f]reedom of expression and information, including the right to seek, receive and

impart information and ideas... is a fundamental and inalienable human right" (see paragraph 63 above).

148. Thus, as the above considerations make clear, since the Convention was adopted the domestic laws of the overwhelming majority of Council of Europe member States, along with the relevant international instruments, have indeed evolved to the point that there exists a broad consensus, in Europe (and beyond) on the need to recognise an individual right of access to State-held information in order to assist the public in forming an opinion on matters of general interest.

(v) The Court's approach to the applicability of Article 10

149. Against the above background, the Court does not consider that it is prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information.

150. The Court is aware of the importance of legal certainty in international law and of the argument that States cannot be expected to implement an international obligation to which they did not agree in the first place. It considers that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Mamatkulov and Askarov*, cited above, § 121, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergence as to the standards to be achieved (see *Biao v. Denmark* [GC], no. 38590/10, § 131, 24 May 2016).

151. From the survey of the Convention institutions' case-law as outlined in paragraphs 127-132 above, it transpires that there has been a perceptible evolution in favour of the recognition, under certain conditions, of a right to freedom of information as an inherent element of the freedom to receive and impart information enshrined in Article 10 of the Convention.

152. The Court further observes that this development is also reflected in the stance taken by international human-rights bodies, linking watchdogs' right of access to information to their right to impart information and to the general public's right to receive information and ideas (see paragraphs 39-42 and 143 above).

153. Moreover, it is of paramount importance that according to the information available to the Court nearly all of the thirty-one member States of the Council of Europe surveyed have enacted legislation on freedom of information. A further indicator of common ground in this context is the existence of the Convention on Access to Official Documents.

154. In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved,

the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate.

155. The object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Soering*, cited above, § 87). As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention.

156. In short, the time has come to clarify the classic principles. The Court continues to consider that "the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Moreover, "the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion". The Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.

(vi) Threshold criteria for right of access to State-held information

157. Whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances. In order to define further the scope of such a right, the Court considers that the recent case-law referred to above (see paragraphs 131-32 above) offers valuable illustrations of the criteria that ought to be relevant.

(α) The purpose of the information request

158. First, it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to "receive and impart information and ideas" to others. Thus, the Court has placed emphasis on whether the gathering of the information was a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate (see, *mutatis mutandis*, *Társaság*, cited above, §§ 27-28; and *Österreichische Vereinigung*, cited above, § 36).

159. In this context, it may be reiterated that in the area of press freedom the Court has held that, "by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III). The same considerations would apply to an NGO assuming a social watchdog function (see more on this aspect below).

Therefore, in order for Article 10 to come into play, it must be ascertained whether the information sought was in fact necessary for the exercise of freedom of expression (see *Roşiianu,* cited above, § 63). For the Court, obtaining access to information would be considered necessary if withholding it would hinder or impair the individual's exercise of his or her right to freedom of expression (see *Társaság*, cited above, § 28), including the freedom "to receive and impart information and ideas", in a manner consistent with such "duties and responsibilities" as may follow from paragraph 2 of Article 10.

(β) The nature of the information sought

160. The Court has previously found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was "factual information concerning the use of electronic surveillance measures" (see *Youth Initiative for Human Rights*, cited above, § 24), "information about a constitutional complaint" and "on a matter of public importance" (see *Társaság*, cited above, §§ 37-38), "original documentary sources for legitimate historical research" (see *Kenedi¸* cited above, § 43), and decisions concerning real property transaction commissions (see *Österreichische Vereinigung*, cited above, § 42), attaching weighty consideration to the presence of particular categories of information considered to be in the public interest.

161. Maintaining this approach, the Court considers that the information, data or documents to which access is sought must generally meet a public-interest test in order to prompt a need for disclosure under the Convention. Such a need may exist where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large.

162. The Court has emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 97 to 103, ECHR 2015 (extracts), with further references).

163. In this connection, the privileged position accorded by the Court in its case-law to political speech and debate on questions of public interest is relevant. The rationale for allowing little scope under Article 10 § 2 of the Convention for restrictions on such expressions (see *Lingens v. Austria*, 8 July 1986, §§ 38 and 41, Series A no. 103, and *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV), likewise militates in favour of affording a right of access under Article 10 § 1 to such information held by public authorities.

(γ) The role of the applicant

164. A logical consequence of the two criteria set out above – one regarding the purpose of the information request and the other concerning the nature of the information requested – is that the particular role of the seeker of the information in "receiving and imparting" it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court has previously attached particular weight to the applicant's role as a journalist (see *Roşiianu*, cited above, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (see *Társaság*, § 36; *Österreichische*

Vereinigung, § 35; *Youth Initiative for Human Rights*, § 20; and *Guseva*, § 41, all cited above).

165. While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I) and the special position of journalists in this context. It has held that the safeguards to be afforded to the press are of particular importance (see *Goodwin*, cited above, § 39, and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216). The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court, as follows:

> "The duty of the press is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III)."

166. The Court has also acknowledged that the function of creating various platforms for public debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court has accepted that when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, ECHR 2013 (extracts)) and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press (ibid.; *Társaság*, cited above, § 27; and *Youth Initiative for Human Rights*, cited above, § 20). It has recognised that civil society makes an important contribution to the discussion of public affairs (see, for instance, *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II; and *Társaság*, § 38, cited above).

167. The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of "public watchdog" in imparting information on matters of public concern (see *Bladet Tromsø and Stensaas*, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively, and their

ability to provide accurate and reliable information may be adversely affected (see *Társaság*, cited above, § 38).

168. Thus, the Court considers that an important consideration is whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog". This does not mean, however, that a right of access to information ought to apply exclusively to NGOs and the press. It reiterates that a high level of protection also extends to academic researchers (see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 61-67, ECHR 1999-IV; *Kenedi*, cited above, § 42; and *Gillberg*, cited above, § 93) and authors of literature on matters of public concern (see *Chauvy and Others v. France*, no. 64915/01, § 68, ECHR 2004-VI, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 48, ECHR 2007-IV). The Court would also note that given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned.

(δ) Ready and available information

169. In reaching its conclusion that the refusal of access was in breach of Article 10, the Court has previously had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the Government (see *Társaság*, cited above, § 36, and, *a contrario*, *Weber v. Germany* (dec.), no. 70287/11, § 26, 6 January 2015). On the other hand, the Court dismissed a domestic authority's reliance on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty was generated by the authority's own practice (see *Österreichische Vereinigung*, cited above, § 46).

170. In the light of the above-mentioned case-law, and bearing in mind also the wording of Article 10 § 1 (namely, the words "without interference by public authority"), the Court is of the view that the fact that the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether a refusal to provide the information can be regarded as an "interference" with the freedom to "receive and impart information" as protected by that provision.

(vii) Application of those criteria to the present case

171. The applicant organisation argued that it had a right under Article 10 to obtain access to the information requested, since the purpose of the request had been to complete a survey in support of proposals for reform of the public defenders scheme and to inform the public on a matter

of general interest (see paragraph 95 above). The Government maintained however that the actual purpose of the survey was to discredit the existing system of public defenders (see paragraph 85 above).

172. The Court is satisfied that the applicant NGO wished to exercise the right to impart information on a matter of public interest and sought access to information to that end.

173. The Court also notes the Government's submission that the information sought, specifically, the names of lawyers who had been assigned as public defence counsel, was by no means necessary for reaching conclusions and publishing findings about the efficiency of the public defender system. Consequently, in their view, the non-disclosure of those personal data did not hinder the applicant NGO's participation in a public debate (see paragraph 77 above). They also challenged the usefulness of the nominative information, arguing that anonymously processed extracts from the files in question would have met the applicant NGO's needs (see paragraph 84 above).

174. The applicant NGO submitted that the names of public defenders and the number of appointments given to each one was information that was required in order to investigate and determine any malfunctioning in the system (see paragraph 96 above). The applicant NGO also argued that the core aspect of its publication on the efficiency of the public defender system was the allegedly disparate distribution of appointments.

175. In the Court's view, the information requested by the applicant NGO from the police departments was, undisputedly, within the subject area of its research. In order to be able to support its arguments, the applicant wished to collect nominative information on the individual lawyers in order to demonstrate any recurrent appointment patterns. Had the applicant NGO limited its inquiry to anonymised information, as suggested by the Government, it would in all likelihood have been unable to produce verifiable results in support of its criticism of the existing scheme. Moreover, with regard to the completeness or statistical significance of the information in dispute, the Court notes that the aim of the data request was to cover the entire country, including all the County Police Departments. The refusal by two departments to provide information represented an obstacle to producing and publishing a fully comprehensive survey. Thus, it can reasonably be concluded that without the information concerned the applicant was unable to contribute to a public debate drawing on accurate and reliable information. The information was therefore "necessary" within the meaning referred to in paragraph 159 above for the applicant's exercise of its right to freedom of expression.

176. As regards the nature of the information, the Court observes that the domestic authorities made no assessment whatsoever of the potential public-interest character of the information sought and were concerned only with the status of public defenders from the perspective of the Data Act. The

latter allowed for very limited exceptions to the general rule of non-disclosure of personal data. Once the domestic authorities had established that public defenders did not fall within the category of "other persons performing public duties", which was the only relevant exception in the particular context, they were prevented from examining the potential public-interest nature of the information.

177. The Court notes that this approach deprived the public-interest justification relied on by the applicant NGO of any relevance. In the Court's view, however, the information on the appointment of public defenders was of an eminently public-interest nature, irrespective of whether public defenders could be qualified as "other persons performing public duties" under the relevant national law.

178. As to the role of the applicant NGO, it is common ground between the parties that the present case concerns a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law. Its professional stance on the matters it deals with and its outreach to the broader public have not been called into question. The Court sees no reason to doubt that the survey in question contained information of the kind which the applicant NGO undertook to impart to the public and which the public had a right to receive. The Court is further satisfied that it was necessary for the applicant's fulfilment of this task to have access to the requested information.

179. Lastly, the Court notes that the information was ready and available; and it has not been argued before the Court that its disclosure would have been particularly burdensome for the authorities (compare and contrast *Weber*, cited above).

(viii) Conclusion

180. In sum, the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. There has therefore been an interference with a right protected by this provision, which is applicable to the present case. The Government's objection that the applicant's complaint is incompatible *ratione materiae* must therefore be dismissed.

(b) Whether the interference was justified

181. In order to be justified, an interference with the applicant NGO's right to freedom of expression must be "prescribed by law", pursue one or

more of the legitimate aims mentioned in paragraph 2 of Article 10, and be "necessary in a democratic society".

