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„Implementation of the best European practices with the aim of strengthening the institutional capacity of the Apparatus of the Ukrainian Parliament Commissioner for Human Rights to protect human rights and freedoms (Apparatus)“

TRAINING PROGRAMME

Violations by information processors (providers) of the requirements of the Law of Ukraine on Access to Public Information

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CONTENT

1. TRAINING CURRICULUM

VIOLATIONS BY INFORMATION PROCESSORS (PROVIDERS) OF THE REQUIREMENTS OF THE LAW OF UKRAINE ON ACCESS TO PUBLIC INFORMATION

TITLE	FORM
VIOLATIONS BY INFORMATION PROCESSORS (PROVIDERS) OF THE REQUIREMENTS OF THE LAW OF UKRAINE ON ACCESS TO PUBLIC INFORMATION	**WORKSHOP**

PREREQUIREMENTS FOR THE PARTICIPANT (if such)
The trainings on the basics of the human rights.

Goals of the trainings	Methods
1. Increase participants' understanding of the basic concepts and principles of freedom of information.	Discussion, verbal questioning.
2. Participant will gain knowledge and skills how to prevent violations by information processors (providers) of the requirements of the law of ukraine on access to public information. Explain the process for applying exceptions to the general principle of access to information.	Problem solving tasks, case-solving tasks, verbal questioning, group discussion.
3. Participant will gain skills how to apply the acquired knowledge to specific cases and situations related with right of access to information.	Problem solving tasks, case-solving tasks, verbal questioning, group discussion.

Themes	Tasks	Techniques
1. Right of access to information in Ukraina.		
2. The principle of maximum disclosure. The exceptions to public access to Information.	Critical analysis; answering open-ended questions; solving practical cases.	Presentation, arguments „pros“ and „cons“, group discussions, brainstorming, case study, work in groups, training, based on practical content.
3. Right of access to information versus other rights in the recent case law of the European Court of Human Rights.	Case law analysis; answering open-ended questions.	Presentation, flip chart, arguments „pros“ and „cons“, group discussions, brainstorming, case study, training, based on practical content.

List of relevant EU legislation/List of relevant Council of Europe legislation

1. Basic documents
1. Treaty on the Functioning of the European Union (TFEU) (Article 15).
2. Charter of Fundamental Rights of the European Union (Article 42).
3. Council of Europe Convention on Access to Official Documents.
4. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
5. Detailed Rules on the Application of Regulation 1049/2001 (Commission Decision of 5 December 2001 amending its rules of procedure, 2001/937/EC, ECSC, Euratom).
6. Rules of Procedure of the Commission (consolidated version) (C(2000) 3614).
7. Commission Decision of 25 November 2014 on the publication of information on meetings held between Directors-General of the Commission and organisations or selfemployed individuals (2014/838/EU, Euratom).
8.Council Decision of 1 December 2009 adopting the Council's Rules of Procedure (2009/937/EU).
9.European Council Decision of 1 December 2009 adopting its Rules of Procedure (2009/882/EU).
10. Summary of procedures applicable for the handling of initial and confirmatory applications for public access to documents of the Council and the European Council and for approval of replies to related Ombudsman inquiries (6896/1/17 REV 1).
11. Rules of Procedure of the European Parliament (Rules 115-116).
12.European Parliament Bureau decision of 28 November 2001 on public access to European Parliament documents.

13. European Parliament Bureau decision of 8 March 2010 adopting a list of the categories of documents directly accessible via the public register (PE 439.615/BUR).
14. Guide to the obligations of officials and other servants of the European Parliament, Code of conduct adopted by the Bureau on 7 July 2008.
15. European Parliament resolution of 14 September 2017 on transparency, accountability
and integrity in the EU institutions (2015/2041(INI)).
16. Decision of the Court of Justice of the European Union of 11 December 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).
17. Decision of the European Ombudsman on internal procedures for dealing with applications for public access to documents and requests for information.
18. Decision No 12/2005 of the Court of Auditors of the European Communities of 10 March 2005 regarding public access to Court documents (2009/C 67/01).
19. Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3).
20. European Parliament Decision of 11 May 2011 on conclusion of an interinstitutional agreement between the European Parliament and the Commission on a common Transparency Register with Annex (2010/2291(ACI)).
22. European Parliament Decision of 15 April 2014 on the modification of the interinstitutional agreement on the Transparency Register (2014/2010(ACI)).
2. Reports and analysis
23. Annual reports from the Commission on the application in 2012 of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents.
24. Fifteenth annual report of the Council on the implementation of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (7709/1/17REV 1).
25. Fourteenth annual report of the Council on the implementation of Regulation (EU) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (9308/16) 29. Annual reports of the European Parliament on Public Access to Documents.
3. Selected case-law
26. Judgment of the Court of 7 September 2017, *French Republic v Carl Schlyter*, C-331/15 P, ECLI:EU:C:2017:639.
27. Judgment of the General Court of 16 April 2015, *Carl Schlyter v European Commission*, T-402/12, ECLI:EU:T:2015:209.
28. Judgment of the Court of Justice of 18 July 2017, *Commission v Patrick Breyer*, C-213/15 P, ECLI:EU:C:2017:563.

29. Judgment of the General Court of 27 February 2015, *Breyer v Commission*, T-188/12, ECLI:EU:T:2015:124.
30. Judgment of the Court of Justice of 11 May 2017, *Kingdom of Sweden v European Commission*, C-562/14 P, ECLI:EU:C:2017:356
31. Judgment of the General Court of 25 September 2014, *Darius Nicolai Spirlea and Mihaela Spirlea v European Commission*, T-306/12, ECLI:EU:T:2014:816.
32. Judgment of the European Court of Human Rights of 14 July 2009, *TÁRSASÁG A SZABADSÁGJOGOKÉRT v. HUNGARY* (Application no. 37374/05).4
33. Judgment of the European Court of Human Rights of 24 June 2014, *ROŞIIANU v. ROMANIA* (Application no. 27329/06) (in French).
34. *ClientEarth* Cases (i.e. T-424/14 - ClientEarth v Commission).
35. *Philip Morris* Cases (T-18/15 Philip Morris v Commission; T-520/13 *Philip Morris Benelux v Commission*; T-796/14 Philip Morris v Commission; T-800/14 *Philip Morris v Commission*; C-520/13 *Philip Morris Benelux v Commission*).
36. Judgment of the General Court of 15 July 2015, *Gert-Jan Dennekamp v European Parliament*, T-115/13, ECLI:EU:T:2015:497.
37. Judgment of 21 July 2011, *Kingdom of Sweden v European Commission and MyTravel Group plc.*, C-506/08 P, ECLI:EU:C:2011:496.
38. Judgment of the Court of First Instance of 9 September 2008, *MyTravel Group plc v Commission of the European Communities*, T-403/05, ECLI:EU:T:2008:316.
39. Judgment of the Court of Justice of 12 May 2011, *Polska Telefonia Cyfrowa sp. z o.o. v Prezes Urzędu Komunikacji Elektronicznej*, C-410/09, ECLI:EU:C:2011:294.
40. Judgment of the Court of Justice of 21 September 2010, *Kingdom of Sweden v Association de la presse internationale ASBL (API)*, C-514/07 P, C-528/07 P and C-532/07 P, ECLI:EU:C:2010:541.
41. Judgment of the General Court of 12 September 2013, *Leonard Besselink v Council of the European Union*, T-331/11, ECLI:EU:T:2013:419.
42. Judgment of the Court of Justice of 17 October 2013, *Council of the European Union v Access Info Europe*, C-280/11 P, ECLI:EU:C:2013:671.
43. Judgment of the General Court of 22 March 2011, *Access Info Europe v Council of the European Union*, T-233/09, ECLI:EU:T:2011:105.
44. Judgment of the Court of Justice of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, C-514/11 P and C-605/11 P, ECLI:EU:C:2013:738.
45. Judgment of the General Court of 9 September 2011, *Liga para Protecção da Natureza (LPN) v European Commission*, T-29/08, ECLI:EU:T:2011:448.
44. Judgment of the Court of Justice of 2 October 2014, *Guido Strack v European Commission*, C-127/13 P, ECLI:EU:C:2014:2250.
45. Judgment of the General Court of 15 January 2013, *Guido Strack v European Commission*, T-392/07, ECLI:EU:T:2013:8 (in French and German).
46. Judgment of the Court of First Instance of 18 December 1992, *Cimenteries CBR and Others v Commission*, T-10/92 and T-11/92, ECLI:EU:T:1992:123.

