NJ 2017/431

Dommering, E.J.

Publication date
2017
Document Version
Final published version
Published in
Nederlandse Jurisprudentie

NJ 2017/431

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
8 november 2016, nr. 18030/11
(G. Raimondi, A. Sajó, I. Karakaş, L. López Guerra, M. Lazarova Trajkovska, A. Nußberger, B. M. Zupančič, N. Vučinić, K. Pardalos, G. Yudkivska, L.-A. Sicilianos, H. Keller, A. Potocki, A. Pejchal, K. Turković, R. Spano, J.F. Kjølbro)
m.nt. E.J. Dommering

Art. 10 EVRM

AB 2017/1
NJB 2017/152
ECLI:CE:ECHR:2016:1108JUD001803011

Art. 10 EVRM. Toegang tot informatie waarover de overheid beschikt. Afweging belangen van derden in het licht van art. 8 EVRM.

Voor wie een maatschappelijke waakhondfunctie uitoefent, vloeit uit art. 10 EVRM het recht voort op toegang tot informatie in het bezit van de overheid. Afweging van privacybelangen wanneer deze informatie geen betrekking heeft op bestuursorganen zelf maar op derden.

Klaagster, Magyar Helsinki Bizottság (het Hongaars Helsinki Comité), is een NGO gevestigd in Boedapest. Ten behoeve van een onderzoek naar de kwaliteit van bijstand door strafrechtadvocaten op basis van een toevoeging en hun onafhankelijkheid, heeft klaagster van een aantal politieregio's een lijst met door hen in 2008 benoemde advocaten opgevraagd en het aantal zaken per advocaat. Aan dit verzoek heeft klaagster de Hongaarse versie van de WOB ten grondslag gelegd. Dit verzoek is door twee politieregio's afgewezen. Klaagster heeft vervolgens geprobeerd via de rechter afgifte te vorderen. Dit verzoek is in eerste aanleg toegewezen maar in hoger beroep afgewezen omdat strafrechtadvocaten die door de overheid aan een verdachte worden toegewezen geen publieke functie uitoefenen en inzage in hun namen niet onder de Hongaarse WOB valt. Het cassatieberoep tegen deze uitspraak wordt verworpen met de motivering dat hoewel het toepassing geven aan het constitutionele recht op rechtsbijstand van een verdachte een overheidstaak is, de feitelijke rechtsbijstand door een advocaat dit niet is en de naam van de desbetreffende advocaat dus geen publieke informatie betreft.

Het EHRM stelt voorop dat art. 10 EVRM uitgelegd dient te worden conform art. 31 Weens Verdragenverdrag. Het geeft vervolgens een overzicht van een rechtsvergelijkende onderzoek in ander internationale documenten waar in tegenstelling tot art. 10 EVRM wel expliciet een recht op informatie is opgenomen. Vervolgens onderzoekt het EHRM de travaux préparatoires van het EVRM op de bedoeling van de opstellers inzake de reikwijdte van art. 10 EVRM. Het EHRM verwijst voorts naar andere documenten van de Raad van Europa inzake het recht op informatie en het recht op inzage in overheidsdocumenten waaronder de Council of Europe Convention on Access to Official Documents van 18 juni 2009 (nog niet in werking; ook Nederland is nog niet toegetreden tot dit verdrag). Het EHRM verwijst ten slotte naar het in art. 42 EU Grondrechtenhandvest opgenomen recht op toegang tot EU-documenten. Het EHRM komt vervolgens tot de conclusie dat uit het verrichte rechtsvergelijkend onderzoek blijkt dat in alle lidstaten van de Raad van Europa, behalve Luxemburg, het recht op inzage in informatie in het bezit van de overheid in het nationale recht is opgenomen.

Het Hof formuleert vier criteria die de drempel vormen om dit recht in het concrete geval te kunnen afdwingen: i) het doel van het verzoek om informatie, ii) de aard van de verzochte informatie, iii) de functie van de verzoeker en iv) de beschikbaarheid van de informatie (§ 157-170).

Op basis van deze criteria komt het EHRM tot de conclusie dat een nationale mensenrechtenorganisatie als in het onderhavige geval met een maatschappelijke waakhondfunctie en een verzoek om informatie als in het onderhavige geval gedaan ten behoeve van een maatschappelijk belang (kwaliteit van rechtsbijstand) onder de reikwijdte van art. 10 EVRM valt (§ 180). Vervolgens onderzoekt het EHRM of de weigering van de verzochte informatie in het onderhavige geval gerechtvaardigd was en komt het tot de conclusie dat de Hongaarse autoriteiten niet aannemelijk hebben gemaakt een redelijke afweging te hebben getroffen tussen het maatschappelijk belang dat met de verzochte informatie is beoogd en de privacyrechten van de betrokken advocaten (§ 200). Schending van art. 10 EVRM.

Magyar Helsinki Bizottság
tegen
Hongarije

EHRM:

The law

I. Alleged violation of article 10 of the convention

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

'1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public

safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

66. The Government contested that argument.

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

1. The parties' submissions to the Grand Chamber

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

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

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

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

2. The Court's assessment

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

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

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

B. Merits

1. The parties' submissions to the Grand Chamber

(a) The Government

73. The Government maintained that Article 10 of the Convention was not applicable, since the findings in the case of *Társaság a Szabadságjogokért v. Hungary* (no. 37374/05, § 14, April 2009 (*NJ* 2010/209, m.nt. E.J. Dommering; *red.*), hereinafter referred to as '*Társaság*') could not be decisive in the present application. In that case, in the absence of an objection from the Government, the Court had not been required to examine the applicability of Article 10. They added that their concession with regard to the applicability of Article 10 in the Társaság case had been based exclusively on domestic-law considerations and could not serve as a basis for expansion of the Convention into areas which it had not been intended to cover.