(i) Lawfulness

182. The Court observes that the parties disagreed as to whether the interference with the applicant NGO's freedom of expression was "prescribed by law". The applicant organisation relied on section 19(4) of the Data Act and argued that it expressly provided for the disclosure of personal data of "other persons performing public duties", whereas there was no provision which prohibited the disclosure of the names of *ex officio* appointed defence counsel. The Government, for their part, referred to the opinion of the Data Protection Commissioner and the judgments of the domestic courts interpreting section 19(4) of the Data Act to the effect that *ex officio* appointed defence counsel were not "other persons performing public duties", and thus their personal data could not be disclosed. In their view, the Court ought to proceed from the facts as established and the law as applied and interpreted by the domestic courts.

183. The Court observes that the difference in the parties' opinions as regards the applicable law originates in their diverging views on the issue of how public defenders are to be characterised in the domestic law. According to the applicant NGO, they should be classified as "other persons exercising public duties", whereas the Government argued that they were to be seen as private persons, including with regard to their activities carried out when appointed by public authorities.

184. As the Court has held on numerous occasions, it is not its task to take the place of the domestic courts and it was primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, among many authorities, *Rekvényi v. Hungary* [GC], no. 25390/94, § 35, ECHR 1999-III). Nor is it for the Court to express a view on the appropriateness of the methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I).

185. The Court notes that the Supreme Court examined in detail the legal status of *ex officio* appointed defence counsel and the applicant NGO's arguments as to their duties to ensure the right to defence and that it found that they were not "other persons exercising public duties". The Supreme Court's interpretation was in line with the Recommendation of the Parliamentary Commissioner for Data Protection, published in 2006 (see paragraph 34 above). The Court sees no reason to question the Supreme Court's interpretation that public defenders could not be regarded as "other persons exercising public duties" and that section 19(4) of the Data Act provided a legal basis for the impugned denial of access. The interference

was thus "prescribed by law" within the meaning of the second paragraph of Article 10.

(ii) Legitimate aim

186. The Court observes that it was not in dispute between the parties that the restriction on the applicant NGO's freedom of expression pursued the legitimate aim of protecting the rights of others, and it sees no reason to hold otherwise.

(iii) Necessary in a democratic society

187. The fundamental principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have been summarised as follows (see, among other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, Reports 1998‑VI; *Steel and Morris*, cited above, § 87; *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 48, ECHR 2012 (extracts); *Animal Defenders International*, cited above, § 100; and most recently *Delfi*, cited above, § 131):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and 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'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

188. The Court observes that the central issue underlying the applicant NGO's grievance is that the information sought was characterised by the authorities as personal data not subject to disclosure. This was so because, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental (State) functions or was related to other persons performing public duties. Since the Supreme Court's ruling excluded public defenders from the category of "other persons performing public duties", there was no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its watchdog role.

189. In this regard, the applicant NGO maintained that there was no justification for the non-disclosure of information concerning the appointment of public defenders who are retained by public authorities within the framework of a State-funded scheme, even in the face of any privacy considerations advanced by the Government.

190. For their part, the Government argued that the broad interpretation of the notion "other persons performing public duties", as suggested by the applicant NGO, would be liable to nullify any protection of the private life of public defenders (see paragraph 83 above).

191. The Court reiterates that the disclosure of information relating to an individual's private life comes within the scope of Article 8 § 1 (see *Leander*, cited above, § 48). It points out in this connection that the concept of "private life" is a broad term not susceptible to exhaustive definition (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008, and *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002‑III). It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of a person's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see *S. and Marper*, cited above, § 66, and *Pretty*, cited above, § 61, with further references). Private life may also include activities of a professional or business nature (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). The Court has also held that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *Couderc and Hachette Filipacchi Associés*, cited above, § 83).

192. In the context of personal data, the Court has previously referred to the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (see paragraph 54 above), the purpose of which is "to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of

personal data relating to him" (Article 1). Personal data are defined in Article 2 as "any information relating to an identified or identifiable individual" (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It has identified examples of personal data relating to the most intimate and personal aspects of an individual, such as health status (see *Z v. Finland*, 25 February 1997, §§ 96-97, *Reports* 1997-I, concerning HIV-positive status, and *M.S. v. Sweden*, 27 August 1997, § 47, *Reports* 1997-IV, concerning records on abortion), attitude to religion (see, in the context of freedom of religion, *Sinan Işık v. Turkey*, no. 21924/05, §§ 42-53, ECHR 2010), and sexual orientation (see *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999), finding that such categories of data constituted particular elements of private life falling within the scope of the protection of Article 8 of the Convention.

193. In determining whether the personal information retained by the authorities related to the relevant public defenders' enjoyment of their right to respect for private life, the Court will have due regard to the specific context (see *S. and Marper*, cited above, § 67). There are a number of elements which are relevant to the assessment of whether a person's private life is concerned by measures effected outside that person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor in this assessment (see *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 57, ECHR 2001-IX).

194. In the present case, the information requested consisted of the names of public defenders and the number of times they had been appointed to act as counsel in certain jurisdictions. For the Court, the request for these names, although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders' professional activities cannot be considered to be a private matter. Moreover, the information sought did not relate to the public defenders' actions or decisions in connection with the carrying out of their tasks as legal representatives or consultations with their clients. The Government have not demonstrated that disclosure of the information requested for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention.

195. The Court also finds that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders (compare and contrast *Peck v. the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). There is no reason to assume that information about the names of public defenders

and their appointments could not be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings, although it is clear that it was not collated at the moment of the survey.

196. Against this background, the interests invoked by the Government with reference to Article 8 of the Convention are not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the applicant NGO's right as protected by paragraph 1 of Article 10 (compare and contrast *Couderc and Hachette Filipacchi Associés*, § 91; *Axel Springer AG*, § 87, both cited above; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, and *Perinçek v. Switzerland* [GC], no. 27510/08, §§ 227-28, ECHR 2015 (extracts)). Nonetheless, Article 10 does not guarantee an unlimited freedom of expression; and as already found in paragraph 188 above, the protection of the private interests of public defenders constitutes a legitimate aim permitting a restriction on freedom of expression under paragraph 2 of that provision. Thus, the salient question is whether the means used to protect those interests were proportionate to the aim sought to be achieved.

197. The Court notes that the subject matter of the survey concerned the efficiency of the public defenders system (see paragraphs 15-16 above). This issue was closely related to the right to a fair hearing, a fundamental right in Hungarian law (see paragraph 33 above) and a right of paramount importance under the Convention. Indeed, any criticism or suggested improvement to a service so directly connected to fair-trial rights must be seen as a subject of legitimate public concern. In its intended survey, the applicant NGO wished to explore its theory that the pattern of recurrent appointments of the same lawyers was dysfunctional, casting doubt on the adequacy of the scheme. The contention that the legal-aid scheme might be prejudiced as such because public defenders were systematically selected by the police from the same pool of lawyers – and were then unlikely to challenge police investigations in order not to be overlooked for further appointments – does indeed raise a legitimate concern. The potential repercussions of police-appointed lawyers on defence rights have already been acknowledged by the Court in the *Martin* case (cited above). The issue under scrutiny thus going to the very essence of a Convention right, the Court is satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest (see paragraphs 164-65 above). The refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest.

198. Having regard to the considerations in paragraphs 194-196, the Court does not find that the privacy rights of the public defenders would have been negatively affected had the applicant NGO's request for the information been granted. Although the information request admittedly

concerned personal data, it did not involve information outside the public domain. As already mentioned above, it consisted only of information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in public criminal proceedings within the framework of the publicly funded national legal-aid scheme.

199. The relevant Hungarian law, as interpreted by the competent domestic courts, excluded any meaningful assessment of the applicant's freedom-of-expression rights under Article 10 of the Convention, in a situation where any restrictions on the applicant NGO's proposed publication – which was intended to contribute to a debate on a matter of general interest – would have required the utmost scrutiny.

200. In the light of the above, the Court considers that the arguments advanced by the Government, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". In particular, the Court considers that, notwithstanding the respondent State's margin of appreciation, there was not a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

There has accordingly been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

201. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

202. The applicant NGO did not submit any claim in respect of non-pecuniary damage. However, it claimed 215 euros (EUR) in respect of pecuniary damage. This sum corresponded to the amount which the applicant NGO was ordered to pay the respondent police departments in respect of the latter's legal costs in the domestic proceedings.

203. The Government contested this claim.

204. The Court accepts that there is a causal link between the violation found and the pecuniary damage alleged; it therefore awards the full sum claimed. It notes that the applicant did not request that the information sought by it should be disclosed.

B. Costs and expenses

205. The applicant NGO claimed EUR 6,400 plus 27 % value-added tax (VAT) for the legal fees incurred before the Court. This amount corresponded to 64 hours of legal work charged at an hourly rate of EUR 100 plus VAT, including 4 hours of consultation, 6 hours to study the file, 16 hours to study the case-law of the Court, 30 hours for drafting submissions and, lastly, 8 hours for preparing for and participating at the Grand Chamber hearing.

Furthermore, the applicant NGO claimed EUR 2,475 for travel and accommodation expenses related to the hearing.

The applicant NGO's total claim for costs and expenses came to EUR 8,875 plus VAT where applicable.

206. The Government contested this claim.

207. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum claimed, that is, EUR 8,875.

C. Default interest

208. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Joins* the Government's preliminary objection to the merits and *dismisses* it, by a majority;

2. *Declares*, by a majority, the application admissible;

3. *Holds*, by fifteen votes to two, that there has been a violation of Article 10 of the Convention;

4. *Holds*, by fifteen votes to two,
   (a) that the respondent State is to pay the applicant NGO, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 215 (two hundred and fifteen euros), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) EUR 8,875 (eight thousand eight hundred and seventy-five euros), plus any tax that may be chargeable to the applicant NGO, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 November 2016.

Lawrence Early
Jurisconsult

Guido Raimondi
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judges Nussberger and Keller;
(b) concurring opinion of Judge Sicilianos, joined by Judge Raimondi;
(c) dissenting opinion of Judge Spano, joined by Judge Kjølbro

G.R.A.
T.L.E.

CONCURRING OPINION OF JUDGES NUSSBERGER AND KELLER

1. We agree with the finding of a violation in the present case, on the basis of a freedom to seek information protected under Article 10 of the Convention. The Hungarian Government should not have withheld the information about the names of the public defenders by referring to data-protection legislation and without weighing up the different interests involved. That constitutes a clear violation of Article 10.

2. Nevertheless, like our colleagues Robert Spano and Jon Fridrik Kjølbro, we cannot agree with the majority's arguments refuting the Hungarian Government's concerns about data protection[1]. In our view the importance of data protection has been downplayed in a way that is incompatible with this Court's constant case-law and, moreover, with the approach of the Court of Justice of the European Union when interpreting data-protection legislation. We fear that this might create problems in future data-protection cases and therefore plead for a very narrow and context-specific interpretation of this part of the judgment.