47. Judgment of the General Court of 9 September 2014, *MasterCard and Others v Commission*, T-516/11, ECLI:EU:T:2014:759.
48. Judgment of the General Court of 12 June 2014, *Intel v Commission*, T-286/09, ECLI:EU:T:2014:547.
49. Judgment of the General Court of 20 March 2014, *Reagens v Commission*, T-181/10, ECLI:EU:T:2014:139.
50. Judgment of the Court of Justice of 27 February 2014, *Commission v EnBW Energie Baden-Württemberg*, C-365/12 P, ECLI:EU:C:2014:112.
51. Judgment of the General Court of 13 September 2013, *Netherlands v Commission*, T-380/08, ECLI:EU:T:2013:480.
52. Order of the Vice-President of the Court of Justice of 10 September 2013, *Commission v Pilkington Group*, C-278/13 P(R), ECLI:EU:C:2013:558.
53. Judgment of the Court of Justice of 6 June 2013, *Donau Chemie and Others*, C-536/11, ECLI:EU:C:2013:366.
54. Order of the President of the General Court of 11 March 2013, *Pilkington Group v Commission*, T-462/12 R, ECLI:EU:T:2013:119.
55. Judgment of the General Court, 19 March 2013, *Sophie in 't Veld v European Commission*, T-301/10, ECLI:EU:T:2013:135.
56. Judgment of the Court, 3 July 2014, *Council of the European Union v Sophie in 't Veld*, C-350/12 P, ECLI:EU:C:2014:2039.
57. Judgment of the General Court of 22 May 2012, *EnBW Energie Baden-Württemberg v Commission*, T-344/08, ECLI:EU:T:2012:242.
58. Judgment of the General Court, 4 May 2012, *Sophie in 't Veld v Council of the European Union*, T-529/09, ECLI:EU:T:2012:215.
59. Judgment of the Court of Justice of 25 October 2011, *Solvay*, C-110/10 P, ECLI:EU:C:2011:687
60. Judgment of the General Court of 16 June 2011, *Heineken Nederland and Heineken v Commission*, T-240/07, ECLI:EU:T:2011:284.
61. Judgment of the Court of Justice of 14 June 2011, *Pfleiderer*, C-360/09, ECLI:EU:C:2011:389.
62. Judgment of the Court of Justice of 1 July 2010, *Knauf Gips*, C-407/08 P, EU:C:2010:389.
63. Judgment of the Court of Justice of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374.
64. Judgment of the Court of Justice of 14 February 2008, *Varec*, C-450/06, ECLI:EU:C:2008:91.
65. Judgment of the Court of Justice of 13 July 2006, *Manfredi*, C-295/04 to 298/04, ECLI:EU:C:2006:461.
66. Judgment of the Court of Justice of 7 January 2004, *Aalborg Portland*, C-204/00 P (joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P), ECLI:EU:C:2004:6.
67. Judgment of the Court of Justice of 20 September 2001, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465.

68. Judgment of the Court of Justice of 24 June 1986, *AKZO Chemie v Commission*, C-53/85, ECLI:EU:C:1986:256.
69. Judgment of the European Court of Human Rights of 17 February 2015, *Guseva v Bulgaria* (Application No. 6987/07).
70. Judgment of the European Court of Human Rights of 8 November 2016, Magyar Helsinki Bizottság v. Hungary (Application No. 18030/11).

2. WORKING PLAN OF THE WORKSHOP

VIOLATIONS BY INFORMATION PROCESSORS (PROVIDERS) OF THE REQUIREMENTS OF THE LAW OF UKRAINE ON ACCESS TO PUBLIC INFORMATION

Time:	Theme	Duration in minutes	Activities
9:00–10:45 - First Session:			
9:00 - 9:30	INTRODUCTORY NOTES. CONTENT AND SCOPE OF THE WORKSHOP. RIGHT OF ACCESS TO INFORMATION. RIGHT OF ACCESS TO INFORMATION IN UKRAINA.	30	Lecturers' introductory notes; Short introduction of every participant and presentation of his expectations; Presentation of the scope and content of the workshop; Presentation of the examples illustrating the topic.
9:30 - 10:45	THE PRINCIPLE OF MAXIMUM DISCLOSURE. THE EXCEPTIONS TO PUBLIC ACCESS TO INFORMATION.	75	Presentation of the issues related to the implementation of principle of maximum disclosure and exceptions to public access to information.
10:45 - 11:15	Break		
11:15-13:30 - Second Session:			
11:15 - 12:30	RIGHT OF ACCESS TO INFORMATION VERSUS OTHER RIGHTS IN THE RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS.	75	Presentation of the issues related to the implementation of European standards. Analyzing practical examples and group discussion.
12.30 - 13:00	THE RESULTS OF THE CASE SOLVING AND DISCUSSION, SUMMARY OF THE WORKSHOP, FINAL QUESTIONS, CLOSING	30	Presentation with summary of the main points. Group discussion; questions-answers.

	REMARKS.		
13.00-13.30	EVALUATION OF THE WORKSHOP AND DISTRIBUTION OF THE CERTIFICATES	30	Collecting feedback.

3. GUIDELINES FOR TRAINERS

VIOLATIONS BY INFORMATION PROCESSORS (PROVIDERS) OF THE REQUIREMENTS OF THE LAW OF UKRAINE ON ACCESS TO PUBLIC INFORMATION

I. INTRODUCTORY NOTES. CONTENT AND SCOPE OF THE WORKSHOP

1. The importance of the right to access information held by public bodies, sometimes referred to as the right to know, has been recognised in Sweden for over 200 years. Importantly, however, over the last ten years it has gained widespread recognition in all regions of the world. This is reflected in authoritative statements signalling the importance of this right by a number of international bodies, including various UN actors and all three regional human rights systems, in specific guarantees for this right in many of the new constitutions adopted in countries undergoing democratic transitions and in the passage of laws and policies giving practical effect to this right by a rapidly growing number of countries and international organisations. A fundamental value underpinning the right to know is the principle of maximum disclosure, which establishes a presumption that all information held by public bodies should be subject to disclosure unless there is an overriding public interest justification for non-disclosure. This principle also implies the introduction of effective mechanisms through which the public can access information, including request driven systems as well as proactive publication and dissemination of key material.