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

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

76. The right of access to information was an autonomous right aimed at enhancing transparency and good governance and was not simply auxiliary to the right to freedom of expression. In their view,

neither the 'living instrument' approach, nor the existence of a European consensus reflected in the adoption of freedom of information acts in the domestic legal systems could justify such a right being read into Article 10 of the Convention.

77. According to the Government, no public debate had been hindered by the lack of disclosure of the requested personal data, since the information sought was not necessary in order for the applicant NGO either to express its opinion on an issue of public interest or to draw conclusions on the efficiency of the appointment system of public defenders.

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

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

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

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

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

83. Moreover, there was no obligation on the State to impart information consisting of personal data when the disclosure of that information was not justified by a pressing social need. Any positive obligation under Article 10 ought to be construed in the light of the authorities' obligation to respect and ensure the enjoyment of other rights enshrined in the Convention and to strike a fair balance not only between private and public interests but also between competing private interests — in the present case the applicant NGO's right to receive information under Article 10 and defence counsel's right to respect for private life under Article 8. In addition, any restriction on public defenders' rights under Article 8 ought to be construed narrowly. In contrast, the interpretation of the expression 'other persons exercising public duties' suggested by the applicant NGO would create an extremely vague exception to the right to protection of personal data, which would not be justified under Article 8 of the Convention.

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

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

(b) The applicant NGO

86. The applicant NGO requested the Grand Chamber to confirm the applicability of Article 10 to the case. It contended that although the Convention used the specific terms 'receive' and 'impart', Article 10 also covered the right to seek information, as first acknowledged by the Court in the *Dammann v. Switzerland* case (no. 77551/01, § 52, 25 April 2006 (*NJ* 2007/126; *red.*)). It referred to the Court's case-law in *Sdruženi Jihočeské Matky v. the Czech Republic* ((dec.), no. 19101/03, 10 July 2006), *Társaság* (cited above), *Youth Initiative for Human Rights v. Serbia* (no. 48135/06, 25 June 2013), and *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria* (no. 39534/07, 28 November 2013, hereinafter referred to as '*Österreichische Vereinigung*') to

demonstrate that the Court had departed from its previous case-law in *Leander* (cited above) and *Gaskin v. the United Kingdom* (7 July 1989, § 57, Series A no. 160), and had clearly taken the stance that the right of access to information held by public authorities fell within the ambit of Article 10.

87. The applicant organisation further argued that this approach was corroborated by international instruments and case-law, among others Article 19 of the International Covenant on Civil and Political Rights and General Comment No. 34 of the Human Rights Committee, showing a widespread acceptance that the right to seek information was an essential part of free expression.

88. In *Guerra and Others v. Italy* and *Roche v. the United Kingdom*, the Court had held that the freedom to receive information could not be construed as imposing on a Contracting Party to the Convention positive obligations to collect and disseminate information of their own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 172, ECHR 2005-X (*NJ* 2009/453; *red.*)).

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

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

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

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

93. The applicant NGO pointed out that the main question in the domestic proceedings had been whether *ex officio* appointed defence counsel were to be regarded as 'other persons performing public duties'. The domestic law did not provide a definition of public duties. The Government's interpretation, to the effect that only persons vested with independent powers and competences were to be considered as persons performing public duties, did not stand up to scrutiny. The applicant NGO argued that defence counsel performed a public duty in the course of criminal proceedings and that their activities were not of a private nature. Furthermore, the fees and expenses of *ex officio* appointed defence counsel were paid from public funds and their activities were supervised by the State. The applicant NGO also relied on the Court's case-law in *Artico v. Italy* (13 May 1980, Series A no. 37), *Kamasinski v. Austria*, (19 December 1989, Series A no. 168) and *Czekalla v. Portugal* (no. 38830/97, ECHR 2002-VIII), where it was found that in certain circumstances the State could be held responsible for certain shortcomings in the *ex officio* defence counsel system. Finally, the names of *ex officio* appointed defence counsel were not anonymised when court judgments were published, and a number of police departments and courts had found that the applicant NGO had a right of access to the requested information.

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

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

96. According to the applicant NGO, the requested data were otherwise inaccessible, which had given the two police departments an effective information monopoly over the appointment of defence counsel within their respective jurisdictions. Thus, the denial of access to the requested information had constituted an exercise of censorial power.
97. The applicant NGO further considered that the restriction on its right of access to information had not been necessary for the protection of defence counsel's right to respect for their private life. The information sought did not concern their private sphere but only their public duties. It did not relate to the actual exercise of their role as defence counsel, but merely to their appointment. Thus, in the applicant NGO's view, the domestic authorities had failed to strike a fair balance between its right under Article 10 and defence counsel's right under Article 8.
98. The applicant NGO invited the Court to find that the interference with its right to receive information had not been necessary in a democratic society within the meaning of Article 10 § 2 of the Convention.