3. The gist of the majority's argument in this context is that Article 8 of the Convention is not applicable to the defending lawyers' right to data protection. This is clearly stated in paragraph 196:

> "... the interests invoked by the Government with reference to Article 8 of the Convention [i.e. data protection of the rights of the public defenders] are not of such a nature and degree as could warrant engaging the application of this provision and bringing it into play in a balancing exercise against the applicant NGO's rights as protected by paragraph 1 of Article 10."

4. The majority thus introduced a threshold for applying Article 8 of the Convention to data protection which is based on three criteria: foreseeability of the use of the personal data, connection of the data with private or professional life, and accessibility of the data (see paragraphs 194 and 195).

5. This approach is at odds with the wide definition of data protection as "any information relating to an identified or identifiable individual".[2] The relevance of such criteria has been refuted in the Court's case-law and is not in line with the CJEU's jurisprudence.

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1. Dissenting opinion of Judge Robert Spano, followed by Judge Jon Fridrik Kjølbro, § 46.
2. See the definition both in Article 2 of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (entered into force on 1 October 1985, quoted in paragraph 54 of the judgment), and Article 2 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on protection of individuals with regard to the processing of personal data (quoted in paragraph 57 of the judgment). This approach has been confirmed by the Court in its case-law.

6. In the case of *Amann v. Switzerland* ([GC], no. 27798/95, § 65, ECHR 2000-II) the Court held that there should be no distinction between data stemming from private or professional activities:

> "The Court reiterates that the storing of data relating to the 'private life' of an individual falls within the application of Article 8 § 1 (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 22, § 48).
>
> It points out in this connection that the term 'private life' must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life' (see the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and the *Halford* judgment cited above, pp. 1015-16, § 42)."

7. The very essence of data protection is to regulate the use of personal data and thus to protect what the German Federal Constitutional Court has called the "right to informational self-determination" ("*Recht auf informationelle Selbstbestimmung*"[3]). Admittedly, it was foreseeable for public defenders that the authorities would store their data. But that is no reason to reject the applicability of Article 8 of the Convention, thereby denying them any protection against the use or misuse of their personal data, both by the authorities themselves and also by third parties.

8. The argument that data which are already in the public domain[4] therefore need less protection may create tensions with the jurisprudence of the CJEU, which has explicitly stated: "...a general derogation from the application of the directive in respect of published information would largely deprive the directive of its effect. It would be sufficient for the Member States to publish data in order for those data to cease to enjoy the protection afforded by the directive."[5] This finding has been confirmed and reinforced in *Google Spain*, in which the Luxemburg Court argued that operations qualify as data processing even "where they exclusively concern material that has already been published in unaltered form in the media."[6]

9. In our opinion, the Court should not dilute the level of data protection recognized in its case-law and should as a rule continue to apply the notion of "private life" in Article 8 § 1 of the Convention to personal data collected by State authorities.

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3. BVerfG, judgment of the First Division, 15 December 1983, 1 BvR 209/83 u. a. – Volkszählung –, BVerfGE 65, 1.

4. See paragraph 195 of the judgment: "there is no reason to assume that the names of public defenders and the number of their appointments could not be known to the public through other means, by compiling, for instance, information from lists of legal-aid providers, court hearing schedules and public court hearings."

5. Case C-73/07 Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy, EU:C:2008:727, paragraph 48.

6. Case C-131/12 Google Spain, EU:C:2014:317, paragraph 30.

10. This does not prejudge the outcome of any subsequent balancing exercise between data-protection rights covered by Article 8 on the one hand and freedom of expression protected under Article 10 on the other, which will have to be decided on a case-by-case basis. We agree that in the circumstances of the present case the balance was tipped in favour of the applicant's freedom of expression.

CONCURRING OPINION OF JUDGE SICILIANOS, JOINED BY JUDGE RAIMONDI

(Translation)

1. I am in full agreement with the conclusion and the substance of the interpretative approach in the present judgment. However, this judgment is of some importance for the interpretation of the Convention, and even the interpretation of international treaties in general, in accordance with the Vienna Convention on the Law of Treaties, as is borne out not only by the substantial reasoning devoted to this question, but also by the dissenting opinion of my esteemed colleagues Spano and Kjølbro. In this context, I should like to add the following reflections in order to clarify, firstly, the relationship between the *travaux préparatoires* and the so-called evolutive method of interpretation (I), before attempting to define the limits of this interpretation (II). It will then remain to assess the importance of the *travaux préparatoires* and their probative value in a case such as this, as well as an original aspect of the present judgment, namely the fact of interpreting the Convention in the light of the *travaux préparatoires* of a later but related instrument (III). On the basis of these elements, corroborated by a series of other interpretive arguments, the solution adopted by the Court is firmly rooted in the normative framework provided by the Vienna Convention (IV).

I. Recourse to the *travaux préparatoires* and the "living instrument" doctrine: two antithetical approaches?

2. The key issue in the present case revolves around two approaches which appear, at least at first sight, to be diametrically opposed: the first approach, based on the *travaux préparatoires* of the Convention, consists in attempting to discern the intentions of the text's "founding fathers"; the second approach, which is reflected particularly in paragraphs 138-148 of the judgment, essentially consists in applying the well-known "living instrument" doctrine. The historical intention of the Contracting Parties and adherence to the exact wording of Article 10 § 1 of the Convention thus seems to be opposed to the so-called evolutive interpretation of this provision.

3. It is well known that since its formulation in the *Tyrer v. the United Kingdom* judgment (25 April 1978, § 31, Series A no. 26), the idea that "the Convention is a living instrument ... which must be interpreted in the light of present-day conditions" has spread throughout the Strasbourg case-law and has formed the basis for an interpretive approach which has enabled the Court to adapt, over time, the text of the Convention to legal, social, ethical

or scientific developments. Where, explicitly or implicitly, it makes use of the "living instrument" doctrine, the Court usually emphasises at the same time the specific features of the Convention as a treaty for human-rights protection (see paragraphs 120-122 of the present judgment).

4. Admittedly, in the area in question the rate of such developments is frequently more rapid than in other areas of international law, which could explain the more frequent recourse to the so-called evolutive method of interpretation. It is perhaps significant that the other bodies for human-rights protection – be they judicial or quasi-judicial, international or regional - also often adopt the approach in question (see, purely by way of indication, the judgment of the Inter-American Court of Human Rights in *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* of 23 August 2013, § 153, on the henceforth wider interpretation of the concept of an "independent court", confirmed by the judgments in *Constitutional Tribunal (Camba Campos et al.) v. Ecuador* of 28 August 2013 and *López Lone et al. v. Honduras* of 5 October 2015). However, as has been amply demonstrated, the evolutive method of interpretation has been used by other international and national judicial bodies, including the International Court of Justice, the arbitral tribunals, the supreme courts of France, the United Kingdom, Germany, etc. (see E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford, Oxford University Press, 2014, and *id*., "The Convention as a Living Instrument Rooted in the Past, Looking to the Future", to appear in *Human Rights Law Journal*, "Colloquy in Honour of Judge Paul Mahoney"). In other words, although the "living instrument" doctrine has been emphasised by the Court, the resulting interpretative approach is not exclusively tied to the Convention (or to the other conventions and treaties for human-rights protection). It extends far beyond this context and is part of national and international judicial practice in respect of many other areas of international law, and even of law in general.

5. Although the "living instrument" doctrine and the underlying evolutive method of interpretation may at first sight appear innovative, in reality – and provided that they are applied with prudence (see below) - they are in line with the presumed intention of the Contracting States, which are also living entities. To borrow the phrasing of a former President of the Court, Sir Humphrey Waldock (who was also, it will be recalled, the last Special Rapporteur of the International Law Commission on the Law of Treaties):

> "The meaning and content of the provisions of the Convention will be understood as intended to evolve in response to changes in legal or social concepts" (H. Waldock, "The Evolution of Human Rights Concepts and the Application of the European Convention of Human Rights", in *Mélanges Paul Reuter*, Paris, Pedone, 1981, p. 547).

This approach has been confirmed and generalised by the International Court of Justice, which recently emphasised:

> "... where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is 'of continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning" (ICJ, *Dispute regarding Navigational and Related Rights* (Costa-Rica *v.* Nicaragua), judgment of 13 July 2009, *ICJ Reports 2009*, p. 213, § 66).

6. In other words, far from marking a departure from the parties' intention, the evolutive interpretation of a convention or treaty containing generic terms – which is the case for the Convention – must be seen as reflecting, in principle, the presumed intention of the Contracting States. The nature and scope of the terms used by the drafters of such a treaty, on the one hand, and its indeterminate duration, on the other, lead us to consider that, unless shown otherwise, the parties wish it to be interpreted and applied in a manner that reflects contemporary developments. This interpretative method allows the text of a convention to be continuously adapted to "present-day conditions", without the need for the treaty to be formally amended. The evolutive interpretation is intended to ensure the treaty's permanence. The "living instrument" doctrine is a condition *sine qua non* for the Convention's survival!

7. This approach is corroborated by the Preamble to the Convention, which refers not only to the "maintenance" but also the "*further realisation* of Human Rights and Fundamental Freedoms". In other words, the "founding fathers" did not conceive human rights as being static and frozen in time but, on the contrary, as dynamic and forward-looking.

8. Admittedly, the evolutive method of interpretation is not mentioned *expressis verbis* in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. It could therefore be argued that this method arises from a progressive development of international law (see L.-A. Sicilianos, "The Human Face of International Law – Interactions between General International Law and Human Rights: An Overview", in *Human Rights Law Journal*, 2012, nos. 1-6, pp. 1-11, p. 6). The fact remains, however, that it is fully compatible with the underlying logic of the above-mentioned provisions of the Vienna Convention. It is certainly to be borne in mind that Article 31 of that convention refers, *inter alia*, to the object and purpose of the treaty, as well as to subsequent agreements, subsequent practice and any relevant rules of international law "applicable in the relations between the parties", including the instruments ratified by those parties after the conclusion of the treaty that is to be interpreted. All these elements allow for a teleological and dynamic interpretation, aimed at ensuring that the treaty in question adapts to developments subsequent to its adoption, especially

where it contains generic terms whose meaning is likely to evolve over time and where it was concluded for an indefinite period.

9. In short, the evolutive method of interpretation of the Convention (and its Protocols) reflects, in principle, the presumed intention of the parties, and it constitutes a prerequisite for the survival (at the very least) of the substantive provisions of these instruments – such as Article 10 of the Convention, which is at the heart of the present case –, while remaining compatible with the relevant provisions of the Vienna Convention on the Law of Treaties. Nonetheless, it is necessary to clarify the limits of evolutive interpretation.

