

## Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights

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Access to state-held information essential in a democratic society – Traditional reluctance of the European Court of Human Rights to apply Article 10 European Convention on Human Rights in access to information cases – Positive obligations and new perspectives: initiatives within the Council of Europe – Parallel with the Inter-American Court of Human Rights – *Sdružení Jihočeské Matky* decision of the European Court: the beginning of a new era?

### A FUNDAMENTAL RIGHT

The transparency of public administration is essential in a democratic society. Wide access to information on issues of general interest allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live. Access to information, therefore, is closely related to the freedom to hold opinions and to receive and impart information and ideas, guaranteed by Article 10 European Convention on Human Rights (ECHR). One could argue that a positive obligation for the State to supply relevant information and to give access to official documents regarding matters of public interest is inherent in that article. For many years, the European Court of Human Rights was reluctant to recognize this. However, there are indications that the Court's position is changing. A European right of access to information, connected with Article 10 ECHR, is drawing near.

A large majority of the 46 Council of Europe member states recognize a statutory right of access to state-held information.<sup>1</sup> Many of these states have incorporated freedom of information in their constitutions. For example, Article 110 of the Netherlands Constitution stipulates that an act of parliament must regulate

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<sup>1</sup> David Banisar, 'Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws', at <[www.freedominfo.org](http://www.freedominfo.org)>.

the principle of open government. Article 32 of the Belgian Constitution takes a step further by creating a right of access to any administrative document for everyone, subject only to restrictions prescribed by law.<sup>2</sup> In France, the Conseil d'État considered that the right of access to administrative documents is a 'fundamental guarantee, accorded to the citizens for the exercise of public freedoms in the sense of Article 34 of the Constitution.'<sup>3</sup> Many other examples could be added.

In the context of European Union law, access to information has the status of a common constitutional tradition. The right of access to EU documents also is guaranteed by Article 255 EC Treaty<sup>4</sup> and is confirmed by the Charter of Fundamental Rights (Nice, 7 December 2000), which is integrated in the Treaty establishing a Constitution for Europe (29 October 2004).<sup>5</sup> The main goal of the

<sup>2</sup> See also Arbitragehof [Court of Arbitration] 25 March 1997, no. 17/97, A.A. 1997, 203 and J.T. 1997, 476.

<sup>3</sup> Conseil d'État 29 April 2002, no. 228830 (Ullmann) and 13 Dec. 2002, no. 237203 (Gabriel X).

<sup>4</sup> See also Regulation (EC) 1049/2001 of the European Parliament and of the Council of 29 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ [2001] L 145/43, 31.5.2001. See furthermore Directive 2003/4/EC of the European Parliament and of the Council of 28 Jan. 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ [2003] L 41/26, 14.02.2003; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ [2003] L 156/17, 25.06.2003 and Regulation (EC) 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ [2006] L 264/13, 25.9.2006. Both the Court of First Instance and the Court of Justice have elaborated a substantial case-law on the matter of access to EU-documents, as, e.g., CFI, *Carvel v. Council*, Case T-194/94 [1995] ECR II-2765; CFI, *World Wildlife Fund v. Commission*, Case T-105/95 [1997] ECR II-313; CFI, *Van der Wal v. Commission*, Case T-83/96 [1998] ECR II-545; CFI, *Svenska Journalistförbundet v. Council*, Case T-174/95 [1998] ECR II-2289; CFI, *Rothmans v. Commission*, Case T-188/97 [1999] ECR II-2463; CFI, *Hautala v. Council*, Case T-14/98 [1999] ECR II-2489; CFI, *Kuijjer (I) v. Council*, Case T-188/98 [2000] ECR II-1959; CFI, *BAT v. Commission*, Case T-111/00 [2001] ECR II-2997; CFI, *Kuijjer (II) v. Council*, Case T-211/00 [2002] ECR II-7 Feb.; CFI, *Turco v. Council*, Case T-84/03 [2003] ECR II-24 Nov.; CFI, *IFAW v. Commission*, Case T-168/02 [2004] ECR II-30 Nov.; CFI, *Verein für Konsumenteninformation v. Commission*, Case T-2/03 [2005] ECR II-13 April and CFI, *Technische Glaswerke Ilmenau GmbH v. Commission*, Case T-237-02, 14 Dec. 2006; ECJ, *Van der Wal and Netherlands v. Commission*, Joined Cases C-174/98 P and C-189/98 P [2000] ECR I-1; ECJ, *Hautala v. Council*, Case C-353/99 P [2001] ECR I-9565 and ECJ, *Mattila v. Council and Commission*, Case C-353/01 P, 22 Jan. 2004.