2. Democracy also involves accountability and good governance. The public have a right to scrutinise the actions of their leaders and to engage in full and open debate about those actions. They must be able to assess the performance of the government and this depends on access to information about the state of the economy, social systems and other matters of public concern.

3. Access to medical records, for example, can help individuals make decisions about treatment, financial planning and so on.

4. Finally, an aspect of the right to information that is often neglected is the use of this right to facilitate effective business practices. Commercial users are, in many countries, one of the most significant user groups. Public bodies hold a vast amount of information of all kinds, much of which relates to economic matters and which can be very useful for businesses. A right to information helps promote a fluid information flow between government and the business sector, maximising the potential for synergies. This is an important benefit of right

to information legislation, and helps answer the concerns of some governments about the cost of implementing such legislation.

5. The right to information is most commonly associated with the right to request and receive information from public bodies. This is a key modality by which the right is fulfilled but it is not the only one. Most right to information laws also place an obligation on public bodies to publish information on a proactive or routine basis, even in the absence of a request. The scope of this varies but it usually extends to key information about how they operate, their policies, opportunities for public participation in their work and how to make a request for information. 'Pushing' information out in this way is increasingly being recognised as one of the more effective ways to enhance access to information held by public bodies.

6. Numerous international bodies with responsibility for promoting and protecting human rights have authoritatively recognised the fundamental human right to access information held by public bodies, as well as the need for effective legislation to secure respect for that right in practice. These include the United Nations, regional human rights bodies, and other international bodies with a human rights mandate, such as the Commonwealth.

7. The primary basis identified in these statements for the right to information is as an aspect of the general guarantee of freedom of expression, and this is the main focus of this chapter. In addition to setting out international standards on the right to information, this chapter also outlines key developments at the national level, on the basis that these demonstrate general recognition of the human rights status of access to information. There is a growing consensus at the national level that access to information is a human right, as well as a fundamental underpinning of democracy. This is reflected in the inclusion of the right to information among the rights and freedoms guaranteed by many modern constitutions, as well as the dramatic increase in the number of countries which have adopted legislation giving effect to this right in recent years.

8. The right to information has also been linked to the right to the environment, to information about human rights and to the right to take part in public affairs. A right to access information held by public bodies has also been linked to pragmatic social objectives, such as controlling corruption.

9. The notion of 'freedom of information' was recognised early on by the UN. In 1946, during its first session, the UN General Assembly adopted Resolution 59(1), which stated:

Freedom of information is a fundamental human right and … the touchstone of all the freedoms to which the UN is consecrated.

10. Although some of the early laws guaranteeing a right to access information held by public bodies were called freedom of information laws, it is clear from the context that, as used in the Resolution, the term referred in general to the free flow of information in society rather than the more specific idea of a right to access information held by public bodies.

11. The Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948 (UN General Assembly Resolution 217 A (III), 10 December 1948) is generally considered to be the flagship statement of international human rights. Article 19, binding on all States as a matter of customary international law, guarantees the right to freedom of expression and information in the following terms:

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

12. The International Covenant on Civil and Political Rights (ICCPR), a legally binding treaty, was adopted by the UN General Assembly in 1966 (UN General Assembly Resolution 2200 A (XXI), 16 December 1966, entered into force 23 March 1976). The ICCPR guarantees the right to freedom of opinion and expression, also at Article 19, and in very similar terms to the UDHR.

13. Access to information is a fundamental component of a number of the conventions and standards against corruption. The following specifically relate to Access to Information: The Council of Europe's Convention on Access to Official Documents affirms an enforceable right to information; the Aarhus Convention grants rights, including access to information, in decisions concerning the environment.

14. These international human rights instruments did not specifically elaborate a right to information and their general guarantees of freedom of expression were not, at the time of adoption, understood as including a right to access information held by public bodies. However, the content of rights is not static. The European Court of Human Rights, for example, has held: "[T]he [European Convention on Human Rights] is a living instrument which … must be interpreted in the light of present-day conditions." (*Tyrer v. United Kingdom*, 25 April 1978, Application No. 5856/72, para. 31.)

15. In accordance with the Law of Ukraine "On access to public information", a public information is reflected and documented by any means and on any carriers of information, which was received or created in the process of implementation by subjects of public authorities of their duties, stipulated by the current legislation or which is in the possession of subjects of public authorities, or other disponents of public information determined by this law.

16. The purpose of the Law of Ukraine "On access to public information" is to ensure transparency and openness of public authorities and creating mechanisms for the realization of the right of everyone to access to public information.

17. This Law does not apply to the relationship on obtaining information by subjects of public authorities in the exercise of their functions, as well as relations in the sphere of citizens' appeals, which are regulated by a special law.

18. The provision of public information of the Ministry of information policy of Ukraine is carried out in response to the request to obtain public information.

19. The legal regulation of the public right to information is closely connected with the consolidation of public right to information security, specifically in terms of protection of citizens from incomplete, untimely and unreliable information and from negative information impact. That is why the question of state "reaction" to the circulation of unreliable information for maintaining public and state information security is of primary importance. Thus, the Constitution of Ukraine states that maintaining information security is one of the key functions of state, concern of every Ukrainian citizen, and information security is classically defined as (...) state of security for vital interests of a human, society and state which ensures prevention of possible harm caused through incomplete, untimely and unreliable circulation of information, violation of integrity and availability of information.

Consider such practical situations:

1. **Storage of, and refusal to grant full access to, personal information kept in security police records**

The five applicants had been members of left-wing political parties. Some of them had been anti-Nazi activists engaged in humanitarian projects. As they suspected that **information on them had been recorded by the security police** because of their political views, they requested access to the relevant police records.

Until April 1999 absolute secrecy applied to such records, and the requests the applicants made prior to this date were thus rejected. Following changes to the legislation in this area, the five applicants were granted access to certain parts of the information in question. Following requests for full disclosure, the second, third, fourth and fifth applicants were given additional information, but certain parts could only be read on the security police's premises and could not be copied by technical means. Access to additional information was denied to the first applicant. They all brought proceedings before the administrative court of appeal challenging the refusal of the security police to grant **full access to the files**. They also **questioned the lawfulness of the storage by the security police of information which did not justify considering them as a security risk**.

What kind of information can a requestor ask for?

What human rights are violated by storage of, and refusal to grant full access to, personal information kept in security police records? Can you comment on possible violations?

2. The public should have wide access to information of general interest. Information should only be withheld from public disclosure if this is strictly necessary to protect another right or interest, such as law enforcement, the operation of public bodies or national security.

General access to communist secret police files in the Czech Republic

In 2002 the Czech Senate approved an act which extended the right of access to previously classified communist secret police files. Czech citizens have been able to access their own files since 1996, but not the files of other people. The new legislation excludes only files of foreign nationals and those containing information that could endanger national security or the lives of other people from access. The act established a new Institute for the Documentation of the Totalitarian Regime to oversee access to the files and ensure the transparency of the process.

What is your opinion about general access to communist secret police files?