II. The limits of evolutive interpretation

10. The Court has always sought to avoid the evolutive interpretation of the Convention from being perceived, particularly by the domestic courts, as a sort of "carte blanche" allowing for excessive liberties with the text of the Convention. This ongoing concern led it to devote the "Dialogue between Judges" seminar, marking the beginning of the 2011 judicial year, to this very topic (see European Court of Human Rights, *What are the limits to the evolutive interpretation of the Convention? Dialogue between Judges 2011*, Strasbourg, EuropeanCourtHR/Council of Europe, 2011). I do not claim to summarise this rich discussion, but it seems to me that there are three limits to the evolutive interpretation: firstly, this interpretive method must not lead to an interpretation *contra legem*; secondly, the proposed interpretation must be compatible with the object and purpose of the Convention in general, and with the provision to be interpreted in particular; and, thirdly, this interpretation must reflect "present-day" conditions and not those which may prevail in the future.

The evolutive interpretation ought not to lead to an interpretation *contra legem*

11. As was explained above, the evolutive interpretation does not overlook the parties' intention. On the contrary, it reflects their *presumed* intention. Yet this is a rebuttable rather than an irrebuttable presumption. For it to be confirmed, it is important that the proposed interpretation remains within the limits of the terms used by the Convention and does not directly contradict them. The evolutive interpretation may, if absolutely necessary, be *praeter legem*, but not *contra legem*.

12. The Court has long emphasised this limit in relation to various provisions of the Convention. Thus, for example, in the *Johnston and Others v. Ireland* judgment (18 December 1986, § 52, Series A no. 112), the Court refused to recognise that the right to marry implied the right to

divorce. It noted on that occasion that "the ordinary meaning of the words 'right to marry' is clear, in the sense that they cover the formation of marital relationships but not their dissolution" (see also *V.K. v. Croatia*, no. 38380/08, § 99, 27 November 2012). Even more clearly, in the *Pretty v. the United Kingdom* judgment (no. 2346/02, § 39, ECHR 2002-III) the Court refused to extend the wording of Article 2 of the Convention, on the right to life, in such a way as to recognise the right to die. It held on that occasion that "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right [to the right to life], namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life". Without needing to provide additional examples, it is important to note that the Court, as a general rule, has carefully avoided interpretations *contra legem* which would represent a "distortion of [the Convention's] language".

13. Its position in the present case is no exception to this attitude. There is nothing in its interpretation that runs counter to the text of Article 10 § 1 of the Convention. Indeed, the words "[this] right *shall include* freedom to hold opinions and to receive and impart information and ideas ..." (italics added) imply that we have here an enumeration of the main aspects of the right to freedom of expression. They do not exclude the possibility of there being others. It follows that to state that Article 10 § 1 also includes the freedom to seek information amounts merely to supplementing the terms of this provision, without contradicting them.

The evolutive interpretation must be compatible with the object and purpose of the Convention

14. The second limit on the evolutive interpretation concerns its compatibility with the object and purpose of the Convention in general, and particularly those of the provision to be interpreted. There is no need to insist on the fact that any interpretation of a convention text must reflect its object and purpose, as emphasised in Article 31 § 1 of the Vienna Convention on the Law of Treaties. This is the "golden rule" of any interpretative approach. To thwart the object and purpose of the treaty would be to betray the parties' intention and to undermine the treaty system.

15. In the present case, the Court places particular stress on this point (see, in particular, paragraph 155 of the judgment). Without wishing to repeat these arguments, it is appropriate to highlight the generic scope of the first sentence of Article 10 § 1 – "Everyone has the right to freedom of expression" – and to reiterate the fundamental importance given to this provision in all the case-law issued on this matter by the Court, which conceives this freedom as a genuine pillar of democratic government. In

those circumstances, to recognise a particular aspect of freedom of expression – namely the freedom to seek information – "where access to the information is *instrumental* for the individual's exercise of his or her right to freedom of expression" (see paragraph 156 of the judgment, italics added) seems to me entirely compatible with the object and purpose of Article 10 and, more generally, with those of the Convention.

The evolutive interpretation should reflect "present-day" conditions, not those which might prevail in the future

16. The third limit to an evolutive interpretation is, in my opinion, of particular importance, since it represents a safeguard against the possible excesses of this interpretative method. As the Court noted in the *Tyrer* case (judgment cited above) and has since reiterated on numerous occasions, the aim of the "living instrument" doctrine is to adapt the Convention to "present-day conditions". This is why the Court usually insists on the existence of a "European consensus" or, at any rate, of a significant trend in the legislation and/or practice of the Contracting States towards the chosen interpretation. Such a consensus would indicate a common acceptance of the interpretation in question, or even the existence of a regional custom at the time of delivery of the judgment. To borrow wording used elsewhere, "the point of the evolutive interpretation, as conceived by the Court, is to accompany and even channel change...; it is not to anticipate change, still less to try to impose it" (see *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013, joint partly dissenting opinion of judges Casadevall, Ziemele, Kovler, Jociené, Sikuta, De Gaetano and Sicilianos, § 23). In other words, the interpretation adopted, while "evolutive", must be rooted in the present. Attempting to speculate on future developments would risk going beyond the judicial function.

17. In the present case, the Court has devoted considerable reasoning to this question (see, in particular, paragraphs 138-148 of the judgment) and it has amply demonstrated that its interpretation of Article 10 § 1 is anchored in international law and comparative law as they currently stand. Of the elements referred to by the Court, the one that strikes me as particularly important is the fact that the chosen interpretation already appeared as far back as 1966, that is, half a century ago, in the text of a binding instrument – Article 19 of the International Covenant on Civil and Political Rights - to which all of the States Parties to the Convention are now contracting parties. In those circumstances, I find it difficult, if not impossible, to argue that the interpretation adopted goes beyond the above-mentioned limit of the evolutive interpretation.

III. The importance and probative value of the *travaux préparatoires*

18. Having attempted to clarify the relationship between *travaux préparatoires* and the evolutive interpretation, and the limits on this interpretation, I must now consider the importance and probative value of *travaux préparatoires* in general and, in the present case, in particular.

The *travaux préparatoires* as a "supplementary means" of interpretation

19. Admittedly, the present judgment, while devoting part of its reasoning to the *travaux préparatoires* of the Convention (see paragraphs 134 et seq.), ultimately chooses not to accord them decisive importance for the interpretation of Article 10 § 1 of the Convention. With good reason. It is important to note at the outset that, according to Article 32 of the Vienna Convention on the Law of Treaties, the *travaux préparatoires* are a "supplementary means" of interpretation. This expression arose from a deliberate choice by the International Law Commission (ILC), endorsed by the Vienna Convention on the Law of Treaties. By describing the *travaux préparatoires* as a "*supplementary* means" of interpretation, Article 32 takes account of the changes in practice which developed following the end of World War Two, namely abandonment of the *subjective* method of interpretation, which gave priority to the "real intention" of the parties (and which was still being partially followed in the inter-war years), in favour of the *objective* method of interpretation, which unambiguously favours the "declared intention". Indeed, as has been noted by the ILC, the elements of interpretation of Article 31 "... all relate to the agreement between the parties at the time when or after it received authentic expression in the text". The ILC added that "... this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text" (*ILC Yearbook*, 1966, vol. II, p. 220, § 10).

20. It follows from the foregoing that resorting to the travaux préparatoires is therefore to be a subsidiary approach, either in order to confirm the meaning resulting from the means of interpretation referred to in Article 31 of the Vienna Convention (see, by way of example, ICJ, Territorial Dispute (Libya/Chad), judgment of 3 February 1994, ICJ Reports 1994, § 55), or to determine the meaning when the interpretation arising from the application of Article 31 leaves the meaning "ambiguous or obscure" or leads to a result which is "manifestly absurd or unreasonable" (for a detailed commentary on that provision, see, in particular, Y. Le Bouthillier, "Article 32 of the 1969 Convention", in O. Corten, P. Klein

(eds.), Les Conventions de Vienne sur le droit des traités : commentaire article par article, vol. II, pp. 1339-1368, and M. E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties, Leiden/Boston, M. Nijhoff, 2009, pp. 442-449).

21. In the present case, the Court reaches its conclusion on the scope of Article 10 § 1 of the Convention by using, for the most part, the means of interpretation provided for by Article 31 of the Vienna Convention on the Law of Treaties (see part IV above). In consequence, if one wishes to apply Article 32 of the Vienna Convention to the letter, one must set aside at the outset the argument based on the travaux préparatoires (see, mutatis mutandis, ICJ, Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, ICJ Reports 1948, p. 57, and especially p. 63). However, given that the argument based on the travaux préparatoires was of central importance in the pleadings submitted by the parties, the Court has rightly preferred to give it further consideration. It remains necessary, however, to determine the probative value of the travaux préparatoires.

In the absence of genuine discussions, what is the probative value of the *travaux préparatoires*?

22. Under the rationale of Article 32 of the Vienna Convention on the Law of Treaties, the use of the *travaux préparatoires* is intended to clarify the meaning of the text by referring to the parties' intention as that was expressed during the negotiations. One wonders, however, if and to what extent it is possible to deduce from such consultation useful or even decisive elements, when the *travaux* in question provide no trace of the discussions or exchanges of reasoning with regard to such or such an amendment to the successive versions of the text. Can one reach decisive conclusions as to the parties' intention simply by noting that a term, initially included in the text to be interpreted, was omitted in a subsequent version of the same text without knowing why that change was made? In the same vein, it is appropriate to note the prudence shown by the International Court of Justice in the *Case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, holding, in particular, that the *travaux préparatoires* of the Doha Minutes were "to be used with caution in the present case, on account of their fragmentary nature" and that they appeared "in the absence of any document relating the progress of the negotiations ... to be confined to two draft texts submitted by Saudi Arabia and Oman successively and the amendments made to the latter" (ICJ, *Case of Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, judgment of 16 February 1995, *ICJ Reports 1995*, § 41 (see also ICJ, *Case concerning the Legality of the Use of Force (Serbia and*

Montenegro v. Belgium), preliminary objections, judgment of 15 December 2004, *ICJ Reports 2004*, especially § 113, in which the ICJ notes the "somewhat cursory" and therefore "less illuminating" nature of the *travaux préparatoires* with regard to Article 35 of its own Statute).