(c) The third parties
(i) The Government of the United Kingdom
99. Relying on Article 31 § 1 of the Vienna Convention on the Law of Treaties 1969, the Government of the United Kingdom argued that the ordinary meaning of the language used by the Contracting States ought to be the principal means of interpreting the Convention. In their view the clear object of Article 10 was to impose negative obligations on organs of the State to refrain from interfering with the right of communication. A positive obligation of Contracting States to provide access to information was not warranted by the language of Article 10 § 1. This was confirmed by the *travaux préparatoires*, since the right to 'seek' information had been deliberately omitted from the final text of Article 10.
100. Reading the right to freedom of information into Article 10 would amount to constructing a 'European freedom of information law' in the absence of the normal consensus. In the understanding of the intervening Government, there was no European consensus as to whether there should be access to State-held information, demonstrated by the fact that the Council of Europe Convention on Access to Official Documents had only been ratified by seven member States.
101. They also referred to the Court's judgment in the *Leander* case, in which the Court had held that Article 10 did not 'confer on the individual a right of access to a register containing information on his personal position, nor [did] it [embody] an obligation on the Government to impart such information to the individual' (see *Leander,* cited above, § 74). This ruling was subsequently confirmed by the Court in the case of *Guerra and Others*, where the information was not in itself private and individual (see *Guerra and Others*, cited above, §§ 53–54) and by the Grand Chamber in *Roche* (cited above, §§ 172-73). Finally, in the case of *Gillberg*, the Court reaffirmed that [the right to receive and impart information] basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him (see *Gillberg v. Sweden* [GC], no. 41723/06, § 83, 3 April 2012 (*NJ* 2012/621, m.nt. E.A. Alkema; *red.*)).
102. The intervening Government also maintained that in the recent cases of *Kenedi v. Hungary* (no. 31475/05, 26 May 2009 (*NJ* 2009/589, m.nt. P.J. Boon; *red.*)), *Gillberg* (cited above), *Roşiianu v. Romania* (no. 27329/06, 24 June 2014), *Shapovalov v. Ukraine* (no. 45835/05, 31 July 2012), *Youth Initiative for Human Rights* (cited above), and *Guseva v. Bulgaria* (no. 6987/07, 17 February 2015) the Court had recognised that the applicants had had a right of access to information under Article 10 by virtue of domestic court orders. In their view the non-enforcement of domestic court orders fell more naturally to be considered in the context of Article 6. According to the intervening Government, the cases of *Társaság, Sdruženi Jihočeské Matky* and *Österreichische Vereinigung* (all cited above) were not explicable on the basis of a domestic-law right to information. In their view these judgments failed to provide a cogent basis for ignoring the previous line of case-law. The Grand Chamber should therefore find that Article 10 was not applicable and that there had been no violation of the applicant's right to freedom of expression.
103. At the hearing the intervening Government submitted that in previous cases where the Court had found it necessary to update its case-law, this had been to ensure that it reflected contemporary social attitudes. No such need existed in the case of freedom of information. If the Court were to recognise a right of access to information held by the State, this would far exceed the legitimate interpretation of the Convention and would amount to judicial legislation.

(ii) Media Legal Defence Initiative, the Campaign for Freedom of Information, ARTICLE 19, the Access to Information Programme and the Hungarian Civil Liberties Union
104. The interveners jointly relied on four arguments, namely the text of Article 10 itself, the underlying principle of freedom of expression, the Court's evolving case-law and comparative material, to argue that the right to freedom of expression included a right of access to information held by public bodies.
105. In their opinion, the wording of Article 10 expressly supported a conclusion that a right of access to information fell within the scope of Article 10, since the right to impart information and the right to receive information were two distinct rights.

Seeking information from the State was an expression of the wish to receive it.

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

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

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

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

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

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

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

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

(iii) Fair Trials

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

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

116. In balancing the interest of public defenders to their right to privacy under Article 8 and the competing interest of NGOs in scrutinising the operation of the legal-aid system under Article 10, it was important to distinguish between the role of a lawyer as an agent of the public justice system and the privacy of the client-lawyer relationship. Lists of public defenders were widely available to the public, thereby showing that lawyers providing legal aid had waived, to some extent, their privacy rights. Furthermore, the publication of information

concerning appointments did not encroach upon the confidentiality of lawyer-client relationships. If a national authority categorised information as private rather than public-interest information, it had to justify such a decision by reference to the countervailing interests protected by Article 10. Without such a balancing exercise, national authorities could not be viewed as having struck a fair balance between the relevant interests at issue. If such a balancing exercise was carried out, it should necessarily favour the disclosure of information on the appointments of lawyers, since access to information ensured external oversight and thereby safeguarded compliance with Article 6 of the Convention, an interest far more important than the protection of the identities and commercial activities of lawyers.

2. The Court's assessment

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

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

(i) Preliminary remarks regarding the interpretation of the Convention

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

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

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

121. The Court emphasises that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory (see *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161).

122. Furthermore the Convention comprises more than mere reciprocal engagements between Contracting States (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, § 100, ECHR 2005-I (*NJ* 2005/321, m.nt. E.A. Alkema; *red.*), and *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25).

123. Account must also be taken of any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, § 134, 21 June 2016); the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part (see, for instance, *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, § 55, ECHR 2001-XI; *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-VI; *Hassan v. the United Kingdom* [GC], no. 29750/09 (*NJ* 2015/141, m.nt. N. Keijzer; *red.*), §§ 77 and 102, ECHR 2014 (NJ and Article 31 § 3 (c) of the Vienna Convention quoted above in paragraph 35).

124. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic-law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision (see *Opuz v. Turkey*, no. 33401/02, § 184, ECHR 2009 (*NJ* 2010/345, m.nt. E.A. Alkema; *red.*)). The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases (see *Bayatyan v. Armenia* [GC], no. 23459/03, § 102 and §§ 108-10, ECHR 2011, finding that an objection to military service fell within the ambit of Article 9; *Scoppola v. Italy (no. 2)* [GC], no.

10249/03, §§ 104-109, 17 September 2009, on the principle of retrospectiveness of the more lenient criminal law under Article 7; and *Rantsev*, cited above, §§ 278-82, on the applicability of Article 4 to human trafficking).