<sup>5</sup> Art. I-9 of the Treaty establishing a Constitution for Europe states that the Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights, which constitutes part II of the Treaty. The Treaty itself shall enter into force only after it has been adopted by each of the signatory countries.

Charter is to reaffirm the fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the member states. Apart from a right of freedom of expression and information, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, laid down in Article 11 of the Charter (Article II-71 of the Treaty), Article 42 of the Charter (Article II-102 of the Treaty) provides that 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium.' This general right of access to documents of EU institutions, bodies, offices and agencies differs from the specific right of every person to have access to his or her file, enshrined in Article 41 of the Charter (Article II-101 of the Treaty) as part of the right to good administration.

On 21 February 2002, the Committee of Ministers of the Council of Europe adopted a Recommendation on access to official documents.<sup>6</sup> The Recommendation contains a set of principles to be used by member states in their law and practice. The key principle is formulated in Article III. Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. An applicant for an official document should not be obliged to give reasons for his request (Article V). Limitations of the right of access are possible, but they should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting a legitimate interest (Article IV). Article II deals with the scope of the recommendation, stating: 'This recommendation concerns only official documents held by public authorities. However, member states should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative bodies and judicial authorities.' Finally, Article XI of the Recommendation considers it a duty of a public authority 'at its own initiative and where appropriate, to take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.'<sup>7</sup> Hence, the Recommendation recognizes both an enforceable subjective right of the citizen to have access, *on request*, to official docu-

<sup>6</sup> Rec (2002) 2. The text of the Recommendation, including the Explanatory Memorandum, at <[www.coe.int/t/e/human\\_rights/media/4\\_documentary\\_resources](http://www.coe.int/t/e/human_rights/media/4_documentary_resources)>.

<sup>7</sup> The Explanatory Memorandum of the Recommendation also contains the provision that 'in order to allow easy access to official documents, the public authorities should provide the necessary consultation facilities, such as appropriate technical equipment, including that making use of new information and communication technology' (Art. X, Complementary measures).

ments and a positive obligation, a duty of the authorities, *on their own initiative*, to provide the public with relevant information in matters of public interest.

Recommendations are often the prelude to a treaty. Indeed, at their meeting on 3–4 May 2005, the Council of Europe Ministers' Deputies instructed the Steering Committee for Human Rights (CDDH) to prepare a legally binding instrument on access to official documents. The Steering Committee in their turn tasked the Group of Specialists on Access to Official Documents (DH-S-AC) with this activity. One of the first questions to be resolved concerned the legal form of the instrument. Should it be a self-standing convention or an additional protocol to an existing treaty? Should it be a traditional convention, fixing precise obligations for the parties, or a so-called 'framework convention' with programme-type provisions, setting out objectives which the parties undertake to pursue? And finally, should the new treaty provide for the possibility that member states accept (*à la carte*) some provisions and not others? In 2006, the Group of Specialists discussed a provisional text, with the advice of three civil society organizations: 'Access Info Europe', 'Article 19' and the 'Open Society Justice Initiative'.<sup>8</sup> The planning is that a traditional, self-standing, convention will be opened for signature in the second half of 2007.

## RELUCTANCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The right to freedom of expression in Article 10 ECHR not only protects the communicator – the person that expresses his opinion or imparts information – but explicitly refers to the right to 'receive' information and ideas.<sup>9</sup> The general public as potential receivers is also protected. The Strasbourg Court has repeatedly recognized 'the right of the public to be properly informed'<sup>10</sup> and 'the public's right to be informed of a different perspective'.<sup>11</sup> A systematic censorship of school-books implies, in the Court's view, a 'denial of the right to freedom of information'.<sup>12</sup> The Court considered 'that the public has a right to receive information as

<sup>8</sup> See <[www.access-info.org](http://www.access-info.org)>, <[www.article19.org](http://www.article19.org)> and <[www.justiceinitiative.org](http://www.justiceinitiative.org)>.

<sup>9</sup> Preventing a (legal) person from lawfully receiving transmissions of broadcasting programs is considered as an interference with the exercise of freedom of expression, as guaranteed by Art. 10 ECHR: ECtHR 22 May 1990, *Autronic AG v. Switzerland*, § 47.

