From Sweden to the Global Stage: FOI as European Human Right?

David Goldberg*

The birthplace of positive law prescribing the right to information is in Europe—specifically, the Nordic countries of Sweden and Finland. "His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press" (1766) sets the ball rolling. It was predicated on the ideas of, amongst others, Peter Forsskal—though it was, arguably, not solely an intellectual product. It took many decades before other European states adopted their own equivalent laws. Currently, the site of the main legal battle is the Council of Europe's Court of Human Rights. Will this Court rule (as has been done, for example, by the Inter-American Court of Human Rights) that the right to information is a stand-alone, fundamental, and general human right? On present evidence, not any time soon.

I. INTRODUCTION

2016 was the 250th anniversary—the sestercentennial—of the enactment of the world's first freedom of information law: *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press*.[1] Adopted by the Swedish/Finnish Parliament (the two territories were one country at the time), it gave birth to the positive law of the right to

* Adjunct Associate Professor, Southwestern Law School; Senior Associate Research Fellow, IALS, University of London.

1. Astonishingly, it was only in 2006 that the first-ever translation—into English—was made of the text. The present author collaborated with colleagues at the Scandinavian Studies Department, University of Edinburgh, and published a new translation on October 7, 2016. HIS MAJESTY'S GRACIOUS ORDINANCE REGARDING THE FREEDOM OF WRITING AND OF THE PRESS (Ian Giles & Peter Graves trans. 2016), http://www.peterforsskal.info/documents/1766-translation.pdf. For the first translation, see *His Majesty's Gracious Ordinance Relating to Freedom of Writing and of the Press (1766)* (Peter Hogg trans. 2006), *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS'S LEGACY TODAY 8 (Juha Mustonen ed., 2006), http://www.chydenius.net/pdf/worlds_first_foia.pdf.

information (called freedom of information in the United States of America).[2] The Ordinance also dealt with the abolition of prior censorship of books and newspapers. The law did not last long. Gustav III amended it in 1774, even though it had been commended by Voltaire, prompting the thought: Did he read it? Or realize the difference between the two versions? It was restored in 1802.

Jonas Nordin states, "The express purpose was to give the public a better view of how the state was run."[3] It underpins *offentlighetsprincipen*, "the general principle of openness" or perhaps "publicity."[4] The direct importance of this is that from 1766 to the present day, "all minutes, protocols and documents relating to the public sector and the running of state are to be public and may be examined by each and every citizen without restrictions."[5]

Marie Christine Skuncke points to the difference between the existence of the principle and the existence of the word:

> The actual word "offentlighetsprincipen" dates from the twentieth century—first recorded in 1931 according to Svenska Akademiens Ordbok. The principle that documents pertaining to public life should be accessible to the citizens, on the other hand, is clear from the 1766 Tryckfrihetsförordning. There is a basic difference between the possibility

2. For the less-noted or remarked-upon common law about access to records, see Robert L. Hughes, *The Common Law of Access to Governmental Records*, OHIO UNIV. (Spring 1995), https://www.1215.org/lawnotes/lawnotes/foicl.htm and *The Common-Law Presumption of Access*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/dc-cir-open-courts-compendium/b-common-law-presumption-access (last visited Feb. 21, 2017). *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 261 (Max Farrand ed., 1911) (Madison's Notes, Aug. 11, 1787) (St. Andrews-born James Wilson stating, "it should not be in the option of the Legislature to conceal their proceedings"). The U.S. 1966 FOIA was predated by the 1946 Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

3. E-mail from Jonas Nordin, Assoc. Prof., Stockholm University, to David Goldberg, Senior Associate Research Fellow, IALS, University of London 3 June 2011, on file with author [hereinafter Nordin e-mail]; TRYCKFRIHETSFÖRORDNINGEN (Freedom of the Press Act) [TF] [CONSTITUTION] 2 (Swed.), https://www.rti-rating.org/wp-content/themes/twentytwelve/files/pdf/Sweden.pdf. On the public nature of official documents, Art. 1 states that every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information. On the public nature of official documents, Art. 1 states that every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information. *See* TRYCKFRIHETSFÖRORDNINGEN (Freedom of the Press Act) [TF] [CONSTITUTION] 1 (Swed.), https://www.rti-rating.org/wp-content/themes/twentytwelve/files/pdf/Sweden.pdf.

4. *See* NILS FUNCKE, OFFENTLIGHETSPRINCIPEN: PRAKTIK OCH TEORI (2014) (title translated as "Principle of Openness: Practice and Theory); *see also* ALF BOHLIN, OFFENTLIGHETSPRINCIPEN (9th ed. 2015) (title translated as "Principle of Openness").

5. Nordin e-mail, *supra* note 3. Although often associated with the general concept of "democracy," the Ordinance and its successors are, arguably, more specifically correlated with an "open public administration." *See* Bojan Bugaric, *Openness and Transparency in Public Administration: Challenges for Public Law*, 22 WIS. INT'L L.J. 483 (2004).

> for individuals to publish documents from lawsuits from the 1730s, and the demands of radical publicists in the political struggles of the late 1750s and 1760s which led to the 1766 Act. The former documents concerned private matters, while the latter concerned matters pertaining to public life. Moreover, the 1766 Act covered many more areas than legal material—for example documents from the Council of the Realm, the Riksdag, and the civil service . . . the online edition of the SAO . . . says . . . offentlighets-princip(en). (i fackspr.) princip(en) att vissa förhandlingar, i sht rättegångar o. d., skola vara offentliga. Offentlighetsprincipen i rättegångsväsendet. 3NF 15: 167 (1931). The abbreviation "3NF" refers to the third edition of the Swedish encyclopedia Nordisk familjebok: Vol. 15, p. 167 (1931).[6]

Less well known is the proximate timeline of events:

- August 7, 1766: The Grand Deputation votes on the abolition of censorship and issues its proposition for the estates to consider;
- September/October 1766: the assemblies of the four estates vote on accepting the law. This took place on various dates (the peasantry voted on September 30 and October 11, and the nobility on October 14).

The three commoner estates voted in favor of the law and the nobility rejected it; the clergy approve it conditionally (no criticism of evangelical doctrine allowed).

- October 15: The Diet sends a letter to His Majesty (i.e., the Council) ordering him to promulgate the law.
    - That's when the Diet had reached a decision; the king's signature was only a formality. If he would have refused to ratify the law, he could easily have been overruled with the rubber stamp (which never happened in such matters);
- December 2, 1766: The law is adopted—the rubber stamp with the King's signature is applied to the text in the room of the Council of the Realm.

Of course, the law did not emerge ready-made, out-of-the-blue. One should distinguish between, on the one hand, the intellectual currents that were swirling around in the years running up to 1766, and on the other, the *realpolitik* processes out of which the law emerged (though some of the

6. E-mail from Professor (ret.) Marie Christine Skuncke, to David Goldberg, Senior Associate Research Fellow, IALS, University of London, 19 March 2012 on file with author; *see also* James Michael, *Freedom of Official Information*, 5 OSCE OFF. FOR DEMOCRATIC INSTS. & HUM. RTS. 23 (Winter 1996/1997) ("The *offentlighetsprincip* is a 15th century juridical principle and is itself divisible into two parts: [first] the right for whomever it may be, to be present as listener at court and other public proceedings."). The rule is at least from the 15th century. E-mail from Gunilla Jonsson, National Library Sweden (retd.) to David Goldberg, Senior Associate Research Fellow, IALS, University of London, 28 March 2012 on file with author (translating the SAO entry as "*Offentlighets-principen*. (in professional language) the principle that certain negotiations, especially processes in court etc., shall be public. *Offentlighetsprincipen* in the system of justice.").

literature was authored by players who were also in the Riksdag).[7] Key names in the first category include Peter Forsskal,[8] Anders Nordencrantz,[9] Baron Gustaf Cederstrom, Anders Schonberg,[10]and Johan Arckenholtz.