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

(ii) The Convention case-law

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

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

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

128. Thus, the plenary Court in *Gaskin* (cited above, § 52) in 1989 and the Grand Chamber in *Guerra* in 1998 confirmed this approach, the Grand Chamber adding in the latter judgment that freedom to receive information 'cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion' (see § 53 of the *Guerra* judgment, cited above; see also *Sîrbu and Others v. Moldova*, nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01, §§ 17–19, 15 June 2004). In 2005 the Grand Chamber followed the same line of reasoning in *Roche* (cited above, § 172), it being noted that the Court had previously done so in *Eccleston v. the United Kingdom* ((dec.), no. 42841/02, 18 May 2004) and *Jones v. the United Kingdom* ((dec.), no. 42639/04, 13 September 2005).

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

130. Later, in *Dammann* (cited above, § 52), the Court held that the gathering of information was an essential preparatory step in journalism and an inherent, protected part of press freedom (see also *Shapovalov*, cited above). This consideration was, without much discussion, further developed in *Sdruženi Jihočeské Matky* (cited above). The Court first referred to the principles set out in *Leander, Guerra* and *Roche* and observed that 'it is difficult to derive from the Convention a general right of access to administrative data and documents (see *Loiseau v. France* (dec.), no. 46809/99, ECHR 2003-XII (extracts)'. Then, referring to *Grupo Interpres SA* (cited above), it went on to hold that the impugned refusal of the public authority to grant access to the

relevant administrative documents, which were readily available, constituted an interference with the applicant's right to receive information guaranteed by Article 10 of the Convention. As in the situation in the *Grupo Interpres SA* case, the Convention complaint in the *Dammann* case related to the application of a duty, imposed by national law, to provide access to the requested documents, subject to certain conditions. Having satisfied itself that the impugned restriction had not been disproportionate to the legitimate aim pursued, the Court subsequently declared the complaint inadmissible as being manifestly ill-founded.

131. Subsequently, in a series of judgments following the above-mentioned *Sdruženi Jihočeské Matky* decision, the Court found that there had been an interference with a right protected by Article 10 § 1 in situations where the applicant was deemed to have had an established right to the information under domestic law, in particular based on a final court decision, but where the authorities had failed to give effect to that right. In finding an interference, the Court moreover had regard to the consideration that access to the information in question was an essential element of the exercise of the applicant's right to freedom of expression, or that it formed part of the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to public debate (see *Kenedi,* 26 May 2009, § 43; *Youth Initiative for Human Rights,* 25 June 2013, § 24; *Roşiianu,* 24 June 2014, § 64; and *Guseva,* 14 February 2015, § 55; all cited above, and all referring in this context to *Társaság*, described in more detail below). Dealing with comparable circumstances in *Gillberg* (judgment of 3 April 2012, cited above), the Grand Chamber adopted a similar approach (see § 93 of that judgment, cited above), whilst reiterating the *Leander* principle that Article 10 'basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him' (ibid., § 83). With hindsight the Court considers that this line of case-law did not represent a departure from, but rather an extension of, the *Leander* principles, in that it referred to situations where, as described by the intervening Government, one arm of the State had recognised a right to receive information but another arm of the State had frustrated or failed to give effect to that right.

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

133. The fact that the Court has not previously articulated in its case-law the relationship between the *Leander* principles and the more recent developments described above does not mean that they are contradictory or inconsistent. The dictum that 'the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him' was, it appears, based on what may be considered a literal reading of Article 10. It was repeated in the plenary and Grand Chamber rulings in *Guerra and Others, Gaskin* and *Roche* (and also in *Gillberg*). However, whilst Holding that Article 10 did not, in circumstances such as those at issue in *Guerra and Others, Gaskin* and *Roche,* confer on the individual a right of access to the information in question or embody an obligation on the Government to impart such information, the Court did not, however, exclude the existence of such a right for the individual or a corresponding obligation on the Government in other types of circumstance. The above-mentioned recent case-law (including *Gillberg*) may be viewed as illustrating the types of circumstance in which the Court has been prepared to recognise an individual right of access to State-held information. For the purposes of its examination of the present case, the Court finds it useful to take a broader look at the question of the extent to which the right of access to information can be gleaned from Article 10 of the Convention.

(iii) Travaux préparatoires

134. The Court notes from the outset the United Kingdom Government's submission, relying on Article 31 § 1 of the Vienna Convention on the Law of Treaties 1969, that the ordinary meaning of the language used by the Contracting States is to be the principal means of interpreting the Convention (see paragraph 99 above). In the UK Government's view, the clear object of Article 10 was to impose negative

obligations on organs of the State to refrain from interfering with the right of communication. A positive obligation on the State to provide access to information was not warranted by the language of Article 10 § 1, which was confirmed by the *travaux préparatoires,* since the right to 'seek' information had been deliberately omitted from the final text of Article 10.

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

The Court is not therefore persuaded that any conclusive relevance can be attributed to the *travaux préparatoires* as regards the possibility of interpreting Article 10 § 1 as including a right of access to information in the present context. Nor is it convinced that there are no circumstances in which such an interpretation could find support in the ordinary meaning of the words 'receive and impart information and ideas without interference by a public authority' or in the object and purpose of Article 10.

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

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

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

(iv) Comparative and international law

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

139. In this regard, the Court observes that in the great majority of the Contracting States, in fact in all the thirty-one States surveyed with one exception, the national legislation recognises a statutory right of access to information and/or official documents held by public authorities, as a self-standing right aimed at reinforcing transparency in the conduct of public affairs generally (see paragraph 64 above). Although this aim is broader than that of advancing the right to freedom of expression as such, the Court is satisfied that a broad consensus exists within the Council of Europe member States on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society.