<sup>10</sup> ECtHR 26 April 1979, *Sunday Times (n° 1) v. United Kingdom*, §§ 64–66 and ECtHR 29 Oct. 1992, *Open Door and Dublin Well Woman v. Ireland*, § 55. See also ECtHR 8 July 1986, *Lingens v. Austria*, § 41; ECtHR 25 June 1992, *Thorgeir Thorgeirson v. Iceland*, § 63; ECtHR 23 Sept. 1994, *Jersild v. Denmark*, § 31; ECtHR 25 Aug. 1998, *Hertel v. Switzerland*, §§ 47–49; ECtHR 25 June 2002, *Colombani v. France*, §§ 55 and 64; ECtHR 13 Feb. 2003, *Çetin and others v. Turkey*, § 64 and ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*, § 38.

<sup>11</sup> ECtHR 18 July 2000, *Sener v. Turkey*, § 46.

<sup>12</sup> ECtHR 10 May 2001, *Cyprus v. Turkey*, § 252.

a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest.' Nevertheless, the Court stopped short of accepting a duty for the public authorities to actively provide information to the public. In the cases *Leander v. Sweden*, *Gaskin v. United Kingdom* and *Guerra and others v. Italy*, the Court pointed out

that 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. That freedom 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.<sup>13</sup>

The words 'in circumstances such as those of the present case' suggest that there might be situations in which a positive obligation for the State does exist. In its case-law, however, the Court never established such a situation.<sup>14</sup> In its judgment of 15 June 2004 (*Sîrbu and others v. Moldova*), the Court made a sharp distinction between a right to receive information without interference from independent media on the one hand, and a right of access to state-held documents on the other. The Court considered that there had been no restriction of press freedom, 'since the applicants complained of a failure of the State to make public a Governmental decision concerning the military, the intelligence service and the Ministry of Internal Affairs.' Referring to its earlier case-law, the Court reiterated 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 disclose to the public any secret documents or information concerning its military, intelligence service or police.'<sup>15</sup> Again, the door was kept ajar to decide otherwise in future cases with different circumstances.

Thanks to the right to privacy, not all applicants were sent home empty-handed. As a matter of fact, Gaskin and Guerra did win their cases. The refusal by British

<sup>13</sup> ECtHR 9 Feb. 1998, *Guerra and others v. Italy*, § 53. Cf. ECtHR 26 March 1987, *Leander v. Sweden*, § 74; ECtHR 7 July 1989, *Gaskin v. United Kingdom*, § 52.

<sup>14</sup> In a decision of 7 April 1997 (*Grupo Interpres v. Spain*), the European Commission of Human Rights applied Art. 10 in a case concerning a refusal to allow a company free access to court archives for the purpose of obtaining information about potential borrowers. According to the Commission, Spain had not violated Art. 10 ECHR, because 'l'étendue du droit à l'accès aux informations en cause est limité par le libellé du paragraphe 2 de l'article 10 de la Convention.' In other words, Art. 10 was considered applicable, but the interference with the right to receive information was justified in the circumstances of the present case. This finding of an interference is obviously at variance with the reasoning of the European Court of Human Rights, considering Art. 10 not to be applicable in such cases: Decision European Commission of Human Rights 7 April 1997, 32849/96, *Grupo Interpres S.A. v. Spain*, D.R. 89, p. 150.

<sup>15</sup> ECtHR 16 June 2004, *Sîrbu and others v. Moldova*, § 18. See also, the decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston v. United Kingdom*.

childcare authorities to give Gaskin the information he had requested about his own childhood, without an adequate procedure, was considered to be a violation of Article 8 ECHR. Enabling people to understand their own childhood is closely connected with the right to respect for private life. It is easy to understand why the Court preferred to use Article 8 and not Article 10 in this case. Giving Gaskin the information he wanted has little to do with 'open government' and providing the public an 'adequate view of the state of society in which they live'. Moreover, access to official documents as a guarantee for democracy cannot be restricted to a specific group of persons. The right to be informed properly about matters of public interest is a right of 'everyone'. Mr. Gaskin, however, certainly would object if the British authorities had opened his personal files for view by every citizen. Information about one's childhood is a purely private matter. Gaskin had the right to know, but 'outsiders' did not.