The role of another name that pops up frequently in this context, Anders Chydenius, has been, in the present author's opinion, rather exaggerated. His reputation in this *specific* regard—creating the idea of, as well as bringing about, the right to information—has been inflated by the highly effective lobbying of the Chydenius Foundation and the expressed views of others.[11]

Marie-Christine Skuncke offers a properly balanced account: on the one hand, Chydenius was the driving force on the Parliament's Third Committee, which elaborated the proposals for the Ordinance during the Riksdag of 1765-66. It was *probably* his achievement that the principle of open access extended to the proceedings of the four estates of the Riksdag and those of the government (the Council of the Realm). It was certainly his achievement that the office of "Censor librorum" (i.e., pre-publication censorship for secular writings) was abolished, but that is not about the right to information

7. Much is revealed in the commemorative publication *On the Freedom of Press Act of* 1766, launched on December 2, 2016 at an event in the Swedish Parliament. *Sveriges Och Finlands Riksdagar Firar Fritt Ord 250 Med Bokslapp* (Nov. 28, 2016), https://frittord250.se/2016/11/sveriges-och-finlands-riksdagar-firar-fritt-ord-250-med-bokslapp. The text was commissioned by the Constitutional Committees of the Swedish and Finnish Parliaments; after lobbying, an English translation (open-access, downloadable and free of charge) will also be published, sometime in 2017. The present author would like to acknowledge the collaboration in this particular regard of Staffan Dahlhoff and Mark Weiler. Weiler's global online petition is here: https://docs.google.com/forms/d/1VbPBAS6wZvxa-uNntT6gvFbr17I-IUki7pRJG6-ocgk/viewform?c=0&w=1.

8. Peter Forsskal's banned 1759 pamphlet, Thoughts on Civil Liberty, states, "it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, *it must be possible for society's state of affairs to become known to everyone* . . ." PETER FORSSKÅL, THOUGHTS ON CIVIL LIBERTY, http://www.peterforsskal.info/thetext.html (last visited Feb. 17, 2017) (emphasis added); *see also* DAVID GOLDBERG, PETER FORSSKAL: GOETTINGEN PRODIGY AND AUTHOR OF ONE OF THE LEAST KNOWN JEWELS OF ENLIGHTENMENT LITERATURE (2013), https://rep.adw-goe.de/bitstream/handle/11858/00-001S-0000-0023-99D4-D/Peter%20Forsskal_pdfa2u.pdf?sequence=1.

9. *See Anders Nordencrantz*, WIKIPEDIA, https://sv.wikipedia.org/wiki/Anders_Nordencrantz (last visited Feb. 7, 2017).

10. *See* Rolf Nygren, *The Citizen's Access to Official Records – A Significant Principle in Swedish Constitutional Life Since 1766*, *in* ACCESS TO PARLIAMENTARY RECORDS AND AUDIO-VISUAL MATERIALS IN ARCHIVES OF PARLIAMENTS AND POLITICAL PARTIES 15 (Günter Buchstab ed. 1999).

11. *See, e.g.*, Stephen Lamble, *Freedom of Information, a Finnish Clergyman's Gift to Democracy*, 97 FREEDOM OF INFO. REV. 2 (2002) (emphasis added) (stating that "notions of freedom of information, freedom of speech and transparency of government together with the principle of a free press were linked to Swedish legislation and forged by Finnish clergyman, *Anders Chydenius—a visionary who should must be regarded as the true father of Fol*"); *see also* Otto Vervaart, *250 Years Freedom of the Press*, RECHTSGESCHIEDENIS BLOG (May 30, 2016), https://rechtsgeschiedenis.wordpress.com/2016/05/30/250-years-freedom-of-the-press (stating that "Anders Chydenius, the Swedish minister [*sic*] responsible for the epoch-making law, came from Finland.").

guaranteeing public access to official documents. Chydenius was also the person who gave the strongest and clearest rationale for freedom of print and information, as is clear from his written contributions during the Riksdag of 1765-66.[12] On the other hand, Chydenius did not invent the principle of open access. Important work had been done in connection with the previous Riksdag, 1760-62. The reformer Anders Nordencrantz had pleaded for the principle of transparency in a 700-page memorandum to the members of the Riksdag, published in 1759. During the 1760-62 Riksdag, a subcommittee on the freedom of printing proposed in 1761 that many categories of documents from the authorities become accessible for publication (yet not the proceedings of the four estates of the Riksdag and those of the government). However, no decision was taken. During the Riksdag of 1765-66, Chydenius was not alone, but instead collaborated skillfully with the lower estates (burghers and peasants), whose votes made it possible to defeat the nobility on crucial points in the proposals. In any case, the last stages in the elaboration of the Act, from July to October 1766, took place after Chydenius had been voted out of the Riksdag.[13]

The foregoing accounts of how the 1766 Ordinance came about depend on the so-called "Great Man" theory of history.[14] Focusing on another approach to explaining past events, the present author has written:

> [T]he real secret of Sweden's espousal of openness is that, on the most authoritative accounts available in English, the word that comes up most frequently in discussing the 1766 Ordinance is that it happened by "accident", meaning, in this context, "the way things happen without any planning . . . or deliberate intent."[15]

Five accounts by *Swedes* can be offered to illustrate this contention:

(a) Ulf Oberg:

The genesis of the constitutional provisions on public access to documents in Sweden at [*sic*] the middle of the eighteenth century probably remains a historical accident, entrenched in the prevailing political context of the time. In this respect, the link between the philosophies of

12. *See* Juha Manninen, *Anders Chydenius and the Origins of World's First Freedom of Information Act*, *in* THE WORLD'S FIRST FREEDOM OF INFORMATION ACT: ANDERS CHYDENIUS'S LEGACY TODAY 18-53 (2006). For the Foundation, see *250th Anniversary of the World's first FOIA, Celebrations Launched in Finland, 4 December 2015*, ANDERS CHYDENIUS FOUNDATION (Feb. 2, 2015), http://www.chydenius.net/eng/articles/artikkeli.asp?id=1728.

13. *See Anders Chydenius on the Freedom of Information*, 250 COMMITTEE (May 1, 2016), http://www.painovapaus250.fi/en/news/anders-chydenius-on-the-freedom-of-information.

14. *See Great Man Theory*, WIKIPEDIA, https://en.wikipedia.org/wiki/Great_Man_theory (last visited Feb. 7, 2017).

15. *See* GOLDBERG, *supra* note 8, at 21-22.

enlightenment and the right of access to official documents that Swedes have now enjoyed for more than two hundred years has yet to be firmly established.[16]

(b) Nils Herlitz:

That it has grown up in Sweden is due to special circumstances; we may say it has arisen by accident.[17]

(c) Rolf Nygren:

As a legal historian I would like to say that the Freedom of the Press Act and the Public Access Principle passed in 1766 are the most significant contributions in European legal history ever made by the Swedish legislature. . . . But is it also important to conclude that neither [of these] were the results of profound legal philosophising. They were the immediate results of a profoundly felt need among the Caps [party] to clear the political stage after the defeat of the corrupt Hats [party]. Many important achievements in the field of law seem to have very poor and trivial backgrounds, and the Freedom of the Press Act as well as the Public Access Principle are, so far, no exceptions.[18]

(d) Thomas von Vegesack:

Only a few months after having issued its freedom of the printing press act, the Government published a warning to its citizens against "in larger or smaller companies . . . through the spread of suspicions and the dissemination of conspired lies to achieve complaints, discord and a detrimental dissension between the citizens of the realm." In this statute,

16. Ulf Öberg, *EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act*, 2 CAMBRIDGE Y.B. EUR. LEGAL STUD. 303, 305 (1999) ("Some refer to English political thinking and to the writings of Montesquieu as the philosophical justification for the constitutional reform that took place. Indeed, many of the provisions of the 1766 Freedom of the Press Act have distinct marks of foreign influence. The abolition of censorship was clearly an idea with English origins. The framers of the 1766 Act made direct references to the then prevailing legislative openness in the English Parliament, when arguing for an increased right of access to Swedish parliamentary documents. It has even been submitted that a quote from Blackstone to the effect that the 'liberty of the Press is indeed essential to the nature of a free state—no previous restraints upon publications' inspired the formulation of the provision on freedom of press in paragraph 86 of the Swedish Constitution of 1809. Others claim that the origins of the 1766 Freedom of the Press Act must be sought in French physiocratic ideals of legal despotism, checked by an enlightened general opinion.").

17. Nils Herlitz is the outstanding scholar of Swedish and Nordic public law. *See, e.g.*, NILS HERLITZ, ELEMENTS OF NORDIC PUBLIC LAW (1969); NILS HERLITZ, SWEDEN: A MODERN DEMOCRACY ON ANCIENT FOUNDATION (1939).