23. The *travaux préparatoires* of the Convention are contained in eight volumes (see Council of Europe, *Collected Edition of the* Travaux Préparatoires *of the European Convention on Human Rights*, The Hague/Boston/London/Dordrecht/Lancaster, M. Nijhoff, 1975–1985, 8 vols.). In the majority of cases, the discussions having led to a particular form of expression rather than another make it possible to grasp the pertinent reasons. One can therefore only welcome the fact that the wealth of information contained in these *travaux* has recently been emphasised by legal writers (see the commentary by W. A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford, Oxford University Press, 2015, which refers systematically to the *travaux préparatoires*). However, with regard to the specific point which interests us, the *travaux préparatoires*, as set out in the above-cited publication, are somewhat lacking. They contain no exchange of arguments or other discussions enabling us to understand the underlying reasons for the sudden disappearance of the reference to "seeking" information, which had nevertheless appeared in the version of the preliminary draft Convention drawn up by the Committee of Experts at its first meeting of 2 to 8 February 1950.

24. This omission is all the more incomprehensible in that Article 19 of the Universal Declaration of Human Rights (UDHR) contains, as we know, such a reference to the right to seek information. The Universal Declaration was the reference text *par excellence* for the drafters of the Convention, as is shown, firstly, by the repeated references to the Declaration in the Preamble to the Convention and, secondly, by the wording of several other Convention provisions, which follow closely that of the UDHR. In those circumstances, we consider that prudence is required before concluding that there was a firm intention on the part of the drafters of the Convention to exclude one of the aspects of the right to freedom of expression.

The interpretation of a treaty with reference to the *travaux préparatoires* of another related instrument

25. This approach is corroborated by the *travaux préparatoires* of Protocol No. 6 to the Convention. It appears from the history of these *travaux*, set out in paragraph 50 of the judgment, that after having obtained the Committee of Ministers' agreement, the Steering Committee for Human Rights – composed, we would recall, of representatives of the Governments, or even their Agents before the Court – was prepared to include in the

relevant Protocol a provision referring specifically to the freedom to seek information. Having noted that this freedom is referred to *expressis verbis* in Article 19 (2) of the International Covenant on Civil and Political Rights, the draft explanatory report to the Protocol noted that this addition was intended to "align the Convention with the Covenant in this respect" in order to "eliminate any doubts which could arise in this area". In other words, all of the Contracting Parties to the Convention, represented at a high level within the Council of Europe – the Committee of Ministers on the one hand, and the relevant Steering Committee on the other – acknowledged that the wording of Article 10 § 1 could create "doubts" and stated that they were willing to dissipate these by adopting a provision that would harmonise the corresponding provisions of the Convention and the Covenant.

26. In accordance with normal practice, the Convention organs were asked to give their opinion on the matter. Both the European Commission on Human Rights and the Court considered that such an amendment was unnecessary and that it was not therefore appropriate to go ahead with it. To repeat the categorical terms used by the Court at the time, "the freedom to receive information, guaranteed by Article 10 of the Convention, implies freedom to seek information". Referring to these clear and unambiguous positions by the Convention organs, the Request for an Opinion from the Committee of Ministers on an additional Protocol to the Convention, addressed to the Parliamentary Assembly, noted that it had finally been decided not to retain the proposed text "because it could reasonably be considered that the 'freedom to seek information' was already comprised in the freedom to receive information guaranteed in Article 10, paragraph 1, of the Convention" (passage quoted in paragraph 50 of the present judgment).

27. Thus, it appears from all of these considerations that there was at the relevant time (late 1970s/early 1980s) a genuine consensus within the Council of Europe, both to recognise the existence of a freedom to seek information and to interpret Article 10 as encompassing that freedom. This approach was shared by the Convention organs and by the Contracting States (and, it seems, by the Parliamentary Assembly). This finding, while it concerns the *travaux préparatoires* of an additional Protocol to the Convention, provides considerable light for identifying the intention of the States Parties to the Convention itself.

IV. The interpretation of Article 10 results from the means of interpretation of Article 31 of the Vienna Convention on the Law of Treaties

28. More generally, the manner in which Article 10 § 1 is interpreted by the Grand Chamber in the present case results, in my opinion, from the

means of interpretation referred to in Article 31 of the Vienna Convention on the Law of Treaties. As we have seen, the letter of Article 10 is respected, since the wording "[this] right *shall include* freedom to hold opinions and to receive and impart information and ideas..." amounts to an indicative rather than an exhaustive list of the various facets of freedom of expression. The adopted interpretation is also compatible with the object and purpose of this provision, and even of the Convention in general (see above, § 15). Equally, it is compatible with the context of the Convention and, in particular, its Preamble, which refers on several occasions to the Universal Declaration of Human Rights, in which the freedom to seek information is explicitly recognised.

29. Moreover, as pointed out in §§ 24-26 above, the Parties to the Convention – all of which are represented in the Committee of Ministers of the Council of Europe – agreed to affirm, in 1983, that Article 10 § 1 of the Convention protects the freedom to seek information. This joint position, recorded in an official Council of Europe document, may be considered as a "subsequent agreement between the parties regarding the interpretation of the treaty" within the meaning of Article 31 § 3 (a) of the Vienna Convention on the Law of Treaties. In addition, the many national legislations of the Contracting States in which a right of access to information and/or official documents held by the public authorities is recognised (see paragraphs 64 and 139 of the judgment) amount to a "subsequent practice", which, according to Article 31 § 3 (b) of the Vienna Convention, must be taken into account. As the ILC has already noted, taking into account subsequent agreements and subsequent practice "may contribute to a clarification in the sense of confirming a wider interpretation" of the treaty (see "Report of the International Law Commission. Sixty-sixth session (5 May – 6 June and 7 July–8 August 2014), UN Doc A/69/10, ch. VII, "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", p. 180, par. 2).

30. Lastly, it will be borne in mind – and this is a particularly important aspect – that Article 19 (2) of the International Covenant on Civil and Political Rights, which explicitly mentions the right to seek information, is binding on all of the Contracting States of the Convention. This provision thus amounts to a "relevant rule[...] of international law applicable in the relations between the parties" within the meaning of Article 31 § 3 (c) of the Vienna Convention.

31. In short, the interpretation adopted by the Court in the present judgment is firmly based in the elements laid down in the "general rule of interpretation" of Article 31 of the Vienna Convention on the Law of Treaties. Moreover, although it may appear to be an "evolutive interpretation" from the point of view of the Convention, in reality it does not amount to a real innovation. This interpretation, far from creating new

international obligations for the States, corresponds in substance to what the parties to the Convention have already accepted for many years in ratifying the Covenant on Civil and Political Rights.

DISSENTING OPINION OF JUDGE SPANO JOINED BY JUDGE KJØLBRO

I.

1. The Court finds that the freedom to receive and impart information under Article 10 § 1 of the Convention constitutes a basis for recognising a right of access to information held by public authorities, although such a right is neither provided for by domestic law nor is the public authority in question willing to part with the information requested. As I am unable to subscribe to the interpretive approach adopted by the Court, I respectfully dissent.

II.
The Question before the Court

2. Let me begin by emphasising that, in my view, the starting point for a Judge of this Court cannot be what he or she considers to be the optimal state of affairs in European law as regards the right of access to information held by public authorities. It goes without saying that transparency and openness in a democratic society are fundamental values and that access to such information promotes such values. However, the role of this Court is not to imbue every positive development in the field of European human rights with the binding force of law by incorporating such developments into the Convention, irrespective of the limits laid down by the Convention's text and structure. The Court's role is rather to determine whether, as a matter of law, the Convention can be interpreted to include a particular right claimed by applicants who bring their cases to the Court. Whatever one's policy views on the value of access to information in a democratic society, the *legal* question before the Court in the present case is therefore the following:

> Does Article 10 § 1 of the European Convention on Human Rights encompass a right of access to official documents or other information held by public authorities when no such right is provided for by domestic law and where the domestic authorities are not willing to part with such documents or information?

3. In accordance with Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) the Court can only legitimately answer this legal question by resorting to a "good faith" interpretation of the "ordinary meaning" of the text of Article 10 § 1 of the Convention read in "its context" and "in the light of its object and purpose" (Article 31 § 1 of the

VCLT). Account must also be taken of the "preparatory work" (*travaux préparatoires)* and the "circumstances" of the Convention's adoption as a "supplementary means of interpretation" in order to determine the correct meaning resulting from a textual interpretation should that interpretation (a) "leave the meaning ambiguous or obscure"; or (2) "[lead] to a result which is manifestly absurd or unreasonable" (Article 32 of the VCLT). Furthermore, in conformity with the fundamental principle of legal certainty, emphasis must be placed on developments in the case-law of the Court. On the basis of the living instrument doctrine, the Court must also, if relevant, assess the possible existence of a consensus within Europe as regards the right in question, and must have regard to developments in international law in the light of the principle of harmonious interpretation. Lastly, an evaluation must be made of the practical consequences of a right of this nature deriving from the Convention.

In what follows, I will deal with each of these interpretive methods in turn.

III.
The Ordinary Meaning of Article 10 of the Convention and the Relevance of the Preparatory Work (*travaux préparatoires*)

4. Words matter when interpreting a legal text, including an international treaty. That proposition is the cornerstone of the fundamental interpretive principle provided for in Article 31 of the VCLT which provides, as stated above, that the starting point is the good-faith interpretation of the terms of the treaty in question in accordance with the *ordinary meaning* to be given to the terms *in their context*.

5. The first sentence of Article 10 § 1 of the Convention begins by stating that "Everyone" has the right to freedom of expression. The second sentence then states that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority". In accordance with the interpretive principle of Article 31 of the VCLT, the textual formulation of the modalities of the free-speech right as set out in the second sentence of Article 10 § 1 of the Convention is, in my view, crucial for the resolution of the present case, for the following three reasons:

6. First, in the context of access to information, the text of Article 10 § 1 of the Convention is limited to the *freedom to receive* information and ideas without governmental interference ("without interference by a public authority"). In other words, the text does not include the *freedom to seek* information, unlike Article 19 of the International Covenant on Civil and Political Rights, Article 19 of the Universal Declaration of Human Rights and Article 13 of the American Convention on Human Rights. The verb *to*

receive, in its ordinary everyday meaning and when applying simple common sense, cannot be understood to include a right to access information that the holder does not want to impart. Thus, until today, this Court has, in Plenary and Grand Chamber judgments, found in a clear and concise manner, on the basis of a contextual reading of the text of Article 10 § 1 in accordance with its ordinary meaning, that the "right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not ... embody an obligation on the Government to impart such information to the individual" (see *Leander v Sweden*, § 74, 26 March 1987, Series A no. 116; see also below, paragraphs 19-29).

Let me explain this further.