Like Gaskin, Mrs. Guerra also successfully invoked Article 8 ECHR. The Italian government had failed to give sufficient information about certain health risks caused by a chemical factory in the area where she lived, and about evacuation plans in the event of an accident. Again, the Court decided that the State had violated a positive obligation inherent in Article 8.<sup>16</sup> Of course, health protection is an element of a person's private life, but one could argue that information about environmental risks is a matter of public interest as well and, therefore, relevant for a public debate. Indeed, the former European Commission of Human Rights was of the opinion that the passive attitude of the Italian authorities in that case was a violation of Article 10 ECHR.<sup>17</sup> However, as we have seen, the Court finally decided that Article 10 was not applicable. Sceptics concluded that a positive obligation to provide information could be deduced from this article only in theory. They remarked that the text of Article 10 reflects the character of a negative right, as appears from the words 'without interference by public authority'.

The sceptic view was corroborated by the Roche judgment in 2005, when the Court decided once more that a refusal to give information was a violation of Article 8, but not of Article 10 ECHR.<sup>18</sup> In Roche, the Grand Chamber of the

<sup>16</sup> For the sake of completeness, it should be noted that Art. 8 is not the only article to impose positive obligations on the State to give access to state-held information to specific persons. The same is true for Art. 6 ECHR. Refusal by national tribunals to give access to certain legal documents can jeopardize the right to a fair hearing in a civil or criminal procedure: ECtHR 9 June 1998, *Mc Ginley and Egan v. United Kingdom*, §§ 84-90. Cf. ECtHR 2 Feb. 1984, *Sutter v. Switzerland*; ECtHR 28 June 1984, *Campbell and Fell v. United Kingdom*; ECtHR 24 Nov. 1997, *Werner v. Austria*; ECtHR 24 April 2001, *B. and P. v. United Kingdom*; ECtHR 28 Sept. 2004, *Loiseau v. France* and ECtHR 7 Feb. 2006, *Donnadieu (no. 2) v. France*.

<sup>17</sup> European Commission of Human Rights 29 June 1996, *Guerra v. Italy*, § 49.

<sup>18</sup> ECtHR 19 Oct. 2005, *Roche v. United Kingdom*, §§ 172-173.

Court referred to the Leander, Gaskin and Guerra judgments and saw no reason 'not to apply this established jurisprudence'.

However, there are a few developments and perspectives as to why the 'established jurisprudence' of the European Court of Human Rights in the future might find a new approach regarding the application of Article 10 of the Convention and the right of access to public documents.

#### POSITIVE OBLIGATIONS AND NEW PERSPECTIVES

Since 2000, there can be no doubt that at least some positive obligations are inherent in Article 10 ECHR. In *Özgür Gündem v. Turkey*, police authorities had remained passive when a controversial newspaper suffered from physical attacks, including killings, assaults and arson, by private persons. The Court concluded 'that the Government have failed, in the circumstances, to comply with their positive obligation to protect Özgür Gündem in the exercise of its freedom of expression.'<sup>19</sup> In other judgments, the Court considered that Article 10 required positive measures of protection in contractual relations between individuals.<sup>20</sup> More generally, Alastair Mowbray, referring to the writings of Shue, states that *all* basic rights in the European Convention involve both negative and positive duties, although the specific balance between both categories will vary according to the particular right at issue. Even apparently 'negative rights', such as the prohibition of torture contained in Article 3, can embody significant positive obligations (e.g., to take vulnerable children into public care to protect them from abuse by their parents).<sup>21</sup>

Legislative initiatives within the Council of Europe, directed at strengthening the right of access to official documents, will stimulate the Court to accept that a positive obligation exists to provide relevant information to the general public. In its jurisprudence, the Court acknowledges that Recommendations by the Committee of Ministers of the Council of Europe can be relevant for the interpretation of the Convention.<sup>22</sup> True, the Recommendation on access to official documents

<sup>19</sup> ECtHR 16 March 2000, *Özgür Gündem v. Turkey*, § 46.

<sup>20</sup> ECtHR 29 Feb. 2000, *Fuentes Bobo v. Spain*, § 38. Cf. ECtHR 28 June 2001, *Verein gegen Tierfabriken v. Switzerland*, § 45 and ECtHR 6 May 2003, *Appleby v. United Kingdom*, § 39.

<sup>21</sup> A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing 2004) p. 108-109.