II. THE PRINCIPLE OF MAXIMUM DISCLOSURE. THE EXCEPTIONS TO PUBLIC ACCESS TO INFORMATION.

The principle of maximum disclosure

20. The principle of maximum disclosure means that there is a maximum strong presumption in favour of access to information. The principle puts an obligation on public authorities to disclose all information held by them unless it is subject to a clear and limited set of exception grounds. In Denmark this is also called the principle of 'more openness' which implies that the administration is free to provide more information than the bare minimum they are obliged to disclose according to the law.

21. As a minimum all government and administration bodies at national, regional and local levels should be covered by the obligation to disclose information. Individuals performing public functions or exercising administrative authority should also be guided by the principle of maximum disclosure. And finally, public authorities which are part of the legislative and the judiciary could also be guided this way. Anybody should be entitled to seek publicly held information – it should not be a privilege of a particular group of society (such as the media). In countries which currently have Information Acts, citizens generally have the right to access information held by the state authorities without having to prove a specific legal interest.

22. Individuals have a right to know what information public authorities record about them. This includes public employees in all cases where their employers hold information about them. There should be easy access to personal information gathered by public and private bodies in registers and databases, so that individuals can get access to their records (such as health records at hospitals). Specific regulation is needed to protect personal privacy, with regards to personal information.

23. The following elements are fundamental for providing information of high quality:

- To make key information available,
- Only to make correct and precise information available,
- To make information available in an intelligible language,
- To make information available in a format accessible to vulnerable groups.

24. Information kept by public institutions must be recorded and stored systematically and properly. Piles of paper that sit in an office corner are kept out of institutional memory. Information must also be presented in a clear and well-structured manner enabling access for all, including disabled. The UK makes "easy-reader" texts available on their website and experience shows that these texts are more frequently read than the originals. Switzerland has adopted a set of 5 criteria which must apply to presentation of online government information: information must be reliable, useful, complete, objective and easily accessible.

25. The right of access to information should apply to all information recorded and linked to public or administrative function, and can include written information, as well as information stored in films, photographs, maps, microchips etc. Information received orally presents a different kind of challenge. Denmark recognises this and requires public officials to record factual information received orally when it may be of importance to decisions of administrative cases.

26. In very comprehensive access to information cases, e.g. requests made as part of a research project, public authorities may consider how to comply with the obligation to provide information in a manner which is not too burdensome. Rather than using a big quantity of resources in relation to one single case the administration may chose to simply leave the files requested at the disposal of the individual requesting the information in a supervised office.

Obligation to publish

27. Public bodies should provide relevant information to the public about their own activities and information of public interest within their fields.

Public administration should be open about its financial management and the services it provides to the citizens. It should also be open about how policies and procedures regulate the development of these activities. As a minimum this obligation should apply to the following areas:
• Development and realization of policies, strategies, initiatives and physical planning, • Financial decisions, including budgets and accounts, • Decisions in administrative cases, • Evaluation of sector performance, • Information about services, • Meetings of the administration.

28. Which information is relevant to the public? It is suggests to use a specific set of questions to assess the level of information disclosure outlined below. The recommendations are focused on the questions apply equally to any type of public institution:

- "Is a description of the objectives, targets and activities available?
- Are evaluations of main activities available?
- Can the public identify all key members of the organization?

• Is there a public record of the number of votes each member holds?
• Is a meaningful description of key decision-making bodies available to the public?
• Are individuals on the executive body publicly identified?
• Are the agendas, draft papers and minutes of both governing and executive body's meetings available to the public?
• Is there an information disclosure policy available which clearly states the types of documents the organization does and does not disclose, stating the reasons for non-disclosure?
• Are annual reports publicly available and do they contain externally audited financial information?
• Is the above information available in the languages of those with a stake in the organizations?"

Too much information may have the same effect as no information at all since an overflow of information risks to blur the essential message in the midst of it.

What should be made public?

As described in the openness principle 'Obligation to publish' earlier, basic information includes information on the function, organization, accounts, procedures and standards of the public authority as well as major decisions affecting society. Freedom of Information Acts in some countries, such as the United Kingdom and the United States, prescribe that basic information should be provided to the public. In other countries, such as Denmark, the public administration is not bound by general law to provide such proactive information disclosure on its own initiative. Whatever the law prescribes, it is good practice that information is made available in a generally accessible form. This includes print, broadcast and electronic forms of dissemination.

29. The right of access to information should apply to all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function. Thus, it could be information written down on paper as well as information stored in films, photographs, maps, microchips etc. With regard to official information held in other than recorded form, e.g. information received orally, this may be a challenge to request access to.

Danish Key Figures Database on Local Government

In Denmark the central government hosts a Local Government (LG) Key Figures Database. The Ministry of the Interior and Health publishes a large number of "key figures" per local government on an annual basis – both in paper reports and in an electronic database. An electronic link to the database is available from the Ministry's website. The main challenge of such information gathering is to ensure that the information is comparable and therefore that reporting is done along the same guidelines. The areas covered include general data such as:

- population, living conditions and employment,
- income and expenditures,
- services,
- child care and social care in general,

- education and culture,
- costs and benefits.

The key figures gathered give the public and especially the press an opportunity to compare key figures of different local governments. However, in order to single out best practices and why specific local governments perform better than others it is necessary to analyze the policies and administrative practises behind these key figures.
The system has proven to be quite an effective method to increase local governments' awareness of their efficiency. Furthermore, the key figure databases have given local governments an incentive to apply national accounting standards, in order to ensure that their financial dispositions are correctly reported to the public.

Promotion of open government

30. Public bodies should actively promote a culture of openness and open government within its own ranks as well as externally. Such promotion measures, which require a strong and dedicated leadership, include

- raising of awareness of the duty to provide information as well as the public's right to receive it,
- establishment of accountability principles making it clear whose responsibility it is to provide information as well as sanctions for obstructing this duty,
- establishment of systems to handle and store records and information in a systematic manner and allowing easy retrieval of information.

Limited scope of exceptions

31. To allow for openness to thrive in practice the grounds for exception to disclose information should be clearly and narrowly defined. Otherwise it is all too easy for public bodies to broaden exceptions to cover most types of information and thereby withhold important information from the general public. The presumption is always in favour of disclosure unless the information meets a so-called three-part test which implies a difficult, but necessary balancing of interests.

32. The three-part test, which is deduced from international law, provides that information can be exempted from disclosure if:

- The information relates to legitimate interests protected by the law, and
- Disclosure of the information threatens to cause substantial harm to that interest, and
- The harm to the interest is greater than the public interest in receiving the information.

33. Information laws must specify which interests are legitimate to protect through exemption from disclosure. The list of legitimate interests to protect may comprise privacy of individuals, health and safety, law enforcement, commercial and other confidential information, the safeguard of policy making and operation of public bodies and national security.

34. The fact that the information falls within the list of legitimate exception grounds is not sufficient to exempt it from disclosure. The disclosure must harm the specific interest

substantially and this harm must be greater than the public interest in receiving the information. This might e.g. be the case if the balancing of interests has to be made between the general publics' interest in information concerning a major threat to the health of a nation and a private individual's privacy interests.

35. The weight of the exception grounds sometimes differ according to the country. As an example the protection of privacy in Denmark is traditionally much higher than in neighbouring Sweden which – on the other hand - has a much broader protection of the public interest at the expense of privacy. It would e.g. be possible to disclose a non anonymized list of examn results in Sweden, information which would have to be anonymized in Denmark. If requested information is only partly covered by an exception ground the remaining part should be disclosed.