7. If one has a right *to receive* something, this right entails an obligation on third parties not to limit the right-holder's ability to take hold of the "something" which is in the custody of another person or entity *who or which is willing to impart it*. The freedom to receive information under Article 10 § 1 is, in this sense and in accordance with its ordinary meaning, a passive right, triggered by the positive action of a willing provider of information and ideas, unlike the right *to seek* guaranteed by the above-mentioned provisions of the ICCPR and the Universal Declaration of Human Rights, which is manifested by the positive actions of the person or entity requesting information. When rightly understood within the context of Article 10 § 1 of the Convention, the freedom to receive information and ideas, exercised *without interference by a public authority*, is thus limited to situations where a person wants to impart information to another person or entity, for example a journalist, an NGO or whomever, correspondingly limiting the ability of Government to interfere with that transfer of information unless such an interference can be justified under Article 10 § 2 of the Convention. For example, according to the Court's case-law, the right to receive information under Article 10 § 1 secures in this way the fundamental right of the press to receive information from anonymous sources (see *Goodwin v. the United Kingdom*, [GC], no. 17488/90, 27 March 1996).

8. It follows that by interpreting the freedom to receive information within the meaning of Article 10 § 1 of the Convention as providing for a right of access to information from public authorities *which are under no statutory duty to disclose that information and are not willing to impart it* the Court turns this right on its head. At a minimum, this finding by the Court ascribes to the freedom to receive information a meaning which takes the right out of context within Article 10 § 1 and can therefore hardly be considered to convey its "ordinary meaning", determined in its "context", within the terms of Article 31 of the VCLT.

9. The textual formulation in Article 10 § 1 is also crucial because, secondly, this Article describes what "shall be included" in the right to freedom of expression. As explained by the Court, it transpires from the preparatory work that the modality of *seeking* information was included by the drafters of Article 10, modelled after Article 19 of the Universal Declaration of Human Rights, but was deliberately omitted in the final text. This notwithstanding, the majority simply dismiss this omission as inconclusive, on the basis that it is unexplained in the *travaux préparatoires* (see paragraph 135 of the judgment). In my view, that is not the correct approach, since "some significance must attach to the subsequent omission of the [words to seek from Article 10]", as correctly noted in the opinion given by Lord Mance for the majority of the United Kingdom Supreme Court in *Kennedy v. the Charity Commission* (26 March 2014, UKSC 20), referred to by the United Kingdom Government in their pleadings as a third-party intervener in the present case.

10. The deliberate omission of the verb *to seek* during the drafting process of the Convention, should, as an absolute minimum, do two things: first, it should lead the Court to exercise a degree of prudence when analysing whether Article 10 § 1 can be interpreted to include the very same manifestation of the right to seek, or in other words, to provide for a positive obligation of disclosure by Governments that was deliberately excluded. Second, the preparatory work must be considered to enjoy a degree of importance in assessing the legitimacy of the interpretive option that the right *to receive* in any event encompasses the right *to seek* information from public authorities, notwithstanding the latter's deliberate omission. It is important to recall the fact that the initial draft of Article 10 § 1 of the Convention was based on an already existing international principle in Article 19 of the Universal Declaration of Human Rights, where these two methods of exercising the right to freedom of expression were clearly distinguished.

11. The third reason that the wording and formulation of Article 10 § 1 are important is, as indicated above, that the methods of exercising the freedom in question are couched explicitly in *negative terms*, thus they shall not be "interfered [with] by public authorities". In this sense, Article 10 § 1 is different from the first paragraphs of Articles 8, 9 and 11 of the Convention, the latter being textually framed in such a way as to allow the Court more flexibility in recognising positive obligations and identifying novel rights than is possible under Article 10. It follows that the example given by the majority in this context in support of its findings, that is, the recognition of a negative right to freedom of association under Article 11 of the Convention, as found in the case of *Sigurður A. Sigurjónsson v. Iceland* (30 June 1993, § 35, Series A no. 264), is quite inapposite (see paragraph 125 of the judgment). The Court's recognition of a negative right

to freedom of association under Article 11 was, in other words, fully compatible with the wider textual formulation of that provision, whatever was stated in the preparatory work. That is not the case when one attempts to locate a right of access to information held by public authorities within Article 10 § 1.

12. In sum, when one examines in good faith the ordinary meaning of the words used in Article 10 § 1 of the Convention, in their context and in the light of the preparatory work as a supplementary means of interpretation, one must conclude, at least as a starting point, that Article 10 § 1 does not, and was not meant to, encompass a right to access information held by public authorities that they are not willing to impart or obliged to disclose under domestic law.

IV.
The Object and Purpose of the Right to Freedom of Expression

13. Let me turn now to the *object and purpose* of the right to freedom of expression under Article 10 § 1 of the Convention, and I emphasise, *Article 10 § 1 of the Convention*, because the present case deals only with the formulation of the free-speech rights under the Convention, and is not a mere abstract and theoretical account of this fundamental right, which is manifested in different ways in different domestic and international norms.

14. It might be useful to start off by posing the following doctrinal question: is it an axiomatic purpose of freedom of expression to include a right of access to information held by public authorities? The answer to that question depends on one's conception of the theoretical foundations of free-speech rights. Constitutional theory in those countries that first adopted the European Convention on Human Rights, which forms the underlying doctrinal premise for many of the fundamental freedoms in the Convention, is based on the idea that freedom of expression is a *liberty*, a right not to be interfered with by those in power, rather than a mandate for proactive measures by Government. The right to freedom of expression as provided by the Convention requires that governments refrain from limiting the free expression of opinions and ideas, not that governments are under a binding obligation, pursuant to the Convention and in the absence of a legal duty under domestic law, to impart documents or other information that they hold. That is the theoretical foundation of the Court's prior case-law in this area, in conformity with the negative textual formulation of Article 10 § 1 of the Convention (see paragraphs 19-29 below). Of course, the founders could have taken a more overarching view of the object and purpose of free-speech rights by including the words *to seek information* in Article 10 § 1, thus requiring that governments actively disclose information to the

public, but they decided not to do so, a clear and concrete decision that this Court must respect.

15. In today's judgment the Court observes that "to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to 'receive and impart information' is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression. For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such situations to be able to rely on the protection of Article 10 of the Convention" (see paragraph 155 of the judgment).

16. With respect, the issue here is not so simple. It is hardly a debatable claim that a fully transparent and open society, where all data and information, whatever its origins, would be accessible to every person, can be conducive to a more informed debate on matters of public interests as well as enhancing the ability of the public to effectively monitor the exercise of governmental power. Indeed, as I stated at the outset, the positive value of access to information is unquestionable, as is demonstrated firstly by the fact that most of the member States of the Council of Europe have enacted freedom-of-information legislation at the level of primary law and, secondly, that the Council of Europe has adopted the 2009 Convention on Access to Official Documents (see further, paragraph 33 below). But, again, the Convention is an international treaty with legal force. It has its limits, set out in its text and structure as interpreted in the light of the fundamental interpretive principles of the VCLT. The principle requiring a practical and effective interpretation of the Convention, by reference to its object and purpose, is not an open invitation for the judges of this Court to elevate any positive development in the member States to the level of a binding international norm, thus limiting the States' sovereign and democratic rights. In other words, even though the Convention is a human-rights treaty it "must surely be wrong ... to say that because of the importance of the object and purpose of human-rights treaties this particular element of interpretation should take on greater importance when one is interpreting [such] treaties than when one is interpreting other types of treaty" (see Eirik Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, 2014, p. 36).

17. Furthermore, and importantly, as regards the proposition that the right to access information held by public authorities is necessarily correlated with the original objective and purpose of freedom of expression, it is quite difficult to take issue with the views expressed by one of the foremost European scholars on free speech, Professor Eric Barendt. In his

book *Freedom of Speech* (Oxford University Press, 2005, p. 108), he argues that the case for a "right to know" is attractive, but should only be accepted subject to "major qualifications":

> "What is at issue is the meaning and scope of *freedom* of speech, and in particular whether it covers a constitutional right of access to information from public authorities. ... Recognition of the right of access would impose a constitutional duty on government or other authority to provide information it did not want to disclose 'as unwilling speakers'."

He then states, and this is very important in this context, as I will further explain in Section VII below:

> "Another problem is that courts would be required to formulate the scope of constitutional information rights, for example, to determine exactly what information is covered, whether access to it should be free, and whether the authority was in breach if it was not supplied within, say, three weeks. They are understandably reluctant to do this. These matters are much better resolved by legislation or administrative regulation. Nor is it persuasive to argue that without freedom of information speakers are unable to exercise their free speech rights effectively. That proves much too much. The same is true of claims to a certain level of education, to travel, and to a reasonable standard of living, which are clearly not covered by freedom of speech."

18. In light of the above, it does not follow in my view that the existence of a right to freedom of expression *inherently* includes a right of access to information held by public authorities. Such recognition depends on the way the free speech instrument in question formulates that right. Article 10 of the Convention does not textually provide for the freedom to seek information, but is limited to the freedom to receive information. Hence, the right of access to information cannot be created without any textual basis by reference to the object and purpose of Article 10 and the need to interpret that provision to be *more* practical and effective, when the text itself makes clear that the purpose of the freedom of expression *under the Convention* is more narrow: it guarantees a freedom from governmental interference, nothing more.

V.
The Prior Case-Law of the Court, the Fundamental Principle of Legal Certainty and the Interpretive Authority of the Grand Chamber

19. Let me now turn to the developments in the Court's case-law in this area and their relevance for the resolution of the present case.

20. In paragraphs 126-33 of the judgment, the majority give an overview of these developments, in particular the Chamber, Plenary and Grand Chamber judgments in *Leander v. Sweden, Gaskin v. the United Kingdom,*

Guerra and Others v. Italy and *Roche v. the United Kingdom*, and the Chamber decisions in *Eccleston v. the United Kingdom* and *Jones v. the United Kingdom*. The majority judgment then refers to subsequent case-law, in particular the inadmissibility decision in *Matky v. the Czech Republic*, the Chamber judgments in *Társaság a Szabadságjogokért v. Hungary*, *Kenedi v. Hungary*, *Youth Initiative for Human Rights v. Serbia*, *Österreichische Vereinigung v. Austria* and the most recent Grand Chamber judgment in *Gillberg v. Sweden* (for full citations, see the text of the present judgment).

21. The majority rightly notes that in *Leander*, *Gaskin*, *Guerra and Others* and *Roche* (along with *Eccleston* and *Jones*), the Court set out the principles which was to become the "standard jurisprudential approach" on the matter in later years. The Court held that the "right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not ... embody an obligation on the Government to impart such information to the individual". Subsequently, in a series of judgments the Court found that there had been an interference with a right protected by Article 10 § 1 in situations where the applicant was deemed to have had an *established right to the information under domestic law*, in particular based on a final court decision, but where the authorities had failed to give effect to that right (see paragraph 131 of the judgment). The majority concludes that this development did not represent a departure from, but rather an extension of, the principles espoused in the *Leander*, *Gaskin*, *Guerra and Others* and *Roche* line of case-law (the *Leander principles*) in that it referred to situations where one arm of the State had recognised a right to receive information but another arm of the State had frustrated or failed to give effect to that right.