<sup>22</sup> See, e.g., ECtHR 9 May 2003, *Tepo v. Turkey*, § 181, referring to Recommendation No. R (99) 3 on the Harmonization of Medico-Legal Autopsy Rules (2 Feb. 1999) and ECtHR 10 Nov. 2005, *Leyla Şahin v. Turkey*, § 136, referring to Recommendation No. R (98) 3 on Access to Higher Education (17 March 1998). The latter judgment also referred to a recommendation by the Parliamentary Assembly of the Council of Europe, Rec. No. 1353 (1998) on the Access of Minorities to Higher Education (27 Jan. 1998). See also ECtHR 9 Nov. 2006, *Leempoel & SA Cine Revue v.*

of 21 February 2002 did not have any influence on the Roche judgment of 19 October 2005, in which the Court denied applicability of Article 10 to a refusal to give access to information.<sup>23</sup> However, an explanation could be that the information requested by Mr Roche was directly relevant for his personal health, which brings the matter essentially into the ambit of Article 8. Indeed, the Court decided that Article 8 had been violated. If the Recommendation on access to official documents is to be followed by a binding Treaty in 2007 or in 2008, the arguments for changing the Guerra approach would gain strength. After all, the Convention is a living instrument that has to be interpreted in the light of present day conditions. As the Grand Chamber of the European Court of Human Rights has stated in 2002:

While the Court is not formally bound to follow its previous judgments, 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 (...). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (...). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement.<sup>24</sup>

The Strasbourg Court also could draw inspiration from its American counterpart, the Inter-American Court of Human Rights. On 19 September 2006, the Inter-American Court issued judgment in the case *Claude Reyes and others v. Chile*, concerning a refusal to give access to information.<sup>25</sup> Three environmental activists had requested information relating to the approval of a major logging project.

*Belgium*, § 78, referring to a resolution of the Parliamentary Assembly of the Council of Europe: Resolution 1165 (1998) on the right of privacy (24 June 1998). In its case-law, the Court also regularly referred to other international instruments, treaties or EU-directives, as, e.g., in ECtHR *Müller and Others v. Switzerland*, 24 May 1988, § 27; ECtHR *Groppera Radio v. Switzerland*, 28 March 1990, § 61; ECtHR *Autronic v. Switzerland*, 22 May 1990, §§ 62-63; ECtHR *Jersild v. Denmark*, 23 Sept. 1994, §§ 27 and 30-31; ECtHR *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, § 65; ECtHR *Nikula v. Finland*, 21 March 2002, §§ 27-28; ECtHR *A. v. UK*, 17 Dec. 2002, §§ 33-36 and 81; ECtHR *Müslüm Gündüz v. Turkey*, 4 Dec. 2003, §§ 22-24 and 40 and ECtHR *Murphy v. Ireland*, 10 July 2003, §§ 32 en 81.

<sup>23</sup> ECtHR 19 Oct. 2005, *Roche v. United Kingdom*, §§ 172-173.

<sup>24</sup> ECtHR 11 June 2002, *Christine Goodwin v. United Kingdom*, § 74.

<sup>25</sup> Inter-American Court of Human Rights 19 Sept. 2006, *Claude Reyes and others v. Chile*, at <www.corteidh.or.cr>.



At the time, Chile had no statute guaranteeing access to information and the authorities simply ignored the request. Before the Inter-American Court, the applicants relied on Article 13 of the Inter-American Convention on Human Rights, protecting – among other things – the freedom to seek and receive information.<sup>26</sup> The Inter-American Court unanimously found a violation of this article, stating ‘that Article 13 of the Convention protects the rights of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.’<sup>27</sup> The restrictions regime of Article 13 closely resembles that of ‘our’ Article 10 ECHR: a restriction must be prescribed by law and be necessary for a legitimate aim. Interestingly, the Inter-American Court stressed the connection between the right of access to information held by the State and democracy.<sup>28</sup>