36. The public should have wide access to information of general interest. Information should only be withheld from public disclosure if this is strictly necessary to protect another right or interest, such as law enforcement, the operation of public bodies or national security.

General access to communist secret police files in the Czech Republic to redress past wrongs
In 2002 the Czech Senate approved an act which extended the right of access to previously classified communist secret police files. Czech citizens have been able to access their own files since 1996, but not the files of other people. The new legislation excludes only files of foreign nationals and those containing information that could endanger national security or the lives of other people from access. The act established a new Institute for the Documentation of the Totalitarian Regime to oversee access to the files and ensure the transparency of the process.

37. The legal regulation of the public right to information is closely connected with the consolidation of public right to information security, specifically in terms of protection of citizens from incomplete, untimely and unreliable information and from negative information impact. That is why the question of state "reaction" to the circulation of unreliable information for maintaining public and state information security is of primary importance. Thus, the Constitution of Ukraine states that maintaining information security is one of the key functions of state, concern of every Ukrainian citizen, and information security is classically defined as (...) *state of security for vital* interests of a human, society and state which ensures prevention of possible harm caused through incomplete, untimely and unreliable circulation of information, violation of integrity and availability of information.

38. Information which the authorities hold about individuals should not be disclosed to the general public unless the person has consented or there are important considerations of public interest to justify departure from the general rule of confidentiality. This could for instance be to protect vulnerable members of society or to ensure good and honest administration.

Access to information about public administration staff in Denmark
According to the Danish Access to Public Administration Files Act everyone is entitled to access information about public administration staff. However, this access is limited to name, position, education, assignment, salary and official journeys. Moreover, information about disciplinary cases against employees in managerial positions may also be disclosed.

The reason that access can be provided to this type of personal information is that it is considered to be of public relevance.

Processes to facilitate access

39. Information requests must be dealt with in an effective manner following a clear procedure for decision–making. This includes that public bodies should:

- Provide assistance to the requester, including if he or she has difficulties filing a request,
- Provide a timely answer within strictly defined time limits,
- Provide an answer in at least the same form as the request was received,
- Provide an answer in the same language as the request was received in multi-lingual societies if the requested information exists in this language,
- Provide the actual access to information, e.g. by means of copies or making documents available to the applicant,
- Reason the decision if the applicant is refused access to the requested information,
- Refusals to disclose specific information should be accompanied by information on review bodies to address possible appeal of the decision to.

40. The way of providing access to information varies, but should include some or all of the following measures:

- Inspection of records in the place where they are kept, in a manner that enables the requester to view and read them, including making necessary equipment available for the purpose,
- Transcript of file,
- Paper or electronic copy of document,
- Another copy of information carrier, e.g. tape or CD,
- Verbal explanation,
- Special forms of access, e.g. to persons with disabilities.

41. Freedom of information includes the public's right to know what the Government is doing on its behalf and to participate in decision-making processes. Freedom of information legislation should therefore establish a presumption that all meetings of governing bodies are open to the public.

42. Disclosure takes precedence to secrecy and to give effect to the principle of maximum disclosure any legislation or provision contradicting this principle should therefore be amended or repealed. In cases where specific acts conflict with information acts the latter should overrule acts hindering maximum disclosure.

43. One way of ensuring that corruption and wrongdoing of public bodies can be brought to the public's knowledge is by protecting so-called whistle blowers. Whistle blowers are public officials who release confidential information on wrongdoing of public bodies. In order to ensure that such internal scrutiny takes place whistle blowers should be protected from criminal and disciplinary liability when they act in good faith to serve the public interest. The limits for whistle blowing are decided by the judiciary in court cases.

44. The Constitution of Ukraine protects citizens' right to access information (Article 34, paragraphs 2 and 3). The Laws No. 2939 "On Access to the Public Information", No. 2657 "On Information" and No. 183 "About state secret" regulate access to information. In line with the Law "On Access to the Public Information", no information held by public authorities can be restricted, unless an assessment reveals that the information is confidential, or secret, or for internal use only. Restriction of access to information must be based on the so-called "three-part test" of public information, as stipulated in Article 6, paragraph 2. The Law provides for the obligation to create structural units or appoint freedom of information officers by public authorities. The Law assigns some monitoring functions to the Secretariat of the Ukrainian Parliament Commissioner for Human Rights (Ombudsman's Office).

45. On 9 April 2015, a major step was made towards open data in Ukraine with the adoption of the Law No. 319 "About changes to some law on access to public information in form of open data",93 which introduced significant changes in other relevant legal acts. These changes obliged public authorities and local governments to publish and regularly update public information in the form of open data. Open data must be provided free of charge on the webpages of the authorities and on the single state open data website.

46. Open data corresponds to the legislation about freedom of information, entrenched in Articles 15 (prohibition of censorship) and 34 (right to access to information) of the Constitution of Ukraine, along with laws on information and on access to public information.

According to Law No. 2939 "On Access to the Public Information", national and local authorities are obliged to publish accurate, exact and complete information, as stated in Article 14, and are required to disclose different categories of information as listed in Article 15, including: accessible information about the structure, mission, functions, budget of the organisation, laws that regulate their work, decision-making process, list of the mechanisms through which citizens can advocate their interests, reports about the sessions and the institutional work, action plans, etc.

47. In line with the principle of transparency and publicity of the budget process (Article 7 of the Budget Code), on 11 February 2015 the Parliament adopted the Law No. 183- VIII "On Open Use of Public Funds". According to the Law, local authorities must use the e-data website to publish information about the use of public funds.

Both the Ombudsman's Office and civil society control the implementation of these regulations. If public authorities do not disclose the information required by law, they will initiate an appeal to the higher authority or court. Those persons whose rights and legal interests to access public information were violated receive a compensation for material and moral damages (Article 24.2 of the Law No. 2939 "On Access to the Public Information").

48. Since March 2017, the Open Data Roadmap for Ukraine provides an extensive list of practical recommendations that public authorities can follow in order to comply with international standards on open data. All these recommendations are based on six major

principles: data should be open by default; timely and comprehensive; accessible and usable; comparable and interoperable; for improved governance and citizen engagement; and for inclusive development and innovation.

> ***Exercises:*** *Can you think of problems you have faced because you lack access to information? What types of information can you think of that should not be disclosed?*

III. RIGHT OF ACCESS TO INFORMATION VERSUS OTHER RIGHTS IN THE RECENT CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The Convention test:
Is the interference in question justified?
1) "prescribed by law"
2) pursued one or more legitimate aims
3) "necessary in a democratic society"?