18. Nygren, *supra* note 10, at 22.

citizens were requested, in return for a reward of 2000 daler silver coins, to inform against those who committed themselves to criminal expressions. I have quoted this statute of March 2nd 1767 to demonstrate that it was hardly a strong belief in the importance of freedom of speech that drove the decision of the Swedish Riksdag. The freedom of the printing press act was probably more the result of existing political controversies than of any deeply rooted conviction.[19]

(e) Hans Gunnar Axberg

Why did we [*sic*] get this FOI-lookalike legislation so early in history? The short answer is that in the early days of press freedom, printed matter to a large extent consisted of content from public documents. It was common, for example, that parties in legal disputes had arguments and decisions from court proceedings printed and circulated. At the time, press freedom, at least in Sweden, seemed more or less pointless if you were not allowed to copy content from public documents. And to do that you had to have access to these documents. The somewhat lengthier answer is related to the fact that the law in 1766 was adopted in a period when the country was in practice governed in a parliamentarian way. The two political parties that were competing for power found a common interest in keeping government files open.[20]

II. SUBSEQUENT DEVELOPMENTS

So, if Sweden/Finland was the world's No. 1 in adopting a freedom of information law, it's not uninteresting to ask . . . who was No. 2?[21]

However, even Sweden's claim to be the first jurisdiction with a freedom of information law has not gone unchallenged. According to Venkatesh Nayak, Coordinator, Commonwealth Human Rights Initiative, Indian Emperor Ashoka (c. 268-232 BCE) was the first to grant his subjects the Right to Information (RTI). Speaking at a seminar on RTI at the Sri Lanka Press Institute, Nayak said,

> Ashoka had inscribed on rocks all over the Indian sub-continent his government's policies, development programs and his ideas on various social, economic and political issues, including how religions should co-

19. *See* PETER FORSSKÅL, *supra* note 8 (commentary section).

20. Hans Gunnar Axberger, Lecture held by Parliamentary Ombudsman in Brussels at a conference arranged by the Council of Europe Commissioner for Human Rights, at745 (May 3, 2011), http://www.jo.se/Global/%C3%84mbetsber%C3%A4ttelser/2011-12_eng.pdf.

21. *See* Brechner Ctr. for Freedom Info., *A Chronological Look at Freedom of information*, UNIV. OF FLA., COLL. OF JOURNALISM, http://www.brechner.org/International/Historyfoia.htm (last visited Feb. 21, 2017).

> exist with each other. He insisted that the inscriptions should be in the local language and not in a courtly language like Sanskrit. And considering the fact that few of his subjects were literate, he enjoined officials to read out the edits [sic. . .edicts?] to people at public gatherings.[22]

Another candidate is claimed to be in seventh century China. Stephen Lamble has written,

> The concept underlying the ideal of freedom of access to government held information actually dates back to 7th Century China during the Tang Dynasty (618-907) and particularly during the reign of Emperor T'ai-tsung (627-649). T'ai-tsung established an "Imperial Censorate"—an elite group of highly educated "scholar officials" who recorded government decisions and correspondence and criticized the government, including the emperor. This institution, based on Confucian principles and philosophies, had a role to scrutinize the government and its officials, to expose "misgovernance, bureaucratic inefficiencies and official corruption."[23]

However, these claims have given rise to a lively debate about what exactly constitutes a right to information law and regime. The current context of the discussion is the United Nation's Sustainable Development Goals (SDG). SDG 16.10 states that all countries pledge to **"***ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.*"[24] As Toby McIntosh states:

> Setting minimum standards for what qualifies as a law therefore becomes crucial in deciding whether they have complied with this target. In the context of the RTI Rating, we have had some debates about this, and arguably some of the bottom feeding "rules" (like Austria with 32 points) should surely not be deemed to pass the test. We have also discussed the idea of minimum threshold standards (i.e., things a law has to have to

22. P.K. Balachandran, *Emperor Ashoka was the First to Grant Right to Information*, THE NEW INDIAN EXPRESS (May 17, 2016, 7:54 PM), http://www.newindianexpress.com/world/Emperor-Ashoka-was-the-first-to-grant-right-to-information/2016/05/17/article3437749.ece.

23. Lamble, *supra* note 11, at 2-8. This article gives vent to the claim about Chydenius criticized in this article. Further, the alleged Chinese connection has been roundly critiqued in Lena Rydholm, *China and the World's First Freedom of Information Act: The Swedish Freedom of the Press Act of 1766*, 20 JAVNOST 45-64 (2013), http://www.diva-portal.org/smash/get/diva2:684198/FULLTEXT01.pdf. The point about China is repeated by the Brechner Centre. *See* Brechner Ctr. for Freedom Info., *supra* note 21. The Centre also points to a precursor of the 1766 law, namely, a legal deposit law in 1707—but the first law was actually adopted in 1661. Pär Nilsson, *Collecting Bits and Pieces—The Development of Methods for Handling E-legal Deposit of Online News Material at The National Library of Sweden*, NATIONAL LIBRARY OF SWEDEN, http://www.ifla.org/files/assets/newspapers/Geneva_2014/s6-nilsson-en-slides.pdf (last visited Mar. 18, 2017).

24. *Sustainable Development Goal 16*, UNITED NATIONS, https://sustainabledevelopment.un.org/sdg16 (last visited Feb. 21, 2017).

> qualify) although this is pretty contentious (because everyone has different candidates for what should be on that list).[25]

So, which polity should be awarded, as it were, the "silver medal"?

Very little noted or remarked upon, albeit it at the sub-national level, is the fact that the first Wisconsin statutes adopted after the organization of Wisconsin as a state provided for public access to the meetings and records of county government.[26]

Most noted as No. 2 is the measure adopted Colombia in 1913: Law No. 4, the *Code of Political and Municipal Organization* (in fact, it actually restates an earlier version of 1888). Article 320 states:

> Todo individuo tiene derecho a que se le den copias de los documentos que existan en las secretarías y en los archivos de las oficinas del orden administrativo, siempre que no tengan carácter de reserva; que el que solicite la copia suministre el papel que debe emplearse y pague al amanuense, y que las copias puedan sacarse bajo la inspección de un empleado de la oficina y sin embarazar los trabajo de esta.[27]
>
> Everyone has the right to receive copies of documents existing in the secretariats and archives of administrative offices, provided they do not have classified status; that whoever requests the copy provides the paper to be used and pays the clerk, and that copies can be made under the supervision of an employee of the office without compromising this material.[28] [author's translation]

---

25. Toby McIntosh, *FOI Laws: Counts Vary Depending on Definitions*, FREEDOMINFO (Oct. 28 2011), http://www.freedominfo.org/2011/10/foi-laws-counts-vary-slightly-depending-on-definitions.

26. *See* NAT'L ASS'N OF COUNTIES, OPEN RECORDS LAWS: A STATE BY STATE REPORT (2010), http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf; *see also* Robert A. Christensen & David Lucey, *The Development of Public Access Law in Wisconsin*, http://www.blonien.com/html/WI/2.HTM (last visited Feb. 18, 2017); Robert Dreps, OPEN GOVERNMENT GUIDE OPEN RECORDS AND MEETINGS LAWS IN WISCONSIN (2011), https://www.rcfp.org/rcfp/orders/docs/ogg/WI.pdf.

27. *See* L. 4/13, Octubre 6, 1913, 15012 DIARIO OFICIAL [D.O.] (Colom.), http://suin-juriscol.gov.co/viewDocument.asp?id=1820591. In 2013, there was an event celebrating its 100 years, "Congreso y Sociedad Capítulo Especial: Centenario código de régimen político y municipal." Congreso y Sociedad, *Congreso y Socieda Capitulo Especial: Centenario Codigo de Regimen Politico y Municipal*, YOUTUBE (Nov. 13, 2013), https://www.youtube.com/watch?v=BIQJUhOtxys. Again, some discount a "single sentence" provision as counting as a full-scale RTI law.

28. This information is courtesy of Alberto Donadio, Colombian journalist, author, blogger and information activist. *See generally* Alberto Donadio, *Detrás de Interbolsa*, EL ESPECTADOR, http://blogs.elespectador.com/interbolsa/autor (last visited Feb. 21, 2017); ALBERTO DONADIO, LA LLAVE DE LA TRANSPARENCIA (2012). Thanks to David Banisar, who led me to Donadio. DAVID BANISAR, FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 22 (2004) (citing Alberto Donadio, *Freedom of Information in Colombia*, ACCESS REPORTS (Feb. 1994)).