<sup>26</sup> It should be noted that, in contrast with Art. 10 ECHR and similar to Art. 19 ICCPR, the right guaranteed by Art. 13 of the American Convention on Human Rights (ACHR) also includes the freedom ‘to seek’ information and ideas, apart from the right to impart and receive information and ideas. Art. 13.1 ACHR states: ‘Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.’ Art. 13.3. ACHR guarantees that ‘the right of expression may not be restricted by indirect methods or means (...) or by any other means tending to impede the communication and circulation of ideas and opinions’, see <www.oas.org>. This difference in wording between Art. 13 ACHR and Art. 10 ECHR however is not substantial. In recent case-law, the ECtHR has recognized that Art. 10 ECHR also includes the right to seek information. The Court, e.g., considered an interference with the right of a journalist to gather and to investigate information under the scope of Art. 10 ECtHR. The Court noted that the case did not concern the restraining of a publication as such or a conviction following a publication, but a preparatory step towards publication, namely a journalist’s research and investigative activities. The Court emphasized that this phase also fell within its scrutiny and even called for the most scrupulous examination on account of the great danger represented by that sort of restriction on the freedom of expression. In the original wording of the Court, the protection of Art. 10 implies ‘les activités de recherche et d’enquête d’un journaliste. A ce titre, il y a lieu de rappeler que non seulement les restrictions à la liberté de la presse visant la phase préalable à la publication tombent dans le champ du contrôle par la Cour, mais qu’elles présentent même des grands dangers et, dès lors, appellent de la part de la Cour l’examen le plus scrupuleux’, ECtHR 25 April 2006, *Dammann v. Switzerland*, § 52, see <www.echr.coe.int>. A right to seek information is also recognized in the Declaration on the freedom of expression of the Committee of Ministers of the Council of Europe, 29 April 1982, in which reference is made to the right of everyone ‘regardless of frontiers, to express himself, to seek and receive information and ideas, whatever their source, as well as to impart them under the conditions set out in Article 10 of the European Convention on Human Rights’, <www.coe.int/t/e/human\_rights/media>.

<sup>27</sup> In § 77, the Court considered: ‘la Corte estima que el artículo 13 de la Convención (...) protege el derecho que tiene toda persona a solicitar el acceso a la información bajo el control del Estado, con las salvedades permitidas bajo el régimen de restricciones de la Convención.’

<sup>28</sup> § 84-87. In § 86 the Court considered: ‘El acceso a la información bajo el control del Estado, que sea de interés público, puede permitir la participación en la gestión pública, a través del control social que se puede ejercer con dicho acceso.’

## THE SDRUŽENI JIHOČESKÉ MATKY DECISION

On 10 July 2006, the European Court of Human Rights gave an admissibility decision in the case *Sdružení Jihočeské Matky v. Czech Republic*.<sup>29</sup> The case concerned a refusal to give an ecologist Non-Governmental Organisation access to documents and plans regarding a nuclear power station. Although the Court decided that there had not been a breach of Article 10, it explicitly recognized that the refusal by the Czech authorities was an interference with the right to receive information. Hence, the refusal had to meet the conditions set forth in Article 10 § 2. The Court declared the application manifestly ill founded, because the criteria in § 2 had been met. It considered that the Czech authorities had motivated their refusal in a pertinent and sufficient way. Next, the refusal was justified for the protection of the rights of others (industrial secrets), in the interest of national security (risk of terrorist attacks) and for the protection of health. The Court also emphasized that the request to have access to essentially technical information about the nuclear power station did not reflect a matter of public interest. For us, the crucial point however is the fact that Article 10 was considered to be applicable in the first place.

The relevant passage in the decision reads as follows:

In its judgments *Guerra and others vs. Italy* (judgment of 19 February 1998, Reports of Judgments and Decisions 1998-I, § 53), concerning the absence of information for the population on the health risks they might run and on the measures to be taken in the event of an accident in an adjacent chemical factory, and *Roche vs. United Kingdom* ([GC], no. 32555/96, § 172, ECHR 2005-...), referring to the absence of any procedure of access to information that might enable the applicant to evaluate the health risks resulting from his participation in military tests, the Court concluded that the afore-said freedom ‘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’. The Court equally observes that it is difficult to derive from the Convention a general right of access to administrative data and documents (*see, mutatis mutandis, Loiseau vs. France* (decision), no. 46809/00, ECHR 2003-XII (extracts)).

<sup>29</sup> Decision ECtHR 10 July 2006, 19101/03, *Sdružení Jihočeské Matky v. Czech Republic*. The name of the applicant can be translated as ‘South Bohemian Mother Association’. Sdružení Jihočeské Matky is established in České Budejovice. It is a non-political civil association whose mission it is to protect nature and the countryside. The association supports the enforcement of alternative methods of acquiring energy that are less of a burden to the environment and, above all, to limit the excessive consumption of energy by looking at ways of saving it. The association also attempts to act as a counter-balance to what it considers ‘the one-sided nuclear lobby campaign enforcing the completion of the Temelín Nuclear Power Plant’: <[www.jihoceskematky.cz/en/index.php](http://www.jihoceskematky.cz/en/index.php)>.