49. Right of access to documents emerging, based on the right to receive and impart information : a matter which has been the subject of gradual clarification in the Convention case-law over many years. The European Court of Human Rights has also considered claims for a right to receive information from public bodies. It has looked at this issue in a number of cases, including ***Leander v. Sweden*** (26 March 1987, Application No. 9248/81), ***Gaskin v. United Kingdom*** (7 July 1989, Application No. 10454/83,), ***Guerra and Ors. v. Italy*** (19 February 1998, Application No. 14967/89), ***McGinley and Egan v. United Kingdom*** (9 June 1998, Application Nos. 21825/93 and 23414/94), ***Odičvre v. France*** (13 February 2003, Application No. 42326/98), ***Sīrbu and others v. Moldova*** (15 June 2004, Applications Nos. 73562/01, 73565/01, 73712/01, 73744/01, 73972/01 and 73973/01), and ***Roche v. United Kingdom*** (19 October 2005, Application No. 32555/96). In the cases which presented a claim based ***on the right to freedom of expression as guaranteed by Article 10 of the ECHR***, the Court held that this did not include a right to access the information sought. The following interpretation of the scope of Article 10 from *Leander* either features directly or is referenced in all of these cases:
[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access… nor does it embody an obligation on the Government to impart… information to the individual.

50. By using the words, "in circumstances such as those of the present case", the Court has not absolutely ruled out the possibility of a right to information under Article 10. However, these cases involve a wide range of different fact patterns so that, taken together, the

rejection of an Article 10 right to access information in all of them presents a high barrier to such a claim. As a Grand Chamber of the Court stated in *Roche* when rejecting the Article 10 claim of a right to access information: "It sees no reason not to apply this established jurisprudence."

51. The Court did not, however, refuse to recognise a right of redress in these cases. Rather, it found that to deny access to the information in question was a violation of the right to private and/or family life, guaranteed by Article 8 of the Convention (*Sīrbu*). In most of these cases, the Court held that there was no interference with the right to respect for private and family life, but that Article 8 imposed a positive obligation on States to ensure respect for such rights:
[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life (*Guerra*).

52. This positive obligation could include granting access to information in certain cases.
In the first case, *Leander*, the applicant was dismissed from a job with the Swedish government on national security grounds, but was refused access to information about his private life, held in a secret police register, which had provided the basis for his dismissal. The Court held that the storage and use of the information, coupled with a refusal to allow the applicant an opportunity to refute it, was an interference with his right to respect for private life. The interference was, however, justified as necessary to protect Sweden's national security. It is interesting to note that it ultimately transpired that Leander was in fact fi red for his political beliefs, and he was offered an apology and compensation by the Swedish government.

53. In *Gaskin*, the applicant, who as a child had been under the care of local authorities in the United Kingdom, had applied for but was refused access to case records about him held by the State. The Court held that the applicant had a right to receive information necessary to know and understand his childhood and early development, although that had to be balanced against the confidentiality interests of the third parties who had contributed the information. Significantly, this placed a positive obligation on the government to establish an independent authority to decide whether access should be granted if a third party contributor was not available or withheld consent for the disclosure. Since the government had not done so, the applicant's rights had been breached.

54. In *Guerra*, the applicants, who lived near a "high risk" chemical factory, complained that the local authorities in Italy had failed to provide them with information about the risks of pollution and how to proceed in event of a major accident. The Court held that severe environmental problems may affect individuals' well-being and prevent them from enjoying their homes, thereby interfering with their right to private and family life.
As a result, the Italian authorities had a positive obligation to provide the applicants with the information necessary to assess the risks of living in a town near a high risk chemical factory. The failure to provide the applicants with that essential information was a breach of their Article 8 rights. The decision was particularly significant as it appears that the State did not

actually hold the information requested, so that it would actually need to go out and collect it.

55. In *McGinley and Egan*, the applicants had been exposed to radiation during nuclear testing in the Christmas Islands, and claimed a right of access to records regarding the potential health risks of this exposure. The Court held that the applicants did have a right to access the information in question under Articles 6 and 8 of the ECHR, regarding, respectively, the right to a fair hearing and respect for private and family life. However, the government had complied with its positive obligations through the establishment of a process by which access to the information could be obtained, which the applicants had failed to make use of.

56. In *Odičvre*, the issue was access to information about the natural mother of the applicant. The Court accepted that this was covered by the right to private life, as guaranteed by Article 8, but held that the refusal by the French authorities to provide the information represented an appropriate balance between the interests of the applicant and the interests of her mother, who had expressly sought to keep her identity secret.

57. *Sīrbu* was slightly different from the other cases inasmuch as the request to access information was really secondary to the main complaint about a failure of the State to apply a domestic ruling to the effect that the applicants were entitled to certain back-pay. The domestic 'Decision' upon which the entitlement to backpay was based had been classified as secret and the applicants were denied access to it. Notwithstanding this, a domestic court awarded each of the applicants the back-pay due to them, but the government simply refused to provide it, resulting in a fairly obvious breach of Article 6, guaranteeing the right to a fair and public hearing.

58. In *Roche*, which like *McGinley and Egan* involved claims of medical problems resulting from military testing, the Court held that Article 6 of the ECHR, regarding a fair hearing, was not applicable.77 Article 8, however, was and in this case the Court held that there had been a breach of the right since the government did not have reasonable grounds for refusing to disclose the information. Signifi cantly, the Court held that the various disclosures that were made in response to requests by the applicant did not constitute the "kind of structured disclosure process envisaged by Article 8". This appears to elevate the status of the right beyond the very particular instances previously recognised.

59. Although these decisions of the European Court recognise a right of access to information, they are problematic. First, the Court has proceeded cautiously, making it clear that its rulings were restricted to the facts of each case and should not be taken as establishing a general principle.79 Second, and more problematical, relying on the right to respect for private and/or family life places serious limitations on the scope of the right to access information. This is clear from the Guerra case, where it was a considerable leap to find, as the Court did, that severe environmental problems would affect the applicants' right to respect for their private and family life. Although the Court made that leap in Guerra, based on overriding considerations of justice and democracy, this is hardly a satisfactory approach. Furthermore, it is fundamentally at odds with the notion of a right to information

as expressed by other international actors, which is not contingent on deprivation of another right. In effect, the Court appears to have backed itself into a corner by refusing to ground the right to information on Article 10.

60. At the same time, there are indications that the Court may be changing its approach. In ***Sdruženi JihoŠeské Matky v. Czech Republic*** (Decision of 10 July 2006, Application No. 19101/03.), the Court held that a refusal to provide access to information did represent an interference with the right to freedom of expression as protected by Article 10 of the ECHR. The decision included the quotation noted above from Leander, and also noted that it was 'diffi cult' to derive from the ECHR a general right to access administrative documents. However, the Court also noted that the case concerned a request to consult administrative documents in the possession of the authorities and to which access was provided for under conditions set out in article 133 of the law on construction. In those circumstances, the Court recognized that the refusal to grant access represented an interference with the right of the applicant to receive information.

The Court ultimate rejected the application as inadmissible due to the fact that the refusal to disclose the information was consistent with Article 10(2), allowing for restrictions on freedom of expression. In its Article 10(2) analysis, the Court referred to various factors, including national security, contractual obligations and the need to protect economic confidentiality. But the crucial point was that the refusal was an interference, which had to be justified by reference to the standards for such restrictions provided for in Article 10(2). It is hard to assess why the Court engaged in such a different analysis in this case. In some of the other cases noted above, the information was not actually held by the State, an important difference on the facts from the *Matky* case. But in others the State did hold the information. Another possible difference was the presence of a law which, under certain circumstances, did provide for access to information. This, however, seems a shaky basis for engaging Article 10 directly (as opposed, perhaps, to Article 10 in conjunction with Article 14, prohibiting discrimination in the application of rights).