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

141. In this connection, it is of importance to observe that the existence of a right of access to information has been confirmed by the United Nations Human Rights Committee (UNHRC) on a number of occasions. The Committee has emphasised the importance of access to information in the democratic process, and the link between the author's access to information and his or her opportunity to disseminate information and opinions on matters of public concern to citizens. It

considered that freedom of thought and expression included protection of the right of access to State-held information. It pointed out in one case that, whilst the right to seek information could be exercised without the need to prove direct interest or personal involvement, the author association's functions as a special watchdog and the particular nature of the information sought warranted the conclusion that the author had been directly affected by the refusal in question (see paragraphs 39–41 above).

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

143. Admittedly, the above conclusions were adopted in regard to Article 19 of the Covenant, the wording of which is different from that of Article 10 of the Convention. For the Court, however, their relevance in the present case derives from the findings that the right of access to public-interest data and documents was inherent in freedom of expression. For the UN bodies, the right of public watchdogs to have access to State-held information in order to discharge their obligations as public watchdogs, that is, to impart information and ideas was a corollary of the public's right to receive information on issues of public concern (see paragraphs 39–42 above).

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

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

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

147. Mention may also be made of the Declaration of Principles of Freedom of Expression in Africa, adopted by the African Commission on Human and Peoples' Rights in 2002. While Article 9 of the African Charter on Human and Peoples' Rights does not refer to the right to seek information, the Declaration of Principles explicitly states that '[f]reedom of expression and information, including the right to seek, receive and impart information and ideas … is a fundamental and inalienable human right' (see paragraph 63 above).

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

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

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

150. The Court is aware of the importance of legal certainty in international law and of the argument that States cannot be expected to implement an international obligation to which they did not agree in the first place. It considers that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Mamatkulov and Askarov*, cited

above, § 121, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I). Since the Convention is first and foremost a system for the protection of human rights, regard must also be had to the changing conditions within Contracting States and the Court must respond, for example, to any evolving convergence as to the standards to be achieved (see *Biao v. Denmark* [GC], no. 38590/10, § 131, 24 May 2016).

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

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

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

154. In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved, the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate.

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

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

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

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

(α) The purpose of the information request

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

159. In this context, it may be reiterated that in the area of press freedom the Court has held that, "by reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54,

ECHR 1999-I; and Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III). The same considerations would apply to an NGO assuming a social watchdog function (see more on this aspect below).

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

(β) The nature of the information sought

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

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

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

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

(γ) The role of the applicant

164. A logical consequence of the two criteria set out above — one regarding the purpose of the information request and the other concerning the nature of the information requested — is that the particular role of the seeker of the information in 'receiving and imparting' it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court has previously attached particular weight to the applicant's role as a journalist (see Roşiianu, cited above, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (see Társaság, § 36; Österreichische Vereinigung, § 35; Youth Initiative for Human Rights, § 20; and Guseva, § 41, all cited above).

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

> 'The duty of the press is to impart — in a manner consistent with its obligations and responsibilities — information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog' (see Bladet

Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III).'

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

167. The manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable the press to exercise its vital role of 'public watchdog' in imparting information on matters of public concern (see *Bladet Tromsø and Stensaas*, cited above, § 59), just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their 'watchdog' role effectively, and their ability to provide accurate and reliable information may be adversely affected (see *Társaság,* cited above, § 38).

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

(δ) Ready and available information

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

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

(vii) Application of those criteria to the present case

171. The applicant organisation argued that it had a right under Article 10 to obtain access to the information requested, since the purpose of the request had been to complete a survey in support of proposals for reform of the public defenders scheme and to inform the public on a matter of general interest (see paragraph 95 above). The Government maintained however that the actual purpose of the survey was to discredit the existing system of public defenders (see paragraph 85 above).

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

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

174. The applicant NGO submitted that the names of public defenders and the number of appointments given to each one was information that was required in order to investigate and determine any malfunctioning in the system (see paragraph 96 above). The applicant NGO also argued that the core aspect of its publication on the efficiency of the public defender system was the allegedly disparate distribution of appointments.
175. In the Court's view, the information requested by the applicant NGO from the police departments was, undisputedly, within the subject area of its research. In order to be able to support its arguments, the applicant wished to collect nominative information on the individual lawyers in order to demonstrate any recurrent appointment patterns. Had the applicant NGO limited its inquiry to anonymised information, as suggested by the Government, it would in all likelihood have been unable to produce verifiable results in support of its criticism of the existing scheme. Moreover, with regard to the completeness or statistical significance of the information in dispute, the Court notes that the aim of the data request was to cover the entire country, including all the County Police Departments. The refusal by two departments to provide information represented an obstacle to producing and publishing a fully comprehensive survey. Thus, it can reasonably be concluded that without the information concerned the applicant was unable to contribute to a public debate drawing on accurate and reliable information. The information was therefore 'necessary' within the meaning referred to in paragraph 159 above for the applicant's exercise of its right to freedom of expression.
176. As regards the nature of the information, the Court observes that the domestic authorities made no assessment whatsoever of the potential public-interest character of the information sought and were concerned only with the status of public defenders from the perspective of the Data Act. The latter allowed for very limited exceptions to the general rule of non-disclosure of personal data. Once the domestic authorities had established that public defenders did not fall within the category of 'other persons performing public duties', which was the only relevant exception in the particular context, they were prevented from examining the potential public-interest nature of the information.
177. The Court notes that this approach deprived the public-interest justification relied on by the applicant NGO of any relevance. In the Court's view, however, the information on the appointment of public defenders was of an eminently public-interest nature, irrespective of whether public defenders could be qualified as 'other persons performing public duties' under the relevant national law.
178. As to the role of the applicant NGO, it is common ground between the parties that the present case concerns a well-established public-interest organisation committed to the dissemination of information on issues of human rights and the rule of law. Its professional stance on the matters it deals with and its outreach to the broader public have not been called into question. The Court sees no reason to doubt that the survey in question contained information of the kind which the applicant NGO undertook to impart to the public and which the public had a right to receive. The Court is further satisfied that it was necessary for the applicant's fulfilment of this task to have access to the requested information.
179. Lastly, the Court notes that the information was ready and available; and it has not been argued before the Court that its disclosure would have been particularly burdensome for the authorities (compare and contrast *Weber*, cited above).