In the present case, the applicant requested permission to consult administrative documents which were at the disposal of the authorities and to which citizens could have access under the conditions prescribed by Article 133 of the Construction Act, contested by the applicant. Under these circumstances, the Court recognizes that the rejection of the afore-said request constituted an interference with the right of the applicant to receive information (*see, mutatis mutandis, Grupo Interpres S.A. vs. Spain*, no. 32849/96, decision of the Commission of 7 April 1997, Decisions and Reports 89, p. 150).<sup>30</sup>

## LOOKING AHEAD

Is *Sdruženi Jihočeské Matky* the beginning of a new era? The Court does not pay much attention to the difference with its earlier case-law. There could be a simple explanation for the fact that Article 10 was applicable this time, in contrast with the *Guerra* and *Roche* judgments. Maybe ‘the circumstances of the present case’ were decisive. In the passage, quoted above, the Courts mention three characteristics of the *Sdruženi Jihočeské Matky* case.

- The applicant organization had filed a request. The refusal of a request for information indeed is not the same as the failure by the authorities to spread information *motu proprio*. In the *Guerra* judgment and in the *Roche* judgment, the Court explicitly stated that the freedom guaranteed by Article 10 cannot be construed as imposing on a State positive obligations to collect and disseminate information of ‘its own motion’.<sup>31</sup> The *Sdruženi Jihočeské Matky*

<sup>30</sup> Our translation. The original French version reads:

‘Dans ses arrêts *Guerra et autres c. Italie* (arrêt du 19 février 1998, Recueil des arrêts et décisions 1998-I, § 53), concernant l’absence d’informations de la population sur les risques encourus et sur les mesures à prendre en cas d’accident dans une usine chimique du voisinage, et *Roche c. Royaume-Uni* ([GC], n° 32555/96, § 172, CEDH 2005-...), portant sur l’absence de toute procédure d’accès à des informations qui auraient permis au requérant d’évaluer les risques pour sa santé pouvant résulter de sa participation à des tests militaires, la Cour a conclu que ladite liberté « ne saurait se comprendre comme imposant à un Etat, dans des circonstances telles que celles de l’espèce, des obligations positives de collecte et de diffusion, *motu proprio*, des informations ». La Cour observe également qu’il est difficile de déduire de la Convention un droit général d’accès aux données et documents de caractère administratif (voir, *mutatis mutandis, Loiseau c. France* (déc.), n° 46809/99, CEDH 2003-XII (extraits)). En l’occurrence, la requérante a demandé de consulter des documents administratifs qui étaient à la disposition des autorités et auxquels on pouvait accéder dans les conditions prévues par l’article 133 de la loi sur les constructions, contesté par la requérante. Dans ces conditions, la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations’ (voir, *mutatis mutandis, Grupo Interpres S.A. c. Espagne*, no. 32849/96, décision de la Commission du 7 avril 1997, Décisions et rapports 89, p. 150).

<sup>31</sup> ECtHR 9 Feb. 1998, *Guerra and others v. Italy*, § 53 and ECtHR 19 Oct. 2005, *Roche v. United Kingdom*, §§ 172-173. *See also* ECtHR 16 June 2004, *Sîrbu and others v. Moldova*.

decision explicitly refers to this established jurisprudence of the Court as not willing to derive from Article 10 an obligation of the State to provide information to the public *motu proprio*. It is to be underlined however that in other judgments and decisions of the Court, Article 10 has been declared inapplicable also in cases where the applicant had requested information or had sought access to personal records.<sup>32</sup> In the *Sdružení Jihočeské Matky* decision, the Court, by clearly emphasizing the circumstance that the applicant had filed a request to have access to administrative documents, upgraded this circumstance to a relevant, if not decisive, element in order to make Article 10 applicable.

- The information was contained in administrative documents held by the public authorities. Therefore, the authorities did not need to collect, even less create, the information requested by the applicant.
- Unlike the applicant, other citizens had or could have access to the information, under the conditions prescribed by the Czech legislation.<sup>33</sup>

In the *Sdružení Jihočeské Matky* decision, the Court firmly puts forward that under such circumstances a refusal to provide a citizen or a legal person with the requested administrative documents must be in accordance with Article 10 of the Convention.