61. The decision in ***Társaság a Szabadság v Hungary*** (14 April 2009, Appl. No 37374/05) where the European Court of Human Rights held, for the **first time**, that **a refusal of access to information constituted a violation of Article 10 of the ECHR**. The applicant, a civil liberties NGO, employed domestic freedom of information (FOI) legislation in a bid to obtain access to the text of an application for constitutional review of laws relating to drug offences submitted to the Constitutional Court by a member of parliament. The decision of the Constitutional Court to refuse to grant access to the requested material had been upheld by the domestic courts on the basis that the application for review contained personal data of the member of parliament which could not be accessed without the author's approval. The European Court of Human Rights decided that the refusal of access amounted to a violation of the applicant's rights under Article 10. The Court commenced its assessment of the merits of the case by asserting that it had 'consistently recognised that the public has a right to receive information of general interest' and that 'the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information'.

62. Another 2009 decision of the European Court of Human Rights, ***Kenedi v Hungary*** (Decision of 26 May 2009, Appl. No 31475/05), again saw the Court hold that a denial of access to information by the State amounted to an interference with the right to freedom of expression. The applicant was a historian undertaking research into state security service in 1960s. The domestic courts had found in favour of the granting of access to the requested information but the State had failed to enforce a court judgment to that effect. The Government conceded that there had been an interference with the applicant's freedom of expression and the Court agreed saying '*access to original documentary sources for legitimate historical research was an essential element of the applicant's right to freedom of expression*'. The Court found that as the Ministry had acted in defiance of domestic law, the interference was not '*prescribed by law'*. This finding obviated the need to examine whether the interference had a 'legitimate aim' or was 'necessary in a democratic society' and the Court concluded that the interference was unjustified.

63. In 2012, the Grand Chamber of the European Court of Human Rights confirmed the recognition by the Court of a right to information arising under Article10 when it referred in ***Gillberg v Sweden*** (Decision of 3 April 2012, Appl. No 41723/06) to persons who had requested access to research files held by a university, as having rights 'under Article 10 . . . to receive information in the form of access to the public documents concerned'. The facts of this case diverged from those of a straightforward access to information scenario, in so far as they related to a rejection by the European Court of Human Rights of a claim by the head of the department of the university in which the requested records were held, that his conviction of a criminal offence for refusing to comply with a court order to give access to his research files amounted to a violation of his rights under Articles 8 and 10 of the ECHR. The decision nonetheless amounts to an acknowledgement by the Grand Chamber that a right to information can arise under Article 10.

Right of access to information versus protection of other rights in the recent case law of the european court of human rights

The right to freedom of expression, as set out in Article 10 of the European Convention on Human Rights and the right to respect for private life, as set out in Article 8 of the Convention

CASE

The interplay between Articles 8 and 10 was again considered in ***Axel Springer AG v Germany*** where the ECHR upheld a complaint by Axel Springer, the publisher of the German tabloid newspaper *Bild,* that the further publication of articles about a well-known TV actor represented a proper exercise of its freedom of expression which outweighed the actor's right to a private life.

- *What human rights are violated? Can you comment on possible violations?*

Background

The case concerned the publication of two articles reporting the arrest of a well-known television actor for possession of cocaine. On 29 September 2004, Bild published an article entitled "Cocaine! Superintendent Y caught at the Munich beer festival" and "TV series Superintendent X confesses in court to having taken cocaine. He is fined 18,000 euros!" on 7 July 2005.

The German courts issued injunctions against further publication of the articles, on the basis that the offences were of a minor nature and the actor's interest in protecting his right to privacy outweighed any argument of public interest.

Having exhausted domestic routes of appeal, the publisher appealed to the ECHR on the basis that the domestic courts' decisions represented an unwarranted interference with its rights to freedom of expression.

Judgment

The Grand Chamber stated that Articles 8 and 10 deserved "equal respect" as a matter of principle. In making the decision, the Court considered the following factors:

- Contribution to a debate of general interest;
- How well known the person concerned is and the subject matter of the report;
- Prior conduct of the person concerned;
- Method of obtaining the information and its veracity;
- Content, form and consequences of the publication; and
- Severity of the sanction imposed.

According to the Grand Chamber there were not sufficiently strong grounds for preserving the actor's anonymity, having regard to the nature of the offence committed, the degree to which the actor was well-known to the public, the circumstances of his arrest and the veracity of the information in question. The ECHR held by twelve votes to five that there had been a violation of the press' right to freedom of expression.

"*In conclusion, the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued. Accordingly, there has been a violation of Article 10 of the Convention*."

64. **Balancing Article 8 (privacy/reputation/image) with Article 10 ECHR and the application of the "*Von Hannover/Axel Springer AG*"-criteria (GC 7 February 2012) in defamation and privacy cases**

The Court's jurisprudence, in cases of alleged breach of privacy and defamation, balances the rights under Article 8 and 10, applying the wellstructured format developed by the Grand Chamber in its judgments of 7 February 2012 (Von Hannover v. Germany (no. 2) and Axel Springer AG v. Germany). In such cases, the Courts evaluates step by step the six criteria of the balancing test of the right to privacy and reputation and the right to freedom of expression, namely (1) the contribution to a debate of general interest, (2) the subject of the report and if it concerned a public figure, (3) the prior conduct of the person concerned, (4) the method of obtaining the information and its veracity, (5) the content, form and consequences of the media content and (6) the severity of the sanction imposed. Some cases concern an application because of alleged violation of Article 8: these applications are lodged against the findings by national authorities that the press reporting was guaranteed under Article 10. In other cases the applicant journalists, editors of publishers complain about the violation of their rights under Article 10, as the domestic courts have allegedly overprotected the rights under Article 8 of the Convention.

65. **Balancing Article 8 and 10 from the perspective of Article 8 and privacy protection: 16 January 2014, *Lillo-Stenberg and Sather v. Norway*, Appl. No. 13258/09.**
Lillo-Stenberg and Sather v. Norway: no violation of Article 8 ECHR.
The applicants in this case are Lars Lillo-Stenberg and Andrine Sather, a well-known musician and actress in Norway, who complained about press invasion of their privacy during their wedding on 20 August 2005. The European Court found that the Norwegian authorities did not fail to comply with its obligations under Article 8 (right to respect for private and family life) of the Convention, balancing the applicants' right to privacy with the right of freedom of expression by the media publishing the pictures at issue, as part of reporting about the wedding.

Without the couple's consent, the weekly magazine *Se og Hųr* published a two-page article about the applicants' wedding accompanied by six photographs. The wedding took place outdoors on an islet in the Oslo fjord accessible to the public. The pictures were obtained by hiding and using a strong telephoto lens from a distance of approximately 250 meters. The pictures showed the bride, her father and bridesmaids arriving at the islet in a small rowing boat, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The couple brought compensation proceedings against the magazine and won before the first two instances, but finally the Supreme Court found against the couple, by three votes to two. It considered that they had married in a place which was accessible to the public, easily visible, at a popular holiday location. Furthermore the article was neither offensive nor negative.

Relying on Article 8 (right to respect for private and family life), Lars Lillo-Stenberg and Andrine Sather complained that their right to respect for private life had been breached by the Supreme Court's judgment.