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

(b) Whether the interference was justified
181. In order to be justified, an interference with the applicant NGO's right to freedom of expression must be 'prescribed by law', pursue one or more of the legitimate aims mentioned in paragraph 2 of Article 10, and be 'necessary in a democratic society'.

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

not be disclosed. In their view, the Court ought to proceed from the facts as established and the law as applied and interpreted by the domestic courts.

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

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

185. The Court notes that the Supreme Court examined in detail the legal status of *ex officio* appointed defence counsel and the applicant NGO's arguments as to their duties to ensure the right to defence and that it found that they were not 'other persons exercising public duties'. The Supreme Court's interpretation was in line with the Recommendation of the Parliamentary Commissioner for Data Protection, published in 2006 (see paragraph 34 above). The Court sees no reason to question the Supreme Court's interpretation that public defenders could not be regarded as 'other persons exercising public duties' and that section 19(4) of the Data Act provided a legal basis for the impugned denial of access. The interference was thus 'prescribed by law' within the meaning of the second paragraph of Article 10.

(ii) Legitimate aim

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

(iii) Necessary in a democratic society

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

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

188. The Court observes that the central issue underlying the applicant NGO's grievance is that the information sought was characterised by the authorities as personal data not subject to disclosure. This was so because, under Hungarian law, the concept of personal data encompassed any information that could identify an individual. Such information was not susceptible to disclosure, unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental (State) functions or was related to other persons

performing public duties. Since the Supreme Court's ruling excluded public defenders from the category of 'other persons performing public duties', there was no legal possibility open to the applicant NGO to argue that disclosure of the information was necessary for the discharge of its watchdog role.

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

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

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

192. In the context of personal data, the Court has previously referred to the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data (see paragraph 54 above), the purpose of which is 'to secure … for every individual … respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him' (Article 1). Personal data are defined in Article 2 as 'any information relating to an identified or identifiable individual' (see *Amann v. Switzerland* [GC], no. 27798/95, § 65, ECHR 2000-II). It has identified examples of personal data relating to the most intimate and personal aspects of an individual, such as health status (see *Z v. Finland*, 25 February 1997, §§ 96–97, *Reports* 1997-I, concerning HIV-positive status, and *M.S. v. Sweden*, 27 August 1997, § 47, *Reports* 1997-IV, concerning records on abortion), attitude to religion (see, in the context of freedom of religion, *Sinan Işık v. Turkey*, no. 21924/05, §§ 42–53, ECHR 2010), and sexual orientation (see *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999), finding that such categories of data constituted particular elements of private life falling within the scope of the protection of Article 8 of the Convention.

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

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

195. The Court also finds that the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders (compare and contrast *Peck v. the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). There is no reason to assume that information about the names of public defenders and their appointments could not be known to the public through other means, such as information contained in lists of legal-aid providers, court hearing schedules and public court hearings, although it is clear that it was not collated at the moment of the survey.

196. Against this background, the interests invoked by the Government with reference to

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

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

198. Having regard to the considerations in paragraphs 194–196, the Court does not find that the privacy rights of the public defenders would have been negatively affected had the applicant NGO's request for the information been granted. Although the information request admittedly concerned personal data, it did not involve information outside the public domain. As already mentioned above, it consisted only of information of a statistical nature about the number of times the individuals in question had been appointed to represent defendants in public criminal proceedings within the framework of the publicly funded national legal-aid scheme.

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

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

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

II. Application of article 41 of the convention

Enz. (*red.*)

For these reasons, the court

1. *Joins* the Government's preliminary objection to the merits and *dismisses* it, by a majority;
2. *Declares*, by a majority, the application admissible;
3. *Holds*, by fifteen votes to two, that there has been a violation of Article 10 of the Convention;
4. *Holds*, by fifteen votes to two,

(a) that the respondent State is to pay the applicant NGO, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
(i) € 215 (two hundred and fifteen euros), plus any tax that may be chargeable, in respect of pecuniary damage;
(ii) € 8,875 (eight thousand eight hundred and seventy-five euros), plus any tax that may be chargeable to the applicant NGO, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Noot