The *Sdružení Jihočeské Matky* decision also makes clear that the right to have access to public documents cannot be an absolute one: ‘as the exercising of the right to receive information can damage the right of others, the security of the state or the public health, the scope of the right to have access to the relevant information is limited by the wording of the second paragraph of Article 10 of the Convention.’<sup>34</sup> This approach brings the evaluation of a refusal of the right of access to public documents within the scope of the conditions set forth in Article 10 § 2 of the Convention, which implies that such a refusal must be prescribed by law, be based on a legitimate aim and especially must be necessary in a democratic society. Referring to the case-law of the Strasbourg Court, this means that when

<sup>32</sup> Decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston v. United Kingdom*. See also ECtHR 26 March 1987, *Leander v. Sweden* and ECtHR 7 July 1989, *Gaskin v. United Kingdom*, § 52.

<sup>33</sup> Notice that the request by *Sdružení Jihočeské Matky* did not concern personal data or personal records regarding the applicants themselves, like in some other cases where the Court considered, ‘under such circumstances’ Art. 10 not applicable: ECtHR 26 March 1987, *Leander v. Sweden*; ECtHR 7 July 1989, *Gaskin v. United Kingdom*; Decision ECtHR 18 May 2004, 42841/02, *Stephen Eccleston v. United Kingdom* and ECtHR 19 Oct. 2005, *Roche v. United Kingdom*.

<sup>34</sup> Our translation. The original French version reads: ‘En effet, lorsque l’exercice du droit à recevoir des informations peut porter atteinte aux droits d’autrui, à la sûreté publique ou à la santé, l’étendue du droit à l’accès aux informations en cause est limitée par le libellé du paragraphe 2 de l’article 10 de la Convention.’

the requested documents are related to a matter of public interest, a matter of serious public concern or an ongoing political debate, the states will be under a strict scrutiny as to whether the reasons invoked to refuse a request for access to such documents were relevant and sufficient.<sup>35</sup>

It is important that, for the first time, the European Court of Human Rights actually applied Article 10 ECHR in an access to information case. Hopefully, further steps will follow. The material provisions of the future treaty on access to information, currently under discussion in the Council of Europe, therefore can be important guidelines. It is probable that this treaty will establish a monitoring system of its own. A traditional mechanism of follow-up is to confer the monitoring task on a committee of experts representing the States. Typically, these experts only have the power to make recommendations. For a human right essential in a democratic society, that is not sufficient. The national authorities and domestic courts directly applying the European Convention on Human Rights, and if need be the European Court of Human Rights, should fill the gap by judging individual complaints under Article 10 ECHR.<sup>36</sup> The Inter-American Court of Human Rights in 2006 has set a good example.



<sup>35</sup> ECtHR 16 Nov. 2004, *Selistö v. Finland*; ECtHR 16 Nov. 2004, *Karhuvaara en Iltalehti v. Finland*; ECtHR 29 March 2005, *Ukrainian Media Group v. Ukraine*; ECtHR 27 July 2005, *Grimberg v. Russia*; ECtHR 6 Sept. 2005, *Salov v. Ukraine*; ECtHR 31 Jan. 2006, *Giniewski v. France*; ECtHR 25 April 2006, *Stoll v. Switzerland*; ECtHR 25 April 2006, *Dammann v. Switzerland*; ECtHR 2 May 2006, *Aydin Tatlav v. Turkey*; ECtHR 4 May 2006, *Alinak v. Turkey*; ECtHR 6 June 2006, *Erbakan v. Turkey*; ECtHR 10 Aug. 2006, *Lyaskho v. Ukraine*; ECtHR 21 Sept. 2006, *Monnat v. Switzerland*; ECtHR 5 Oct. 2006, *Zakharov v. Russia*; ECtHR 7 Nov. 2006, *Mamère v. France*; ECtHR 14 Dec. 2006, *Karman v. Russia*; ECtHR 19 Dec. 2006, *Radio Twist, SA v. Slovakia* and ECtHR 19 Dec. 2006, *Dabrowski v. Poland*.

<sup>36</sup> Actually pending before the ECtHR is application No. 11721/04, in *Geraguyin Khorhurd Patgamavorakan Akumb v. Armenia*. This case involves the alleged failure of an Armenian election authority to provide to the applicant organization information related to its decision-making processes, as well as data regarding the campaign contributions and expenses of certain political parties. The basic legal issue raised by the case is whether Art. 10 of the Convention grants individuals and other persons a general right of access to information held by public authorities.