Finally, the foregoing has been focused on the right to information at the national level (and in the case of Wisconsin at the sub-national level). What about at the universal/global level? "Freedom of information" lies at the historical centre of the United Nations. It was the topic of the organization's first-ever conference in 1948.[29] However, what was meant by that phrase was the free flow of information (i.e., press freedom) and not the right to information in the proper sense, i.e., entitling requesters to access information held by a public body (though, being entitled to request information is not the same as actually obtaining it). Further, the UN source for FOI in this second sense does not lie—as is so often claimed—in General Assembly Resolution 59(1), which called for the establishment of the Conference on Freedom of Information and is widely touted as the foundation for the global FOI movement. The present author would describe it as the foundational *myth* for that movement. Instead, it should be traced to General Assembly Resolution 13(1), "concerning the Organization of the UN Secretariat" which established the *information policy* for the Organization:[30]

> II. INFORMATION
>
> The United Nations cannot achieve its purposes unless the peoples of the world are fully informed of its aims and activities. . . . The United Nations should establish as a general policy that the press and other existing agencies of information be given the fullest possible direct access to the activities and official documentation of the Organization. The rules of procedure of the various organs of the United Nations should be applied with this end in view.[31]

29. *See* Zecheriah Chaffee, Jr., *Legal Problems of Freedom of Information in the United Nations*, 14 LAW & CONTEMP. PROBS. 545 (1949), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2423&context=lcp; *see also* OFFICE OF THE HISTORIAN, DEP'T OF STATE, THE UNITED STATES AND THE UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, HELD AT GENEVA, SWITZERLAND, MARCH 23–APRIL 21, 1948 (1948), https://history.state.gov/historicaldocuments/frus1948v01p1/d189.

30. *See* Resolutions Adopted by the General Assembly During Its First Session, http://www.un.org/documents/ga/res/1/ares1.htm; David Goldberg, *The United Nations and FOI: From freedom of Information to the Right to Access Information*, 2 GLOBAL MEDIA J. 76 (Slovak Ed. 2014), http:// www.paneurouni.com/files/sk/casopisy/gmj/gmj3naweb.pdf; *see also* Int'l Covenant on Civil and Political Rights, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).

31. Other agencies of the United Nations have a patchy or non-existent right to information policy; note though, it has recently been announced that UNESCO, the agency whose portfolio includes advocating for freedom of information laws internationally, is preparing its own FOI policy, according to a UNESCO official. UNESCO already has some internal rules on what should be confidential, but there is no disclosure policy resembling a national FOI law. According to a Department of Public Information official, "We . . . have nothing similar to a right of information law." *See* Toby McIntosh, *UNESCO Drafting Standard for Disclosure of Information*, FREEDOMINFO (Aug. 10, 2016), http://www.freedominfo.org/2016/08/unesco-drafting-standard-for-disclosure-of-information. UNEP, on the other hand, has an Access to Information Policy. *See*

III. RIGHT TO INFORMATION, THE COUNCIL OF EUROPE, AND EUROPEAN COURT OF HUMAN RIGHTS

Like Julius Caesar's Gaul,[32] institutional Europe is divided into three: the European Union, the Council of Europe, and the Organisation for Security and Cooperation in Europe. This article is concerned solely with the Council of Europe, and its judicial body, the European Court of Human Rights, with respect to securing the right to information for citizens—and others?—in member states.

A. Treaty Law

Convention on Access to Official Documents[33]

It is truly noteworthy that the Council of Europe has promulgated the first, and so far only, binding international legal instrument to recognize a *general* right of access to official documents held by public authorities.[34] The *Convention on Access to Official Documents* was opened for signature on June 18, 2009 in Tromso, Norway, during the 29th Council of Europe Conference of Ministers of Justice. It emerged from the work of the Group of Specialists on Access to Official Information (DH-S-AC), initially set up in 1997, which was given its terms of reference from the Committee of Ministers upon the suggestion of the Steering Committee on Human Rights.[35]

Member states that signed that day comprised Belgium, Estonia, Finland, Georgia, Hungary, Lithuania, Macedonia, Montenegro, Norway, Serbia, Slovenia, and Sweden.[36] Notable by their absence were, e.g., the

UNEP Access-to-Information Policy (Revised), UNITED NATION ENVIRONMENT PROGRAMME (Jan. 28, 2016) http://web.unep.org/environmentalgovernance/unep-access-information-policy-revised.

32. *Ivli Caesaris Comment Ariorvm De Bello Gallico Liber Primvs*, LATIN LIBRARY, http://www.thelatinlibrary.com/caesar/gall1.shtml (last visited Feb. 4, 2017).

33. EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS (2009), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836.

34. There is the 1998 United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. *The Aarhus Convention*, EUROPEAN COMM'N (Dec. 19, 2016), http://ec.europa.eu/environment/aarhus.

35. Group of Specialists on Access to Official Information (DH-S-AC), http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp; *see also* Terms of reference of the Group of Specialists on public service media in the information society (MC-S-PSM), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a07bf (explaining terms of references).

36. *12 European Countries Sign First International Convention on Access to Official Documents*, FREEDOMINFO (June 19, 2009), http://www.freedominfo.org/2009/06/12-european-countries-sign-first-international-convention-on-access-to-official-documents. For a full list of countries, *see Chart of Signatures and Ratifications of Treaty 205*, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=UZKwAIqR.

United Kingdom, France, and Germany. However, not only member states may sign: the treaty is open for accession by non-member states and by any international organization. So far, none has done so.

At the time of writing, the Treaty has not yet entered into force, as it requires ten ratifications; currently, there are nine.[37] The name reprises the earlier Group established by the Steering Committee for Human Rights:

> [It was] given specific terms of reference in 1997 to elaborate a legal instrument incorporating basic standards on the right for the public to have access to information in the hands of the public authorities. This work resulted notably in adoption by the Committee of Ministers of Recommendation Rec (2002)2 on Access to Official Documents [post] and the 2009 Council of Europe Convention on Access to Official Documents.[38]

The real prize of the Convention coming into force will be the establishment of the Article 11 "Group of Specialists on Access to Official Documents." This will monitor the implementation of the Convention by the parties. The substance of the Treaty was criticized by NGOs[39]—and even by the Council of Europe's own Parliamentary Assembly:[40]

> The Assembly considers that the current draft has some shortcomings which need to be resolved in order not to miss the opportunity to enshrine modern standards for access to information in what will be the first binding international legal instrument in this field. The Assembly finds the issues raised sufficiently important to recommend to the Committee of Ministers that it send the draft back to the Steering Committee for Human Rights (CDDH) for further consideration with respect to:
>
> 9.1. broadening the definition of "public authorities" to include a wider range of activities of these authorities and hence widening the scope of the information made available;
>
> 9.2. including a time limit on the handling of requests;

37. The most recent is Moldova (September 2016). *See Chart of Signatures and Ratifications of Treaty 205*, *supra* note 37. Armenia—and also Romania—are reported to be on the brink of becoming the "tenth man."

38. *See* Group of Specialists on Access to Official Information (DH-S-AC), http://www.coe.int/t/dghl/standardsetting/cddh/DHSAC_en.asp.

39. *See Council of Europe Convention on Access to Official Documents*, ACCESS INFO, https://www.access-info.org/uncategorized/10709 (last visited Feb. 6, 2017); *12 States Sign World's First Treaty on Access to Information*, ACCESS INFO (June 19, 2009), https://www.access-info.org/wp-content/uploads/n-ost19.06.09_Council_of_Europe_-_12_States_Sign_Worlds_First_Treaty_on_Access_to_Information.pdf.

40. *See* 7 DOCUMENTS WORKING PAPERS: 2008 ORDINARY SESSION (FOURTH PART) 29 SEPTEMBER TO 3 OCTOBER 2008, at 179 (2009).

> 9.3. clarifying and strengthening the review process provided in Article 8.1.[41]

The Treaty's rationale is explained thus:

> Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist. The right of access to official documents is also essential to the self-development of people *and to the exercise of fundamental human rights*. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them.[42]

So, the official Council of Europe position does not affirm or assert the status of this right as a fundamental human right, merely pointing out that it is an instrumental right for furthering the exercise of other, fundamental human rights. Not all agree. The "fundamental, human rights" language was promoted in 2004 in the Joint Declaration of the Special Rapporteurs on freedom of opinion and expression of the United Nations, the Organisation for Security and Cooperation in Europe, and the Organization of American States:

> 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.[43]

41. *See* Eur. Parl. Ass., *Draft Council of Europe Convention on Access to Official Documents*, Opinion 270 (2008), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17687&lang=en.

42. *See* Details of Treaty No.205, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205 (emphasis added). The travaux preparatoires have now been declassified. *See* EUROPEAN COURT OF HUMAN RIGHTS, *Travaux Préparatoires to the Convention*, http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf.