22. I see no reason in the present case to state a viewpoint on this analysis of the Court's case-law, as one may take different views on whether this approach is consistent with Article 10 of the Convention (see, for example, the dissenting opinions of my colleagues Judges Mahoney and Wojtyczek in the case of *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015, quoted below). It suffices here to point out that this line of case-law is not applicable in the present case, as the applicants did not have any right to disclosure under Hungarian law, given that their claims to that effect had been rejected by the domestic courts.

23. What is important, however, is that the majority in today's judgment goes on to say that concurrently with the aforementioned line of cases there "emerged a closely related approach", namely that set out in the *Társaság* and *Österreichische Vereinigung* judgments, in which the Court recognised, subject to certain conditions, the existence of a limited right of access to information, as part of the freedoms enshrined in Article 10 of the Convention. The majority judgment then states that the fact that the Court

has not previously articulated in its case-law the relationship between the *Leander principles* and these more recent developments "does not mean they are contradictory or inconsistent". By referring to the "particular circumstances of the case" the Court did not in the Plenary and Grand Chamber judgments, applying the *Leander principles*, "exclude the existence" of a right to access information held by public authorities or a "corresponding obligation on the Government in other types of circumstances" (see paragraphs 132-33 of the judgment). Here, the majority places great emphasis on the reference by the Court in the above cases to the "particular circumstances of the case" and thus the personal nature of the information involved.

I understand my colleagues in the majority to be saying that these cases were in effect Article 8 access-to-information cases and did not therefore resolve the question of general access under Article 10 of the Convention. Hence, the argument is made that the Court's prior findings do not exclude the recognition of such a general right of access in cases where free–speech rights are directly implicated. In short, the Court concludes that the "time has come to clarify the classic principles" (see paragraph 156 of the judgment).

24. I disagree for the following reasons.

It is clear that under the Court's case-law an individual has a strong right under Article 8 of the Convention to access private information pertaining to him held by public authorities (see, for example, *Godelli v. Italy*, no. 33783/09, 25 September 2012, §§ 68-72). As Lord Mance held for the majority of the UK Supreme Court in *Kennedy* (cited above, § 68), a claim for disclosure by a person of private information held by public authorities regarding him thus starts from a strong basis in the Convention. If such a claim can only be put under Article 8, there is no obvious reason to suppose that a claim for other non-private information is generally possible under Article 10.

25. Further, and importantly, in the Grand Chamber judgment in *Guerra and Others v. Italy*, the Commission had explicitly endorsed the right of access to information under Article 10. It is important to recall that that case was not a strictly personal, private–information case, since the local authorities in *Guerra and Others* had failed to provide residents with sufficient information on a potential health hazard arising from the presence of a chemical factory. The Grand Chamber explicitly declined this invitation to interpret Article 10 so expansively, but the Court's findings in the present judgment in effect mean that *Guerra and Others* should be understood to the effect that Article 10 of the Convention would provide an NGO or another so-called ""public or social watchdog", *but not the residents themselves*, with the right to request the exact same information from the

local authorities in Spain, in an attempt to impart an opinion to the public on health hazards arising from dangerous industries.

That cannot logically follow in my opinion. *Leander, Gaskin, Guerra and Others* and *Roche* stand for the unambiguous proposition that Article 10 § 1 of the Convention does not grant a right of access to information, irrespective of whether the purpose of the requesting party lies at the core of political speech or is more private in nature, albeit still connected to other free-speech values connected to "individual self-fulfilment", long recognised by the Court (see, for example, *Lingens v. Austria*, 8 July 1986, Series A no. 103, § 41).

26. In sum, the case-law in *Leander, Gaskin, Guerra and Others* and *Roche*, thus including no less than three Plenary and Grand Chamber judgments, was clear. As pointed out by the UK Supreme Court in *Kennedy* (cited above, § 63) they stand for the proposition that Article 10 of the Convention does not go so far as "to impose a positive duty of disclosure on Member States at the European level". It is true that three of these cases (*Leander, Gaskin and Roche*) concerned private information, in respect of which the Court held that such a right could arise under Article 8 of the Convention. However, in all these cases, the "Court did not go on to leave open the position under [Article 10] or to say that it raised no separate question. Rather, it made clear that no right arose in the circumstances under [Article 10]" (see UK Supreme Court in *Kennedy*, cited above, § 66).

27. What then of the more recent cases, namely *Társaság* and *Österreichische Vereinigung*, heavily relied upon by the majority in support of a "broader" more extensive interpretation of Article 10? These judgments at Chamber level do not in my view have precedential value, as they were in direct conflict with the *Leander* line of Plenary and Grand Chamber case-law. These judgments might have had some precedential value for the present case had they examined directly the arguments advanced in the previous cases, in particular by analysing the wording of Article 10 § 1 of the Convention, its object and purpose and the preparatory work, which all clearly point in a different direction and support directly the *Leander principles* as I have explained above. However, there is not one word on these arguments in *Társaság*. In support of its finding that the Court had "recently advanced towards a broader interpretation of the notion of "freedom to receive information'" (see § 35), the Chamber in *Társaság* refers only to the inadmissibility decision in *Sdruženi Jihočeské Matky*, a very weak source indeed, and one that can hardly be determinative today. In fact, there is not a single reference made to the Plenary and Grand Chamber judgments in *Gaskin* and *Roche*, and the reference to *Guerra and Others* (see § 36) is made in a context that is wholly irrelevant to the questions of principle involved in *Társaság.* Finally, as regards the subsequent judgment

in *Österreichische Vereinigung*, it suffices to note that it merely endorses the approach in *Társaság* without further comment.

28. As regards other cases where a right of access to information under Article 10 of the Convention has been recognised, such as *Kenedi*, *Youth Initiative for Human Rights*, *Gillberg*, *Roşiianu v. Romania* and *Guseva v. Bulgaria* (see full references in the judgment), these are cases where there was an *established right to the information under domestic law*. They are thus clearly not relevant for the purposes of the present case, as there was no right of access recognised for the applicants at domestic level. Furthermore, in *Gillberg* the Grand Chamber reiterated with approval the general principles from *Leander*. At the same time, however, the Grand Chamber stated that *domestic rights* to access information could give rise to an entitlement under Article 10 (see § 93). Again, as I have explained, that is not the case here.

29. In sum, the prior case-law of this Court, notably Plenary and Grand Chamber judgments, is to be understood as excluding a right of access to information held by public authorities under Article 10 § 1 of the Convention. To the extent that later developments in two Chamber judgments contradict the clear findings set forth in the consistent line of Plenary and Grand Chamber judgments setting out and confirming the *Leander principles*, they do not in my view have precedential value in the light of Article 43 of the Convention, which provides for the interpretive authority of the Grand Chamber. It is inconsistent with the fundamental guarantee of legal certainty, and detracts from the member States' ability to secure the rights provided for by the Convention under Article 1 and the principle of subsidiarity, if Chambers of this Court do not faithfully apply settled Grand Chamber case-law. In the understated words of the UK Supreme Court: "It is not helpful for national courts seeking to take into account the jurisprudence of the European Court of Human Rights to have different Section decisions pointing in directions inconsistent with Grand Chamber authority without clear explanation" (see *Kennedy*, cited above, § 59).

In conclusion it is, quite frankly, impossible to accept that the majority are merely engaged in "clarification" of the *Leander principles*. On the contrary, let it be clear, today the Court's settled Plenary and Grand Chamber case-law in *Leander*, *Gaskin*, *Guerra and Others* and *Roche* has, in fact, been overruled.

VI.
The Living Instrument Doctrine and the Principle of Harmonious Interpretation as Regards Other Relevant Norms of International Law

30. As neither the ordinary meaning of Article 10 § 1 of the Convention, its object and purpose, the preparatory work nor prior–case law can sustain the findings of the Court, the main argument advanced for the recognition of a right of access to information held by public authorities is, in substance, based on the living instrument doctrine and developments in comparative and international law (see paragraphs 138-48 of the judgment).

31. The Court finds that as the vast majority of member States of the Council of Europe have enacted primary legislation recognising a statutory right of access to information and/or official documents held by public authorities, the Court is satisfied that a "broad consensus exists ... on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society". Further, referring to Article 19 of the ICCPR, the views of the United Nations Human Rights Committee and the UN Special Rapporteur on Freedom of Opinion and Freedom of Expression, the Court finds that a "high degree of consensus has also emerged at the international level". However, while admitting that these conclusions at the international level were adopted in regard to Article 19 of the ICCPR, the Court considers, notwithstanding a significant difference in the wording, which the Court acknowledges, that their relevance for the present case derives from the fact that the right of access to public-interest data and documents is considered "inherent in freedom of expression". The Court also refers, in support of its findings, to Article 42 of the Charter of Fundamental Rights of the European Union, Regulation (EC) No. 1049/2001 and the 2009 Council of Europe Convention on Access to Official Documents, although the latter has only been ratified by seven member States. It concludes that these norms "[denote] a continuous evolution towards the recognition of the State's obligation to provide access to public information". In the Court's view, the Council of Europe 2009 Convention "indicates a definite trend towards a European standard, which must be seen as a relevant consideration" (see paragraphs 139-45 of the judgment).

32. Once again, the Court's reasoning here is problematic on several levels.

First, it must be reiterated that the application of the living instrument doctrine, which is the basis of the Court's reference to a purported "broad consensus" within Europe, depends on the existence being demonstrated of a consensus or convergence in practice in the Member States as to the right

in question. Furthermore, in particular where such a right seems to be excluded by the wording of the Convention, this consensus must manifest an understanding or, at least, an implicit acceptance by the member States of their enhanced Convention obligations.

33. Although it is true that almost all member States of the Council of Europe have adopted freedom-of-information legislation at the level of primary legislation, the issue here is more complex, the reason being that a consensus has not emerged accepting that a general right of access to public documents, *based on the right to freedom of expression*, has attained constitutional status, thus limiting democratic control of its scope and substance in each and every member State. On the contrary, as is clearly manifested by the great reluctance of Member States to ratify the 2009 Council of Europe Convention on Access to Information, States seem to want to retain their margin of democratic discretion in this area. For the Court to find, irrespective of the fact that only seven member States have to date ratified the 2009 Convention, that the mere adoption of the 2009 Convention at the level of the Council of Europe "indicates a definite trend towards a European standard" is debatable to say the least. It is important to recall why the Council of Europe considered it necessary in the first place to draft and then propose the adoption of a Convention on access to official documents. The reason was, as explained in the Explanatory Report to the 2009 Convention, that Article 10 of the European Convention on Human Rights does not guarantee a general right to access to official documents. Today's judgment thus severely limits the significance of the 2009 Convention, and in fact deprives the member States of the power to decide for themselves, based on their own sovereign and democratic will, whether they wish to be bound by obligations in this area at the international level.