The European Court starts from the premise that the present case requires an examination of the fair balance that has to be struck between the applicants' right to the protection of their private life under Article 8 of the Convention and the publisher's right to freedom of expression as guaranteed by Article 10. The Court confirms "that a person's image

constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof" and that "even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life". The Court again applies the criteria it considers relevant where the right of freedom of expression is being balanced against the right to respect for private life (see also Von Hannover v. Germany (no. 2) and Axel Springer AG v. Germany, 7 February 2012, Grand Chamber).

These relevant criteria are : (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken and (v) content, form and consequences of the publication. In the opinion of the European Court, both the majority and the minority of the Norwegian Supreme Court have carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law. The Court considered that there was an element of general interest in the article about the applicants' wedding and that the article did not contain any elements that could damage their reputation. Since the wedding took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract attention by third parties. Being well known public figures in Norway, these circumstances certainly lowered their legitimate expectation of privacy, while on the other hand no pictures where published of the private marriage ceremony itself. Although the Court considers that "opinions may differ on the outcome of a judgment", it sees no sufficient strong reasons to substitute its view for that of the majority of the Norwegian Supreme Court. Having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the Supreme Court did not fail to comply with its obligations under Article 8 of the Convention. The interference with the right of privacy of the applicants was sufficiently justified by the right to freedom of expression of the magazine *Se og Hųr.*

This case also indicates that if the Norwegian judicial authorities had come to a different result in finding a breach of privacy by *Se og Hųr,* and if a case by the magazine would have been introduced as an alleged violation of Article 10, the ECtHR might have accepted the interference with the magazine's freedom of expression, referring to the margin of appreciation as well as to the circumstance that both the majority and the minority of the Norwegian Supreme Court have carefully balanced the right of freedom of expression with the right to respect for private life, and explicitly took into account the criteria set out in the Court's case-law which existed at the relevant time.

66. **14 January 2014, *Lavric v. Romania*, Appl. No. 22231/05**: **violation of Article 8 ECHR.**
In this case a public figure complained about the failure of the Romanian courts to convict a journalists for defaming her. The Romanian courts held that the litigious article was an allowable exaggeration and provocation, protected under Article 10 ECHR. The ECHR

however found this a violation of Article 8 ECHR. The Court considers that the accusations concerning the applicant's alleged corruption and incompetence were of a serious nature and were capable of affecting her in the performance of her duties and of damaging her reputation. A person's status as a politician or other public figure does not remove the need for a sufficient factual basis for statements which damage his or her reputation, even where such statements are considered to be value judgments, and not statements of fact. The Court notes that there is no indication that the applicant committed any offence of forgery or bribery in connection with the performance of her professional activity. In conclusion, the Court considers that the journalist failed to prove that he had written the articles with the professional care required of journalists. Therefore, it is not appropriate to make reference to the leeway generally permitted to journalists for provocation or exaggeration when articles concern public figures.

67. **9 December 2014, *Yevgeniy Yakovlevich Dzhugashvilil* v. Russia, Appl. No. 41123/10 (decision): no violation of Article 8 ECHR.**
The applicant, who is a grandson of Stalin, argued in Strasbourg that the Russian Courts had failed to protect his well-known ancestor from attacks on his reputation. In 2009 *Novaya Gazeta*, an opposition newspaper, published in its feature supplement, *Pravda Gulaga,* an article entitled "Beria pronounced guilty", which dealt with the shooting of Polish prisoners in Katyń in 1940. The article was written in accusatory terms in respect of the former USSR government and included, among others, statements in which Joseph Stalin was considered responsible for the Katyń massacre. It was stated in the newspaper article that "Stalin and the members of the Politburo of the VKP(b) who took a legally binding decision to shoot the Poles evaded moral responsibility for the extremely serious crime". Stalin was described as a "bloodthirsty cannibal". Having considered that the article slandered his grandfather, the applicant sued the publishing house, *Novaya Gazeta,* and the author, Mr Ya., for defamation. But the Russian courts dismissed the claim.

The ECtHR notes that the domestic courts considered the contribution made by the disputed publications to the debate of general interest, the role of the person concerned as well as the subject, the content, the form and the information value of the publications. Firstly, they based their reasoning on the premise that the publications contributed to the factual debate over the events of exceptional public interest and importance. Secondly, they found that the historic role of the applicant's ancestor called for a higher degree of tolerance to public scrutiny and criticism of his personality and his deeds. Finally, turning to the content and the form, the national courts noted the highly emotional character of some statements, but found them within the limits of acceptable criticism. The ECHR also observes that the national courts explicitly took account of the Court's relevant case-law, including the general distinction between statements of facts and value judgments. Accordingly the Court considers that the domestic courts have struck a fair balance, required in the context of the State's positive obligations, between the journalist's freedom of expression under Article 10 and the applicant's right under Article 8 ECHR.

68. **Balancing Article 8 and 10 from the perspective of Article 10 in cases related to the right of reputation of public persons: 10 July 2014, *Axel Springer AG v. Germany* (No. 2), Appl. No. 48311/10 (*cf. supra*); 4 November 2014, *Braun v. Poland*, Appl. No. 30162/10; 14**

January 2014, *Ruusunen v. Finland*, Appl. No. 73579/10 *and Ojala and Etukeno Oy v. Finland,* Appl. No. 69939/10.

***Braun v. Poland*: violation of Article 10 ECHR.**
The applicant (a historian and film director) in this case was found liable of defamation in a civil case because of a statement during a radio debate in which he stated that a well-known professor in his country, J.M., had been a secret collaborator with the communist regime. The ECtHR considers that the statement was part of a public debate on an important issue. Most importantly the ECtHR is unable to accept the domestic courts' approach that required the applicant to prove the veracity of his allegations. It was not justified, in the light of the Court's case-law and in the circumstances of the case, to require the applicant to fulfil a standard more demanding than that of due diligence only on the ground that the domestic law had not considered him a journalist. The domestic courts, by following such an approach, had effectively deprived the applicant of the protection afforded by Article 10. Although the national authorities' interference with the applicant's right to freedom of expression may have been justified by a concern to restore the balance between the various competing interests at stake, the reasons relied on by the domestic courts cannot be considered relevant and sufficient under the Convention. This conclusion cannot be altered by the relatively lenient nature of the sanction imposed on the applicant. There has accordingly been a violation of Article 10 of the Convention.

***Ruusunen v. Finland and Ojala and Etukeno Oy v. Finland*: no violation of Article 10 ECHR.**
These two cases concern the former Finnish Prime Minister's girlfriend's conviction for violating his privacy following disclosure of sexual encounters in a book she wrote and a publisher's conviction for publishing the memoir of the Prime Minister's girlfriend which had violated his privacy. In both cases the ECHR finds no violation of Article 10 ECHR. The ECHR accepts the domestic courts' finding that parts in the book describing the sex life of the Prime Minister and his girlfriend in the beginning of their relationship, the descriptions of their brief and passionate intimate moments as well as giving massages to each other, and accounts of their sexual intercourse, fell within the core area of the private life of the former Prime Minister. The ECtHR finds that the unauthorised publication of this kind of information was conducive of causing the former Prime Minister suffering and contempt and it considered it necessary to restrict the applicants' freedom of expression in this respect in order to protect the former Prime Minister's private life. As the sanctions imposed only concerned fines, the ECtHR finds the interference reasonable and justified, in accordance with Article 10 § 2 ECHR. Hence it finds no violation of the right to freedom of expression of the applicants.