43. Ambeyi Ligabo et al., *International Mechanisms for Promoting Freedom of Expression*, ORG. AM. STATES (2004), http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&lID=1 (emphasis added); *14 Key Principles*, CAMPAIGN FOR AN AFRICAN PLATFORM ON ACCESS TO INFO., http://www.africanplatform.org/apai-declaration/14-key-principles/ (last visited Feb. 18, 2017). For the OAS, see also *Inter-American Program on Access to Public Information*, ORG. AM. STATES (2004), http://www.oas.org/en/sla/dil/access_to_information.asp (last visited Feb. 18, 2017).

Convention for the Protection of Human Rights and Fundamental Freedoms[44]

Sir Stephen Sedley view is that "[t]he European Convention contains no express right to information."[45] That this is so is, no doubt, a reflection of the period when it was drafted (late 1940s). At that time, the enforceable, general right of the public to access information held by authorities under positive law was virtually unrecognized.

However, in Article 10, in relation to freedom of expression, there is the word "receive": "This right shall include freedom . . . *to receive* . . . information . . . without interference by public authority . . ."[46]

Does this mean, or can it be interpreted to include, the right for the public to access information held by public authorities? A judicial interpretation was offered in *Guseva v. Bulgaria*, in the dissenting judgement of Judge Wojtyczek:

> The verbs "receive" in English and "recevoir" in French imply that another person is willingly giving something. Moreover, the emphasis is placed on negative freedom, i.e. on freedom from interference, and there is no reference to any claim-right (positive right) to be provided with information held by public authorities. The provision under consideration therefore protects freedom to receive information that another person is disseminating or providing.[47]

Article 10 does not include the different word—"seek"—which is found, for example, in Article 19 of the Universal Declaration of Human Rights; in Article 19 of the International Covenant on Civil and Political Rights, and in Article 13 of the American Convention on Human Rights—which is promoted in some quarters as including/inferring the right to information.[48] The Council of Europe's 2002 Recommendation on access to official documents states:

---

44. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS (June 1, 2010), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

45. *See* Sir Stephen Sedley, *Information as a Human Right*, Freedom of Expression and Freedom of Information: Essays in Honour of Sir David Williams 243 (Jack Beatson & Yvonne Cripps eds., 2000). *But see* EXPLANATORY REPORT TO THE COUNCIL OF EUROPE CONVENTION ON ACCESS TO OFFICIAL DOCUMENTS (2009), https://rm.coe.int/CoERM PublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836.

46. COUNCIL OF EUROPE, EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 44.

47. Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015) (Wojtyzcek, J., dissenting), http://hudoc.echr.coe.int/eng?i=001-152416.

48. Universal Declaration of Human Rights, G.A. 217 A, art. 19, Dec. 10, 1948, http://www.un.org/en/universal-declaration-human-rights; *see also* International Covenant on Civil and Political Rights, G.A. 2200A, art. 19, Dec. 16, 1966, http://www.ohchr.org/EN/ ProfessionalInterest/Pages/CCPR.aspx.

> It should be noted that Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Covenant on Civil and Political Rights *appear to grant a wider right of access to official information than the European Convention on Human Rights as these provisions also contain a right to seek information*.[49]

This seems tantamount to equating the right to "seek" with the claim-right (positive right) to be provided with information held by public authorities and that those authorities should establish mechanisms and procedures to implement this. In 1979, The Council's Parliamentary Assembly adopted a Recommendation, "Access by the public to government records and freedom of information."[50] In it, it called for the Committee of Ministers to implement its decision, taken in 1976, to insert a provision on the right to *seek* information in the European Convention on Human Rights.[51]

Nonetheless, equating "seek" with meaning requesting information that an authority has an obligation to disclose seems difficult to square with earlier stated positions. Thus, the 1975 Report of the Committee of Experts on Human Rights deals with the extension of the right to freedom of information.[52] It considered the matter from two separate aspects: (i) the feasibility of including the freedom to seek information in Article 10 of the Convention (as well as what would be the best mechanism to do that); and (ii) the duty of public authorities to make information available on matters of public interest, subject to appropriate limitations.[53] In a 1969 report looking at the co-existence of the ICCPR and the ECHR—and noting that the former did and the latter did not include a right to "seek" information—it was concluded, "This is an additional obligation which, however, does not, in the view of the experts, entail a legal obligation to supply information . . ."[54] i.e., with regard to the duty on public authorities to make information available on matters of public interest, subject to appropriate limitations, the Committee of Experts considered that *this duty represented an additional*

49. *See Recommendation Rec (2002) 2 of the Committee of Ministers to Member States on Access to Official Documents* (2002), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c6fcc (emphasis added).

50. Eur. Parl. Assemb., *Access by the Public to Government Records and Freedom of Information*, Recommendation 854 (1979), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14888&lang=en.

51. *Id.*

52. Eur. Consult. Assemb., *The Protection of the Individual in Relation to Acts of Administrative Authorities* 1 (Dec. 22, 1975).

53. *See* Lucy Maxwell, *Access to Information in Order to Speak Freely: Is this a Right under the European Convention?*, OXFORD HUM. R. HUB (Jan. 19, 2017), http://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention.

54. Toby Mendel, *Freedom of Information as an Internationally Protected Human Right* 3-4 (unpublished manuscript), https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf.

obligation which was not a necessary corollary of the right to seek information. It noted that the laws and practices of the various member countries varied considerably and that there were different approaches to the question of how information held by the State could be made more available to members of the public.[55] The Committee of Experts therefore suggested that the Committee of Ministers authorize it to organize, in co-operation with a scientific institute or university, a European Colloquy with a view to making a comparative study on the laws and practices of the Member States of the Council of Europe concerning access by members of the public to information entrusted to or held by public authorities.[56]

Finally, an interesting observation has been made by European Court of Human Rights Judge Wojtyczek with respect to the Tromso Convention and its relationship to the Convention for the Protection of Human Rights and Fundamental Freedoms:

> It appears that the drafters of this [Tromso] treaty intended to fill a lacuna in the international protection of transparency . . . the Convention for the Protection of Human Rights and Fundamental Freedoms was devised as a first step for the collective enforcement of certain rights set out in the Universal Declaration of Human Rights. It does not encompass all the fundamental standards of the democratic rule of law. Furthermore, the Court has only a limited mandate, defined in Article 19 of the Convention, namely to ensure the observance of engagements by the High Contracting Parties in the Convention and the Protocols thereto. The adoption of the Council of Europe Convention on Access to Official Documents confirms that the "further realisation of human rights and fundamental freedoms" referred to in the Preamble of the Convention for the Protection of Human Rights and Fundamental Freedoms is to be undertaken by way of new treaties.[57]

B. Soft Law

(i) As noted above, in 1979, the Council's Parliamentary Assembly adopted a Recommendation on access by the public to government records and freedom of information, and called for its decision, taken in 1976, to insert a provision on the right to "seek" information in the European

55. Maxwell, *supra* note 53.

56. *See* Eur. Consult. Assemb., *Proceedings of the Colloquy of the Council of Europe on Freedom of Information and the Duty for the Public Authorities to Make Available Information*, 15 (Sept. 21-23, 1976); Eur. Consult. Assemb., *Secrecy and Openness: individuals, enterprises and public administrations*, 17th Sess., 111 (Oct. 21-23, 1987).

57. Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), http://hudoc.echr.coe.int/eng?i=001-152416

Convention on Human Rights, to be implemented—albeit different opinions exist as to the significance of that word.[58]

(ii) Suggested by the Steering Committee for Human Rights, the Committee of Ministers adopted the 1981 Recommendation No. R (81)19 to member states on access to information held by public authorities:

> Having regard to Assembly Recommendation 854 on access by the public to government records and freedom of information
>
> Considering the importance for the public in a democratic society of adequate information on public issues;
>
> Considering that access to information by the public is likely to strengthen confidence of the public in the administration . . .
>
> In the implementation of these principles regard shall duly be had to the requirements of good and efficient administration. Where such requirements make it necessary to modify or exclude one or more of these principles, either in particular cases or in specific areas of public administration, every endeavour should nevertheless be made to achieve the highest possible degree of access to information.[59]

(iii) 1982, the Declaration of the Committee of Ministers on freedom of expression and information:

> IIc. the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters.[60]

(iv) 2002, the Committee of Ministers adopted Recommendation Rec (2002)2 on access to public documents—the principal source of inspiration for the Tromso Convention:

> Considering the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest;
>
> Considering that wide access to official documents, on a basis of equality and in accordance with clear rules:
>
> - allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities

58. Eur. Parl. Assemb., *Access by the Public to Government Records and Freedom of Information, Recommendation 854* (1979), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14888&lang=en.