34. In the light of the above, I consider that compliance with the strict conditions for reliance on the living instrument doctrine, based on the existence of a European consensus for the constitutional and Convention-based recognition of a fundamental right of access to information held by public authorities, has not been demonstrated in the present case. I reiterate that to the limited extent that access to public information has constitutional status in the member States it is, with very few exceptions, based on a *special constitutional provision providing for that right*. It is not based on the general right to free speech, as pleaded by the applicants and accepted by the majority in the present case.

35. Second, with regard to the Court's reference to Article 42 of the EU Charter of Fundamental Rights, it suffices to note that the Charter makes a clear distinction between freedom of expression and access to official documents held by EU organs, the former protected by Article 11 § 1, which is textually the same as Article 10 § 1 of the Convention, and the second provided by Article 42 of the Charter on access to official

documents, as noted by the Court. The Court's reference to Article 42 of the EU Charter thus seems actually to prove the opposite of what is intended by the majority in its reasoning. In other words, due to the fact that access to official documents is not inherent in freedom of expression, the EU Charter provides for that right in a special provision that is distinct from the provision guaranteeing free speech. In addition, it is important to stress that Article 42 of the Charter only covers access to documents held by EU institutions and bodies. Despite the extensive regulatory powers conferred by the Treaty on the Functioning of the European Union, member States of the latter have opted, as regards a wider right of access to documents held by national authorities, to retain their margin of discretion and legislative competence in this area.

36. Lastly, as regards the Court's references to other international–law materials, in particular Article 19 of the ICCPR and accompanying UN instruments, I again emphasise that it is crucial that, unlike Article 10 § 1 of the Convention, the ICCPR explicitly guarantees the *freedom to seek* information, which is the textual foundation for the right to access public documents, as confirmed by the UNHRC (see paragraphs 37-41 of the judgment). In that sense, the right to access official documents is, indeed, inherent in the freedom of expression *as guaranteed by Article 19 of the ICCPR*. But that is not the case for Article 10 § 1 of the Convention. To the extent that the Court refers to other general soft-law international instruments, recommendations and reports of the UN Special Rapporteur, these can only be assessed in this context as "general aspirations" at the level of policy. However, the issue before the Court is, as rightly noted in the same context by the UK Supreme Court in *Kennedy* (cited above, § 99), whether Article 10 "contains a concrete decision to give general effect to them at international level enforceable without any more specific measures and without any controlling qualifications and limitations at that level". I find nothing in the majority's reasoning in today's judgment that is persuasive enough to conclude that Article 10 § 1 can be interpreted in that manner.

VII.
The Practical Consequences of Recognising a Right of Access to Information Held by Public Authorities Under the Convention

37. Finally, let me say a few words about the practical consequences of today's judgment, on the ground that when assessing whether the time has come to recognise a novel right under the Convention, it is important to consider the ramifications of such recognition at national level, as well as whether this Court can develop the scope and content of the right in question in a foreseeable and workable manner in future cases.

38. The independent right to access information held by public authorities under Article 10 § 1 of the Convention, without the person or entity in question having such a right under domestic law, will in my view create numerous conceptual and practical problems for the Court in the future. Let me just mention three:

39. First, it is imperative to understand the nature and structure of the vast majority of freedom-of-information legislation in force in the member States. Access limitations under domestic law can be either absolute or conditional (see, for example, Pävi Tiilikka, "Access to Information as a Human Right in the Case Law of the European Court of Human Rights", (2013) 5 (1) JML 79-103, p. 83). Once recognised under Article 10, a right of access will generally have to be balanced with either the privacy interests of non-disclosure under Article 8 of the Convention, when the requested information is of a personal nature, or in other situations with public-interest considerations under Article 10 § 2. These balancing exercises will not necessarily coexist harmoniously with domestic norms providing for absolute limitations on public access to documents in, for example, the fields of national security, law enforcement or data protection. These difficulties can in fact be seen in stark terms by the manner in which the Court applies its reasoning to the circumstances of the present case.

40. The applicants' request for information on public defenders in criminal proceedings was rejected by the domestic courts on the basis of the Hungarian Data Act (see paragraph 32 of the judgment), which provides that "personal data", held by public authorities is not amenable to public access unless very limited exceptions are found to apply, which was not considered to be the case at domestic level. Thus, the Data Act prevented the domestic courts from examining the potential public-interest nature of the information (see paragraph 176 of the judgment), and this is an important element in the Court's reasoning in finding a violation of Article 10 on the facts of the case (see paragraph 199). In other words, the practical consequences of the Court's judgment is that member States of the Council of Europe may now have to change fundamentally their national freedom-of-information laws in order to take account of the requirements of Article 10 of the Convention that logically flow from today's judgment. They will also, where relevant, have to reconcile those requirements with national and EU data-protection legislation.

41. In relation to this point, it is worth noting that the majority's findings in paragraph 194 of the judgment are also quite problematic. The Court rightly considers that the request made by the applicants at domestic level for the names of the public defenders related to "personal data". However, in the Court's view, given that the data "related predominantly to the conduct of professional activities in the context of public proceedings", the Government had not demonstrated that the disclosure of the data requested

for the specific purposes of the applicant's inquiry could have affected the public defenders' enjoyment of their right to respect for private life within the meaning of Article 8 of the Convention. In my view, this line of reasoning is not in conformity with the Court's settled case-law in the field of data protection, in which the Court has consistently interpreted the scope of Article 8 § 1 of the Convention in a broad manner, so as to encompass the "storing of data relating to the 'private life' of an individual" and in that regard has further found that there "is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life'" (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, 16 February 2000, and, more recently, *Uzun v. Germany*, no. 35623/05, § 48, 2 September 2010). In the Grand Chamber judgment in *Amann*, cited above, § 65, the Court referred in this regard to Article 2 of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which defines personal data as "any information relating to an identified or identifiable individual" (see also *Uzun*, cited above, § 48).

Therefore, until today, the mere fact that personal data, stored by public authorities, had to relate to the public activities of the person concerned has not had a bearing on the threshold question of whether Article 8 is, as such, applicable. That issue has been taken into account in the merits assessment of whether, on the particular facts of a case, disclosure of such data constitutes a proportionate interference with privacy rights under Article 8 § 2 of the Convention. The majority judgment in the present case calls into question this whole line of the Court's case-law and may also prove difficult to reconcile with ongoing legislative and jurisprudential developments in the field of data protection in European Union law (see Article 1 (1) of Directive 95/46/EC and Regulation (EU) 2016/79 on the protection of natural persons with regard to processing of personal data and the free movement of such data).

42. The second problem with the Court's finding to the effect that a right of access to official documents flows independently from Article 10 is that the Court may in the future have to create autonomous Convention concepts of what constitutes a "public authority" or a "quasi-public authority", or even define the notion of an "official document". What about private entities holding official documents on the basis of outsourcing or contract relations between those entities and Government? In fact, and again using the prescient words of the UK Supreme Court in *Kennedy* (cited above, § 94), interpreting Article 10 § 1 to include a duty of governmental disclosure of all matters of public interest "leads to a proposition that no national regulation of such disclosure is required at all, before such a duty arises. Article 10 would itself become a European-Wide Freedom of Information law. But it would be a law lacking the specific provisions and

qualifications which are in practice debated and fashioned by national legislatures according to national conditions and are set out in national Freedom of Information statutes". That, it seems to me, is the inevitable consequence of today's judgment.

43. Third, and finally, the right of access recognised today is, the Court tells us, primarily acquired by a "person seeking access to information ... with a view to informing the public in the capacity of a public 'watchdog'" (see paragraph 168 of the judgment). In other words, although the general right to freedom of expression under Article 10 § 1 applies to "everyone", the application of the novel right to access official information is determined by whether the person requesting such documents is doing so to foster expressive activity in the public interest.

44. This begs the question. Why is the right so limited? What about an interested person who wishes, for example, to obtain information on certain budgetary proposals for improved housing for the homeless? Just for himself, to further his own education and civic-mindedness, not for anyone else, and not with any intention to disseminate further his thoughts on the issue or his opinions. Would he not benefit from the novel right under the Convention recognised in today's judgment? If not, why not, considering that freedom of expression under Article 10 of the Convention is, under the Court's well-established case-law, in no way limited to fostering political speech or public debate, but is also meant to enhance individual self-fulfilment?

45. As correctly noted by the UK Supreme Court in *Kennedy* (cited above, § 93), "many organisations and individuals, including those seeking information for research or historical or personal or family purposes, may have legitimate and understandable interests in enforcing a domestic right to information". The "occupation of [the role of a social watchdog] cannot sensibly represent any sort of formal pre-condition, before a breach of a domestic duty of disclosure engages [Article 10 § 1 of the Convention]". My colleague Judge Wojtyczek made this same point in even starker terms in his dissenting opinion in *Guseva v. Bulgaria* (cited above), where he stated that this approach "implicitly differentiates between two categories of legal subjects: journalists and non-governmental organisations on the one hand, and all other persons on the other. The first category enjoys stronger protection in respect of the right of access to information, whereas the second category does not enjoy the same protection. All this leads to an implicit recognition of two circles of legal subjects: a privileged elite with special rights to access information, and the 'commoners', subjected to a general regime allowing more far-reaching restrictions".

46 In sum, although the right to access information held by public authorities, as found by the Court today, is supposed to be primarily applicable only to those persons or entities that are in the business of

"informing the public debate", so-called public or social "watchdogs", in the words of the Court, there is no conceptual limitation coherent enough under Article 10 of the Convention to stop this right from being in the future applied in reality as a general right of access to official documents for any person seeking such information from Government. In fact, this reading of today's judgment fully conforms with the Court's own stated reasoning at paragraph 168, where the Court explicitly declares that the newly established Convention right of access to official documents does not exclusively apply to NGOs and the press. On the contrary, the right not only extends to "academic researchers" and "authors of literature on matters of public concern", but also to "bloggers and popular users of the social media" who may also be "assimilated" with public watchdogs. It goes without saying that the potential reach of these categories, which now enjoy an independent Convention right of access to official documents, will prove exceedingly difficult to circumscribe in any sensible manner.

VIII.
Conclusion

47. I conclude where I started.

I fully understand what has inspired my colleagues in the majority to seek recognition of a right of access to information held by public authorities. However, after comprehensive review of and reflection on all the available and relevant legal arguments, and after an assessment of the practical consequences of such a finding, I cannot but conclude that the applicant's complaint should be dismissed as *incompatible ratione materiae* with the Convention.