1. In deze Hongaarse zaak zet de Grand Chamber een stap voorwaarts naar een uit art. 10 EVRM af te leiden algemene recht op openbaarheid van bestuur. In de eveneens Hongaarse zaak *Társaság a Szabadságjogokért* (EHRM 14 april 2009, *NJ* 2010/209, m.nt. E.J. Dommering) had het een dergelijk recht in

de concrete omstandigheden van het geval (machtsmisbruik) uit art. 10 EVRM afgeleid; voor een analyse van de jurisprudentie van het EHRM en de Nederlandse literatuur daarover, zie E.J. Daalder, *Handboek Openbaarheid van Bestuur*, Den Haag: Boom Juridische Uitgevers 2015, hoofdstuk 2.3). Nu formuleert het een algemene regel. In de eerdere zaak ging het om een weigering aan een verzoek van een parlementariër te voldoen om inzage te krijgen in ontwerp wijzigingsbepalingen van het Wetboek van Strafrecht. Nu ging het om een weigering te voldoen aan het verzoek van een NGO inzage te krijgen in stukken bij politiedepartementen betreffende al of niet toewijzing van pro deo advocaten in strafzaken. Die verzoeken waren bij twee van de 28 politiedepartementen afgewezen omdat het zou gaan om 'persoonsgegevens'. Net als in de eerdere zaak wijdt het ook uit over de positie van andere dan persinstanties, in dit geval dus een NGO, onder art. 10 EVRM (zie mijn noot bij de eerdere zaak onder punt 4-6). Voordat het Hof in paragraaf IV (overwegingen 157-180) de drempelvoorwaarden voor het recht op openbaarheid van informatie over het bestuur formuleert, heeft het veertig overwegingen nodig om uit te leggen waarom het deze draai in zijn jurisprudentie maakt. Het gaat om de materie van de 'dynamische verdragsinterpretatie', interpretatie in het licht van nieuwe ontwikkelingen 'ex post'. Laten we daar eerst even naar kijken. Het centrale probleem is dat artikel 10 in de tekst het hebben, ontvangen en doorgeven ('hold, receive, impart') van informatie zonder overheidsbelemmeringen beschermt, maar niet het actief vergaren ('to seek') zonder overheidsbelemmeringen, en daar gaat het nu juist om bij de openbaarheid van bestuur.

2. In de overwegingen 118-125 zet het Hof zijn beginselen van dynamische verdragsinterpretatie uiteen. Ik vat ze samen: de bewoordingen van het verdrag moeten volgens de algemene beginselen van verdragsuitleg naar hun alledaagse betekenis in de context van de bedoeling van de bepaling in het verdrag worden genomen. In overweging 119 heet dat 'ordinary meaning to be given to the words in their context and the light of the object and the purpose of the provision'. Daar zit dus nog wel ruimte tussen tekst en bedoeling. De uitleg moet de rechten praktisch toepasbaar en effectief maken (121). De uitleg moet kijken naar het internationale recht als geheel, zoals zich dat heeft ontwikkeld sinds het sluiten van dit verdrag (123). Het verdrag is echter ook een verdrag van Europese staten, zodat we dus ook moeten kijken naar de praktijk zoals die zich sinds het sluiten van het verdrag in de lidstaten heeft gevormd (124). Tenslotte is er de verdragsgeschiedenis (125). Het Hof gaat dit in de volgende overwegingen toepassen en bereikt daarbij de slotsom dat er naar huidige opvattingen onder voorwaarden een recht op openbaarheid valt te construeren. Wat het Hof doet gaat diametraal in tegen wat in het Amerikaanse recht heet de 'originalistische' richting, ook wel aangeduid als 'textualisme', waarvan de in 2016 overleden rechter Scalia een prominente vertegenwoordiger was (zie over 'textualism' in het algemeen en in relatie tot Scalia het essay van Herman Philipse in "Antonin Scalia's Textualism in philosophy, theology, and judicial interpretation of the Constitution" *Utrecht Law Review* vol 3, Issue 2 (December 2007), p. 1-24, www.utrechtlawreview.org). Dat is niet voorbijgegaan aan de twee jonge door IJsland en Denemarken voorgedragen rechters, wier dissenting opinion op die benadering is gebaseerd. Zij stellen vast dat in art. 10 EVRM gewoon niet staat dat het recht ook omvat 'to seek information'.

3. De beperkende randvoorwaarden voor een op art. 10 EVRM gebaseerd recht van openbaarheid van bestuur zijn in de overwegingen 157 e.v. opgenomen. De eerste is het doel van het informatieverzoek. Het verzoek moet staan in de sleutel van hetgeen wel in artikel 10 staat: het verzoek om informatie moet tot doel hebben om informatie te ontvangen en door te geven. Dit koppelt het Hof in overweging 159 aan zijn jurisprudentie dat er ook rechten en verantwoordelijkheden zijn, die voor journalisten inhouden dat zij te goeder trouw moeten handelen in overeenstemming met hun beroepsethiek (de journalistieke code). De tweede beperking is dat het moet gaan om informatie van publiek belang (161-162). De derde beperking is een verduidelijking van de eerste. Degene die informatie vraagt moet een rol hebben in het verspreiden van informatie van publiek belang. Net als in *Társaság* benadrukt het Hof dat het in de eerste plaats gaat om journalisten, maar niet tot die categorie is beperkt. Het somt verschillende 'social watch-dogs' op die daarmee op één lijn moeten worden gesteld (164 e.v.): NGO's, internet discussieplatforms, wetenschappers, auteurs die publiceren over informatie van openbaar belang (168). De vierde beperking is dat de gevraagde informatie aanwezig ('ready and available') moet zijn. Artikel 10 schept dus niet een positieve verplichting als overheid actief informatie aan te maken.