59. Eur. Consult. Assemb., *Recommendation No. R(81)19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities* (1981), http://www.right2info.org/resources/publications/instruments-and-standards/coe_rec_ati_1981.

60. *See Recommendation Rec (2002)2*, *supra* note 49.

> that govern them, whilst encouraging informed participation by the public in matters of common interest;
>
> - fosters the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption;
>
> - contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities;
>
> Considering therefore that the utmost endeavour should be made by member states to ensure availability to the public of information contained in official documents, subject to the protection of other rights and legitimate interests;
>
> Stressing that the principles set out hereafter constitute a minimum standard, and that they should be understood without prejudice to those domestic laws and regulations which already recognise a wider right of access to official documents;
>
> Considering that, whereas this instrument concentrates on requests by individuals for access to official documents, public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society.[61]

(v) Most recently, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights has adopted a Report by Ms. Nataša VUČKOVIĆ, Serbia, on "Transparency and openness in European institutions," focusing mainly on the transparency and regulation of lobbying activities.[62]

C. The European Court of Human Rights: Jurisprudence[63]

Although the European Court of Human Rights has, at the time of writing, not recognized a *general* right of access to official documents or information arising from Article 10 of the Convention, the recent case law of the Court suggests that, under certain circumstances, Article 10 of the Convention may support a right of access to documents for so-called "public

61. *Id.*

62. Eur. Parl. Assemb., *Transparency and Openness in European Institutions*, 3rd Sess., Doc. No. 14075 (2016), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22797&lang=en.

63. *See* Dirk Voorhoof, *On the Road to more Transparency: Access to Information under Article 10 ECHR*, CTR. FOR MEDIA PLURALISM & MEDIA FREEDOM (Dec. 2, 2014), http://journalism.cmpf.eui.eu/discussions/transparency-access-to-information-article-10-echr; *see generally Monitoring Media Pluralism in Europe – Testing and Implementation of the Media Pluralism Monitor 2015*, CTR. FOR MEDIA PLURALISM & MEDIA FREEDOM (May 3, 2016), http://journalism.cmpf.eui.eu/discussions/world-press-freedom-day-2016.

watchdog" bodies.[64] In addition, the Court has recognized a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other Convention rights such as the right to respect for private and family life.[65]

Initially, the Court set its face against recognizing a right to get hold of recorded information under Article 10. There is a line of cases that decided that, although Article 10 guarantees the right to "receive" information, it does not require the State to provide access to information that is not already available:

> [T]here is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public.[66]

This approach was confirmed in subsequent Grand Chamber judgments[67] and Chamber judgments.[68]

64. Sdružení Jihočeské Matky v. Czech Republic, App. No. 19101/03(Eur. Ct. H.R. July 10, 2006), http://hudoc.echr.coe.int/eng?i=001-76707.

65. Gaskin v. United Kingdom, App. No. 10454/83 (Eur. Ct. H.R. July 7, 1989), http://hudoc.echr.coe.int/eng?i=001-57491; *see* Guerra and others v. Italy, App. No. 14967/89 (Eur. Ct. H.R. Feb. 19, 1988) (arguing for the right to environmental hazard documents for the safety of family and private life), http://hudoc.echr.coe.int/eng?i=001-58135.

66. Judge Mahoney said, "My main concern in the present case is that the Chamber in its judgment should not be a party to a covert overturning of rather clearly stated established case-law, including Grand Chamber judgments. As Judge Wojtyczek points out in his dissenting opinion (paragraph 2), beginning with a chamber judgment in Leander v. Sweden (26 March 1987, Series A no. 116, § 74) as confirmed in succeeding plenary Court or Grand Chamber judgments (Gaskin v. the United Kingdom [plenary Court], 7 July 1989, Series A no. 160, § 52; Guerra and Others v. Italy [GC], 19 February 1998, Reports 1998-I, §§ 52-53; and Roche v. the United Kingdom [GC], no. 32555/96, ECHR 2005-X, § 172 there is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public." Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), http://hudoc.echr.coe.int/eng?i=001-152416.

67. *See* Gaskin v. United Kingdom, App. No. 10454/83 (Eur. Ct. H.R. July 7, 1989), http://hudoc.echr.coe.int/eng?i=001-57491; Guerra and others v. Italy, App. No. 14967/89 (Eur. Ct. H.R. Feb. 19, 1988), http://hudoc.echr.coe.int/eng?i=001-58135; Roche v. the United Kingdom, 2005-X Eur. Ct. H.R. 87.

68. *See* Case of Sîrbu and Others v. Moldova, App. No. 73562/01 (Eur. Ct. H.R. June 15, 2004), http://hudoc.echr.coe.int/eng?i=001-61819; Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), http://hudoc.echr.coe.int/eng?i=001-152416. *But see* Jones v. United Kingdom, App. No. 42639/04 (Eur. Ct. H.R. July 27, 2004), http://hudoc.echr.coe.int/webservices/content/pdf/001-70437?TID=ihgdqbxnfi (providing decision on the inadmissibility of permitting photographs at cemeteries).

But the Court has also thought about the provision of information by states as a "secondary right or obligation derived from the tabulated rights in the Convention." Thus, the Court has recognized a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other Convention rights such as the right to respect for private and family life. The right to a fair trial as granted by Article 6 of the European Convention on Human Rights gives the parties to court proceedings a right to have access to documents held by the court and of relevance to their case.

Article 10 and Information Disclosure

As Dirk Voorhoof has stated, "The Court's recognition of the applicability of the (effective) right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the Convention . . . ."[69]

The line of cases that Judge Wojtyczek has characterized as his "colleagues' endeavors to protect and promote the democratic rule of law"—which he applauds, but cannot share their approach—includes:

(a) Sdruzeni Jihoceske Matky v. Czech Republic (2006)[70]

The Court stated: "In this instance, the applicant association asked to be able to consult administrative documents which were available to the authorities and to which access could be granted in the conditions provided for by section 133 of the Building Act, which was contested by the applicant association. In those circumstances, the Court accepts that the rejection of the said request amounted to interference in the applicant association's right to receive information."

69. Voorhoof, *supra* note 63. *But see* Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia, App. No. 11721/04 (Eur. Ct. H.R. Apr. 14, 2009), http://hudoc.echr.coe.int/eng?i=001-92548; Friedrich Weber v. Germany, App. No. 70287/11 (Eur. Ct. H.R. Jan. 6, 2015), hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-150811.

70. App. No. 19101/03 (Eur. Ct. H.R. July 10, 2006), http://hudoc.echr.coe.int/eng?i=001-76707.

(b) & (c) Társaság a Szabadságjogokért v. Hungary (2009)[71] *and Kenedi v. Hungary (2009)*[72]

Without dealing with a particular medium of communication as such, the Court acknowledged in *Társaság a Szabadságjogokért v. Hungary* that non-governmental organisations had an essential "watchdog" role and that their activities should be protected by the Convention in the same way as those of the press.[73] It further held that it would be fatal for freedom of expression if political figures could censor the press and public debate by contending that their opinions on matters of public interest constituted personal data which could not be disclosed without their consent.[74] In *Kenedi v. Hungary*, the Court clarified the scope of the exercise of freedom of expression by finding in substance that access to original documentary sources for legitimate historical research, in this case documents concerning the Hungarian State Security Service during the communist era, was an essential element of the exercise of that right.[75]

(d) Youth Initiative for Human Rights v. Serbia (2013)[76]

The European Court reiterated that "the gathering of information is an essential preparatory step in journalism and is an inherent, protected part of press freedom and the obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters.[77] As a result, they may no longer be able to play their vital role as 'public watchdogs,' and their ability to provide accurate and reliable information may be adversely affected."

71. App. No. 37374/05 (Eur. Ct. H.R. April 14, 2009), http://hudoc.echr.coe.int/eng?i=001-92171.

72. Kenedi v. Hungary, App. No. 31475/05 (Eur. Ct. H.R. May 26, 2009), http://hudoc.echr.coe.int/eng?i=001-92663.

73. Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05 (Eur. Ct. H.R. April 14, 2009), http://hudoc.echr.coe.int/eng?i=001-92171.

74. *Id.*

75. EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2009 OF THE EUROPEAN COURT OF HUMAN RIGHTS 84 (2009), http://www.echr.coe.int/Documents/Short_Survey_2009_ENG.pdf.

76. Youth Initative for Human Rights v. Serbia, App. No. 48135/06 (Eur. Ct. H.R. June 25, 2013), http://hudoc.echr.coe.int/eng?i=001-120955.

