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Judge Dean Spielmann
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European Court of Human Rights
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F-67075 Strasbourg Cedex
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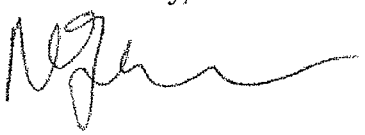
21 September 2015

Re: Written comments in the case of *Magyar Helsinki Bizottság v. Hungary* (Application no. 18030/11)

Dear President,

Pursuant to leave granted on 4 September 2015, please find enclosed the written comments of the third party interveners in the above mentioned case.

Yours faithfully,



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

GRAND CHAMBER

MAGYAR HELSINKI BIZOTTSÁG

v

HUNGARY

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

Introduction and Summary

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

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

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

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

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

(a) The Textual Argument

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

(b) Underlying Principle

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

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

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

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

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

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

(c) The Case Law of the Court

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

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

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

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

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

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

Conclusions from the Case Law

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) Comparative material

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[14] ***Kaneko v Japan***, Supreme Court, 1969.11.26 Keishu 23-11-1490.

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

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

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

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

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

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

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

Unjustifiable interference

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

A positive obligation

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

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

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

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

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

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

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

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

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[18] See e.g. ***X and Y v The Netherlands*** (8978/80) (1986) 8 EHRR 235 (the failure to provide criminal sanctions for an assault on a mentally incapacitated girl breaches Article 8); ***Wilson v UK*** (30668/96) (2002) 35 EHRR 20 (permitting employers to use financial incentives to induce employees to surrender important union rights breaches Article 11).

[19] See e.g. ***Appleby v UK*** (44306/98) (2003) 37 EHRR 38 at [41]-[49].

[20] ***Verein gegen Tierfabriken v Switzerland*** (24699/94) (2002) 34 EHRR 4 at [45]-[47] (protection of media expression); ***Feuntes Bobo v Spain*** (39293/98) (2001) 31 EHRR 5 (safeguarding from threats by private persons); ***Mustafa v Sweden*** (23883/06) (2011) 52 EHRR 24 (permitting installation of satellite dishes to receive foreign language programming).

[21] ***Öneryildiz v Turkey*** (48939/99) (2004) 39 EHRR 12 (Article 2); ***McGinley and Egan v UK*** (21825/93) (1999) 27 EHRR 1 at [85]-[86] (Article 6); ***Gaskin*** and ***Guerra*** (above) (Article 8).

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

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

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

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

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