4. Van deze voorwaarden roepen de eerste in combinatie met de derde de meeste vragen op. Het verdrag kent rechten toe aan 'een ieder', ook in artikel 10. Het wringt om een recht 'to seek information' te koppelen aan categorieën van instellingen en personen, terwijl het recht om informatie te koesteren, te ontvangen en door te geven aan 'een ieder' toekomt. Moeilijk in de 'één lijnsredenering' is ook welke juridische en ethische eisen moeten worden gesteld aan andere categorieën dan de pers. De pers moet volgens de jurisprudentie van het Hof (die het uitvoerig in dit arrest citeert) immers 'te goeder trouw' handelen conform een journalistieke code. Die valt voor leden van wetenschappelijke gemeenschap nog wel te construeren, maar bij NGO's en internet platforms is dat veel problematischer. Tot dusver stelden de internetplatforms zich op het standpunt dat ze geen verantwoordelijkheid dragen voor de informatie die ze doorgeven. Dat is het tegengestelde van het nemen van verantwoordelijk-

heid voor de juistheid en het openbare belang van de doorgegeven informatie. Uit de *Delfi*zaak (EHRM 16 juni 2015 (*Delfi t. Estland*), *NJ* 2016/457 m.nt. E.J. Dommering) blijkt dat het Hof nog worstelt met deze materie. Bovendien is onduidelijk of het hier gaat om een 'Europees' begrip waarvan het EHRM in laatste instantie de inhoud vaststelt of een feitelijk begrip dat binnen de 'margin of appreciation' van de nationale autoriteiten valt.

5. Een andere vraag is de concretisering van 'ready and available'. Mijns inziens zou een criterium 'tegen redelijke kosten en inspanningen beschikbaar te maken' passender zijn, omdat overheden met dat 'ready and available' wel heel makkelijk kunnen wegkomen. In de zaak *Bubon t. Rusland* (EHRM 7 februari 2017, appl. 63898/09) gaf het Hof een toepassing van dit criterium: de gevraagde statistische informatie was niet beschikbaar en in wezen hield het verzoek van klager in dat de overheid gegevens moest bewerken en samenvatten voor gebruik van specifieke parameters. De overheid behoeft dus geen informatie te 'creëren'. Dat zou je zo kunnen opvatten dat informatie die er wel is, maar nog bij elkaar moet worden gezocht niet door deze beperking getroffen behoeft te worden. Maar er is natuurlijk een vloeiende lijn tussen beschikbare informatie bij elkaar halen en nieuwe informatie maken. Een punt dat daarbij ook in aanmerking moet worden genomen is de vraag in hoeverre het beschikbaar hebben van de informatie uit de overheidstaak voortvloeit (bijvoorbeeld een archief van beslissingen die de overheidsinstantie krachtens zijn taak neemt, vgl. EHRM 28 november 2013, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes t. Oostenrijk*, appl. 39534/07).

6. Nadat het Hof had vastgesteld dat het niet verstrekken van de gevraagde informatie in dit geval een inmenging in een door art. 10 EVRM gewaarborgd recht opleverde, moest worden onderzocht of de weigeringsgrond een noodzakelijke beperking in de zin van het verdrag oplevert. Interessant is de redenering waarmee het Hof het door de Hongaarse autoriteiten gedane beroep op privacybescherming verwerpt (194 e.v.): 'For the Court, the request for names (van de potentiële pro deo advocaten), although they constituted personal data, related predominantly to the conduct of professional activities in the context of public proceedings. In this sense, public defenders'professional activities cannot be considered to be a private matter.' Dat bevestigt mijn kritiek op het arrest van de Hoge Raad van 31 maart 2017, (zaak *Rabobank/Stichting Restschuld – RED*-, ECLI:NL:2017:HR:569), *NJ* 2017/238, m.nt E.J. Dommering (m.n. onder punt 7 van die noot), waar professionele activiteiten wel tot de privacy werden gerekend.

7. Wat betekent dit arrest voor de Nederlandse praktijk van openbaarheidsregels, met name de Wet Openbaarheid van Bestuur? De Afdeling Rechtspraak van de Raad van State heeft de in het verleden de Wob in abstracto getoetst aan art. 10 EVRM door aan te nemen dat de Wob een geoorloofde wettelijke beperking op art. 10 EVRM vormt, waarvan de weigeringsgronden noodzakelijk zijn in een democratische samenleving (voor de rechtspraak en analyse, zie E.J. Daalder a.w., p. 32-33). In een uitspraak van 22 februari 2017 (ECLI:NL:2017:RVS:498; *AB* 2017/147, m.nt. J. Tingen) heeft de Afdeling voor het eerst toepassing gegeven aan het onderhavige arrest. De verzoekers in die zaak wilden informatie uit politieregisters over een incestdader hebben, stellende dat zij de grootouders waren van kleinkinderen, slachtoffers van incest, en dat zij als 'klokkenluiders' daarover meer informatie dan waarvoor de bestaande openbaarheidsregels in Nederland voorzagen, naar buiten wilde brengen. De Afdeling wees dat verzoek af, omdat 'klokkenluiders' geen 'social watch-dogs' waren in de zin die het EHRM daaraan heeft toegekend. Door deze uitspraak ontstaat mijns inziens een bizarre situatie. De Wob schrijft niet voor dat je een belang moet hebben bij een verzoek, al is er de laatste tijd veel meer discussie over oneigenlijke wob verzoeken (zie E.J. Daalder a.w., p. 123). Wanneer je meer informatie wilt hebben dan de Wob toelaat, is de weg naar een rechtstreeks beroep op art. 10 volgens de hoogste nationale rechter afgesneden als je geen 'social watch-dog' bent. Wie een Wobtoepassing door een nationale instantie wil laten toetsen aan art. 10 EVRM zal dus moeten stellen en aannemelijk maken dat hij daar als 'social watchdog' een belang bij heeft.

8. Bij dit arrest verschenen verhelderende noten van M.M. Groothuis in *Mediaforum* 2017-2, p. 64-66 en T. Barkhuysen en M.L. van Emmerik in *AB* 2017/1.

E.J. Dommering