77. *Id.*

(e) Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria (2013)[78]

This case further clarified and expanded the scope of application of Article 10 of the Convention. The applicant in this case was an NGO, the Austrian Association for the Preservation, Strengthening and Creation of an Economically Sound Agricultural and Forestry Land Ownership (ÖVESSG). The Court considered that the refusal to give ÖVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. The unconditional refusal by the Austrian regional authorities to give access to a series of documents thus made it impossible for ÖVESSG to carry out its research and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in the region. Further, the Court also observed that in contrast with similar authorities in other regions in Austria, the Tyrol regional authority had chosen not to publish its decisions and thus, by its own choice, held an information monopoly.

(f) Rosiianu v Romania (2014)[79]

Ioan Romeo Roşiianu, a Romanian journalist, had been hosting a news show on a regional channel for six years when, in January 2005, he was fired and his show cancelled. Among other issues, the show had been discussing the use of public funds by the mayor of Baia Mare. The program was replaced with a show funded by a municipality of the town. Roşiianu requested access to public documents concerning the use of public funds, as provided by Romanian law and Article 10 of the ECHR. The mayor of Baia Mare rejected such requests and, subsequently, failed to comply with tribunal sentences ordering him to hand over the documents. The Court of Appeal in Cluj, in reinstating the order, also required that Baia Mare's mayor pay compensation to Roşiianu.[80]

78. *App. No. 39534/07 (Eur. Ct. H.R. Nov. 28, 2013),* http://hudoc.echr.coe.int/eng?i=001-139084.

79. App. No. 27329/06 (Eur. Ct. H.R. June 24, 2014), http://hudoc.echr.coe.int/eng?i=001-144999.

80. Roşiianu v. Romania, Global Freedom of Expression, COLUM. UNIV., https://globalfreedomofexpression.columbia.edu/cases/rosiianu-v-romania.

(g) Guseva v Bulgaria (2015)[81]

"A Chamber of the Court of Human Rights . . . again recognized an Article 10 right to access to information and found a violation where a public authority had failed to provide public interest information despite court orders. . . . The majority of the Fourth Section noted that Article 10 did not guarantee a general right of access to information; however, it said that particularly strong reasons must be provided for any measure limiting access to information which the public has a right to receive."[82]

The UK judge (now retired) Judge Mahoney dissented, stating:

> [T]here is a line of jurisprudential authority which unambiguously rules out reading into freedom of expression as protected by Article 10 any right of access to information from an unwilling provider and any corresponding positive obligation on public authorities to gather and disclose information to the general or specialised public [and he preferred] not to be associated with reasoning that, in effect, reverses the clear direction of existing Grand Chamber case law.[83]

Polish Judge Wojtyczek also dissented, partly on the same ground as Judge Mahoney and partly on the ground that he could not accept two categories of applicants—journalists and NGOs on the one hand and all other citizens on the other:

> 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 . . . . In my view, it is irrelevant whether someone needs information for any selfish purpose or in order to participate in public debate with a view to promoting the common good.[84]

The privileged status of journalists as such also troubles the judge:

> It is no exaggeration to say that today we, the citizens of European States, are all journalists. We (at least many of us) directly access different sources of information, collect or request information from public authorities, impart information to other persons and publicly comment on matters of public interest . . . . We are all social watchdogs who oversee the action of the public authorities. Democratic society is—inter alia—a community of

81. Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), http://hudoc.echr.coe.int/eng?i=001-152416.

82. Hugh Tomlinson, *Case Law, Strasbourg: Guseva v Bulgaria, More Freedom of Information Under Article 10 (with dissents)*, Informm's Blog (Feb. 28, 2015), https://inforrm.wordpress.com/2015/02/28/case-law-strasbourg-guseva-v-bulgaria-freedom-of-information-under-article-10-with-dissents-hugh-tomlinson-qc.

83. Guseva v. Bulgaria, App. No. 6987/07 (Eur. Ct. H.R. Feb. 17, 2015), http://hudoc.echr.coe.int/eng?i=001-152416.

84. *Id.*

> social watchdogs. The old distinction between journalists and other citizens is now obsolete. In this context, the case-law hitherto on the functions of the press seems out of date in 2015 and should be adapted to the latest social developments.[85]

Finally, there is the piece de resistance, the November 2016 Grand Chamber Judgment: *Magyar Helsinki Bizottság v Hungary* (2016).[86]

The Grand Chamber of the Court, by a majority of 15-2,[87] found for the applicant and against Hungary. Joined by the UK—in a written and oral submission—the two Governments argued that Article 10 could not be interpreted to imply a right to access information, as a matter of both principle and practicality.

The applicant NGO was conducting a survey of the public defender system. It requested the names of the public defenders retained by investigating authorities, mainly police departments, and the number of their respective appointments. From a total of twenty-four police departments, two declined to supply the requested information. The applicant complained that the domestic courts' refusal to order the disclosure of the information amounted to a breach of its right to access to information under Article 10. The main issue confronting the Grand Chamber was "whether and to what extent a right of access to State-held information could be viewed as falling within the scope of Article 10, notwithstanding the fact that such a right was not immediately apparent from the text of that provision." Whilst mindful of the need to be consistent with precedents and the values of equality, legal certainty and foreseeability, the Court also accepted that "since the Convention was first and foremost a system for the protection of human rights, regard had also to be had to the changing conditions within Contracting States and the Court had to respond to any evolving convergence as to the standards to be achieved."[88] Evidence of such changing standards could be found as follows:

---

85. *Id.*

86. Magyar Helsinki Bizottsag v. Hungary, App. No. 18030/11 (Eur. Ct. H.R. Nov. 8, 2016), http://hudoc.echr.coe.int/eng?i=001-167828. For the third party intervention, see *Third Party Intervention Submitted in Accordance with Rule 44(3) of the Rules of Court* (Sept. 9, 2015), https://www.article19.org/data/files/Magyar_Helsinki_v_Hungary_-_Intervention_19_Sep.pdf. For a recording of the hearings, see *Magyar Helsinki Bizottság v. Hungary (no. 18030/11)*, EUROPEAN CT. OF HUM. RTS. (Nov. 4, 2015) http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=1803011_04112015&language=lang.

87. The very detailed and trenchant dissent is by Judge Spano (Iceland) joined by Judge Kjolbro (Denmark).

88. Prior decisions include Leander v. Sweden, 9248/81, 26 March 1987; Gaskin v. the United Kingdom, 10454/83, 7 July 1989; Guerra and Others v. Italy, 14967/89, 19 February 1998; Roche v. the United Kingdom [GC], 32555/96, 19 October 2005, Information Note 79; Sdružení Jihočeské Matky v. the Czech Republic (dec.), 19101/03, 10 July 2006; and Youth Initiative for Human Rights v. Serbia, 48135/06, 25 June 2013, Information Note 164.

- National legislation in the majority of Contracting States recognized a statutory right of access to information;
- Article 19 of the International Covenant on Civil and Political Rights 1966;
- the existence of a right of access to information had been confirmed by the United Nations Human Rights Committee;
- Article 42 of the European Union Charter of Fundamental Rights guaranteed citizens a right of access to certain documents; and
- the adoption of the Council of Europe Convention on Access to Official Documents, even though ratified by only seven [sic] member States, denoted a continuous evolution towards the recognition of the State's obligation to provide access to public information.

Notwithstanding the foregoing, the Court held that the phrasing of Article 10, namely the right to "receive" information, could not be interpreted as imposing positive obligations on a State to collect and disseminate information on its own motion and Article 10 did not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. On the other hand, such a right or obligation could arise:

- where disclosure of the information had been imposed by a judicial order which had gained legal force (and had not been implemented); and
- in circumstances where access to the information was 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 constituted an interference with that right.

Would not getting the requested information be a denial of access to information tantamount to an interference with an applicant's freedom of expression? The Court held that this was a matter to be assessed in each individual case, *in casu*; relevant factors would include:

- the purpose of the information request;
- the nature of the information sought;
- the role of the applicant; and
- whether the information was ready and available.

In the instant case, the Court was satisfied that the applicant in the present case wished to exercise the right to impart information on a matter of public interest, as the information on the appointment of public defenders was eminently public-interest in nature. The survey contained information which the applicant undertook to impart to the public and which the public had a right to receive. Lastly, the information was ready and available.

So, was the interference (i.e., that the applicants did not get the information they sought) justifiable? On the one hand, the data did consist of personal data. On the other hand, the information related to the conduct of professional activities in the context of public proceedings. Significantly, the Court held that public defenders' professional activities could not be considered to be a private matter. The information requested did concern personal data, but it did not involve information outside the public domain.[89] Furthermore, the data did not pertain to the public defenders' actions as legal representatives or to consultations with their clients. Finally, the Government had failed to demonstrate that the disclosure of the information requested could have affected the public defenders' enjoyment of their right to respect for private life. In any case, the names of public defenders and their appointments might become known to the public through other means.

The Court was satisfied that the applicant intended to contribute to a debate on a matter of public interest and that the refusal to grant the request had effectively impaired its contribution to a public debate on a matter of general interest. The Court concluded that, notwithstanding the State's margin of appreciation, there had not been a reasonable relationship of proportionality between the measure complained of and the legitimate aim pursued.

IV. ENDNOTE

One of the relatively few think pieces specifically on "FOI as a human right" is authored by Kay Mathiesen, in particular, her article *Access to Information as a Human Right*.[90] In it, she focuses on the rights related to free access to information, concluding that access to information is a "fundamental human right"—entailing, as a "welfare right" and not just a liberty right, duties being placed on governments to provide and give access to information.[91] Grounding her argument on James Nickel's view that

89. Thus, "the Court declined to perform a 'balancing exercise' between the NGO's Article 10 rights and the Article 8 privacy rights of the criminal defence lawyers – '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', so Article 8 was not even engaged. There was no justification; Hungary had breached the NGO's Article 10 rights." See *A Human Right to Freedom of Information*, https://panopticonblog.com/2016/11/14/human-right-freedom-information.

90. Kay Mathiesen, *Access to Information as a Human Right* (2008), https://www.ideals.illinois.edu/bitstream/handle/2142/15236/IConf_Information_as_a_Human_Right.doc.pdf.

91. *Id.* § 1. *See* S. Jagwanth, *The Right to Information as a Leverage Right*, *in* The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice 3–16 (Richard Calland & Allison Tilley eds., 2002); Joshua Cohen, *Freedom of Expression*, 22 PHIL. Pub. AFF. 207, 223 (1993).

human rights are the rights to resources and circumstances to live a "minimally good life," she identifies three aspects:

- human beings are creatures with a capacity and a desire for knowledge;
- knowledge is not only good in itself; it is pragmatically essential that persons have access to information if they are to have the capacity to exercise their other rights (Rawls' "primary good"); and
- in order for persons to effectively exercise and protect their other rights, they need access to information.[92]

Peter Forsskal put the matter thusly in 1759:

> Finally, it is also an important right in a free society to be freely allowed to contribute to society's well-being. However, if that is to occur, *it must be possible for society's state of affairs to become known to everyone*, and it must be possible for everyone to speak his mind freely about it. Where this is lacking, liberty is not worth its name.[93]

Interestingly, Mathiesen acknowledges that she may argue that our human rights extend beyond what has been explicitly encoded in human rights documents.[94]

This echoes the point made by Onora O'Neill, "[T]he Human Rights documents do not justify determinate speech or media freedoms [because] Declarations do not justify. . . they deliberately short-circuit justification."[95]

Arguably, whilst Mathiesen focuses on the significance of access to information for the individual's life, Forsskal's formulation is more societal in orientation – the need to be able to access knowledge in order for anyone to contribute to society's well-being.[96]

Basically, Mathiesen distinguishes between the intrinsic and the instrumental dimensions of the right to access information:

- A minimally good human life is not possible without access to a rich array of expressions and to knowledge for both practical ends and intrinsic benefits to the human spirit. Nevertheless, even if these interests were not sufficiently compelling, there would still be grounds for arguing that access to information is a fundamental

92. Mathiesen, *supra* note 90, § 1. *See* James W. Nickel, Making Sense of Human Rights 174 (2d ed. 2007).

93. PETER FORSSKÅL, THOUGHTS ON CIVIL LIBERTY ¶ 21, http://www.peterforsskal.info/thetext.html (last visited Feb. 17, 2017) (emphasis added).

94. Mathiesen, *supra* note 90, § 1.

95. Onora O'Neill, *Regulating for Communications*, FOUNDATION FOR LAW, JUSTICE AND SOC'Y (2012), http://www.fljs.org/sites/www.fljs.org/files/publications/ONeill.pdf.

96. *See, e.g.*, *Consultation on Guidelines for Participation in Political Decision-Making*, COUNCIL OF EUROPE (July 11, 2016), http://www.coe.int/t/dgap/localdemocracy/News/2016/consultation0716_en.asp.

human right. Access to information is a necessary precondition for us to exercise our other human rights.[97]

- If one is denied access to information about how to apply for jobs, for benefits, how to access and use healthcare, then, for all intents and purposes, one is being denied the rights to such things.
- If one does not have at least basic information about who is running in an election, their positions, their past experience and actions, then the rights listed in Article 21 of the UDHR [2], "everyone has the right to take part in the government of his country, directly or through freely chosen representatives" are meaningless. One cannot express one's will in elections if one does not have the information necessary to make one's choices a genuine expression of one's values and preferences.

Finally, Mathiesen argues that whilst access to information can be viewed as a "liberty right" it should also be understood as a "welfare right":

> [T]he only way that our fundamental interests to access to information can be adequately protected is if they are understood as encompassing a welfare right that places duties on governments and others to supply people with the necessary information and knowledge. . . . the right to information should be understood as a welfare right that places on governments (and perhaps others) the duty to provide people with information.[98]

The philosophical analysis of the right to information being a fundamental human right is echoed legally in the decision of the Inter-American Court of Human Rights in *Reyes v. Chile* (2006):

> This case addresses the State's refusal to provide Marcelo Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with certain information that they requested from the Foreign Investment Committee regarding forestry company Trillium and the Río Cóndor project, a deforestation project that was being carried out in Chile. In this ruling, the Inter-American Court recognized that the right to access to information is a human right protected under Article 13 of the American Convention.[99]

As the Court said in paragraph 77:

> Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the

97. Mathiesen, *supra* note 90, § 5.2.

98. *Id.* § 5.3, 7.

99. *Decisions and Judgments of the Inter-American Court*, OAS, http://www.oas.org/en/iachr/expression/jurisprudence/si_decisions_court.asp#Claude (last visited Mar. 18, 2017). Crucial to that decision—and in contradistinction to the situation under the European Convention—as has been pointed out *supra*, is the inclusion of the term "seek" in ACHR Article 13(1) and its absence in Article 10(1).

> 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.[100]

Crucially, both Mathiesen's analysis and the decision in *Reyes* make no distinction as to the category of requester as being a determinant of whether disclosure should be ordered or not. Indeed, how could that be relevant? If the right is a fundamental human right, then it must be a right of all. However, the Grand Chamber, whilst resisting the trenchant claims of the Hungarian and UK Governments that reading a right to access information into Article 10 is an overbroad act of judicial activism, nonetheless, as has been described above, is still resistant to extending the right to all in all circumstances. As has been remarked, rather delicately, "There is now a defined (if not unconfined) human right of access to information."[101] Further, to restate, the "right" is limited by the purpose for which the information is sought and its nature; but, the principle of the right to information is purpose and motivation blind. So, legally, the European Court still persists with a two-class approach to admitted beneficiaries of the right, even though it has now extended the list to include social media bloggers.[102]

It was said in another context, but the Strasbourg Court has "never missed an opportunity to miss an opportunity"—in this context, to find that the right of access to information is a right of all, in all circumstances, subject only to very precisely and narrowly drawn restrictions prescribed by law for a legitimate purpose and necessary in a democratic society. So, unless Article 10 is amended (highly unlikely) or a new Protocol to the Convention is adopted (highly unlikely), there is no reasonable prospect that there will be an interpretation from the European Court to match the decision of the Inter-American Court of Human Rights in *Reyes v. Chile* that the right to access information is a human right and, therefore, a right of all.

---

100. Claude-Reyes v. Chile, Report No. 60/03, Inter-Am. Ct. H.R., ¶ 77 (Sept. 19, 2006).

101. *A Human Right to Freedom of Information*, PANOPTICON (Nov. 14, 2016) https://panopticonblog.com/2016/11/14/human-right-freedom-information; *see also* Nani Jansen Reventlow & Jonathan McCully, *The European Court of Human Rights and Access to Information: Clarifying the Status, with Room for Improvement*, HARVARD LAW SCHOOL: CYBERLAW CLINIC (Nov. 22, 2016), http://clinic.cyber.harvard.edu/2016/11/22/the-european-court-of-human-rights-and-access-to-information-clarifying-the-status-with-room-for-improvement.

102. *See* Magyar Helsinki Bizottság v. Hungary, Eur. Ct. H.R. (2016) at ¶ 168 ("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.").