

# “THE RIGHT TO KNOW: FREEDOM OF INFORMATION”

The Human Rights Conference 2008

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## Is Freedom of Information a ‘Human Right’?

The right of access to official information is nowhere protected explicitly by ECHR. Attempts to establish a right of access to official information under Article 10, which protects the right to impart and to receive information, have not so far been successful. The European Court of Human Rights commented, in the leading case of *Leander v Sweden*<sup>1</sup>:

*“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 the present case, confer on the individual a right of access to [information], nor does it embody an obligation on [a] government to impart such information to the individual.”*

The phrase ‘circumstances such as the present case’ has been repeated by the Court on a number of occasions in refusing to find any violation of the Convention in a failure to disclose information. This formula has indeed been described by the Court as ‘established jurisprudence’.<sup>2</sup> Yet, although it suggests that the result might be different in different circumstances, none have yet been found by the Court to be enough. In the case which was perhaps the closest it came to doing so, *Sdruzeni*, 10 July 2006, while finding that the applicants (a Czech environmentalist group) were in principle entitled under Article 10 to access to documents regarding the design and construction of a nuclear power station, the Court went on to find that commercial confidentiality was a sufficient answer on the facts.

Occasionally, however, the Court has held that a right of access to official information can be taken from other articles of the Convention. Access to personal data has been allowed under Article 8<sup>3</sup>; a refusal to grant local communities access to environmental information relative to health risks has been held to breach Article 8<sup>4</sup>; and, more traditionally, Article 6 rights to a fair trial may involve a right of access to official information. There are other exceptional cases.

Might there be further development under Article 10? In September 2006, in *Reyes and Others v Chile*, the Inter-American Court of Human Rights<sup>5</sup> held for the first time

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<sup>1</sup> (1987) 9 EHRR 433.

<sup>2</sup> *Roche v United Kingdom*, (2006) 42 EHRR 30.

<sup>3</sup> For example, *Gaskin v United Kingdom* (1989) 12 EHRR 36.

<sup>4</sup> *Guerra v Italy*, (1998) 26 EHRR 357, is a good example.

<sup>5</sup> <http://www.corteidh.or.cr/index.cfm>

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that the near-identical provisions of Article 13<sup>6</sup> of the American Convention on Human Rights ‘protects the rights of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.’ And this approach is, at national level, common in Europe. Many Council of Europe member states have made freedom of information a constitutional right. Thus, for example, Article 32 of the Belgian Constitution confers a right of access to any administrative document for everyone, subject only to restrictions prescribed by law. The French Conseil d’État has held 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>7</sup> The Hungarian Constitutional Court, in striking down an official secrets act, found that free access to information held by the state was a precondition of the constitutional right of free expression.<sup>8</sup> If the Convention is indeed a living instrument as it is often said to be, there may be room for movement in Article 10 from the mere passive right to receive and impart information to the positive right to insist on information being given. *Guerra*, where the applicants sought environmental information on a nearby chemical factory, shows this shift under Article 8: the Court held:

*“The Court considers that Italy cannot be said to have “interfered” with the applicants’ private or family life; they complained not of an act by the State but of its failure to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the 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 .”*

If there are ‘positive obligations’ under Article 8, then why not under Article 10?

The Convention clearly protects rights which could be said to be in opposition or contrast to freedom of information: rights of privacy in particular. Articles 8 to 11 of the Convention can be seen as a group; they do not confer absolute rights, as do Articles 2 and 3 for example, but rights of the individual as a member of civil society; and they are made subject to the legitimate requirements of that society by the phrase “such limitations as are prescribed by law and are necessary in a democratic society...”<sup>9</sup> because “...inherent in the whole of the Convention is a search for fair balance between the demands of the general interest of the community and the requirements of the

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<sup>7</sup> Conseil d’État 29 April 2002, no. 228830 (Ullmann) and 13 Dec. 2002, no. 237203 (Gabriel X).

<sup>8</sup> Decision 34/1994 (VI.24) AB.

<sup>9</sup> This phrase, in Article 9, is to the same effect as the language of Articles 8, 10, and 11.

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*protection of the individual’s human rights”.*<sup>10</sup>

When introducing the Freedom of Information Bill, the then Home Secretary said:

*“The rights with which we have had to wrestle in the Freedom of Information Bill are not absolutes, but have to be balanced one with another. Article 10 gives a right to freedom of expression, but that has to be set against article 8 on the right to respect for a private life.*

*We have therefore sought in the Bill to secure a balance between the right to information needed for the proper exercise of the freedom of expression and the--directly conflicting--right of individuals to protection of information about themselves; the rights that institutions, including commercial companies, should have to proper confidentiality; and the need for any organisation, including the Government, to be able to formulate its collective policies in private.”*<sup>11</sup>

So there is, hopefully, a balance, although I would prefer to see it as a dynamic tension, between FOI and the rights protected in the Convention.

## **But how does this tension or balance work?**

This is the important question and it remains one which is being worked out. Thus some important questions include these:

- Section 38 (1) of the Freedom of Information (Scotland) Act has the general effect that personal data may be protected from FOI requests. But what, on the facts of particular cases, is personal data? As an example, consider Balfour & Manson’s request to be informed what fees were sought by counsel for the Scottish Executive in a litigation. The Scottish Information Commissioner reserved his opinion as to whether this was personal data of the counsel concerned.<sup>12</sup>
- The protection for ‘*personal data*’ protects the privacy of living humans. What about the dead<sup>13</sup>, or non-natural persons: do they have rights to privacy under Article 8 which might affect FOI? They have rights under other articles.

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<sup>10</sup> From *Soering v United Kingdom* (1989) 11 EHRR 439, at paragraph 89.

<sup>11</sup> <http://tinyurl.com/4vnjbg>

<sup>12</sup> <http://tinyurl.com/4ggcqu>

<sup>13</sup> In <http://tinyurl.com/3rr5wa> Article 8, and also section 36(2), were applied in relation to the records of a dead person by the Scottish Information Commissioner.

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- Is Article 8 indeed a provision which may lead to exemption from disclosure (as the Commissioner has held), standing the reasoning in *Dumfries and Galloway Council v SIC* 2008 CSIH 12?
- Assume that particular data is indeed personal data. FOISA and FOIA then go on to provide that it may nevertheless be released if the disclosure (which is a ‘processing’ for the purposes of the DPA) would not breach the data protection principles. So the disclosure must be ‘fair and lawful’. The most obvious route is Schedule 2 paragraph 6 (1) of the DPA<sup>14</sup>, but what does this mean in practice? This seems to contemplate a consideration of the reasons the information is sought, which is out of kilter with FOI legislation as a whole. The imminent decision of the House of Lords in *CSA v Scottish Information Commissioner* may help answer this.
- Disclosure of information under FOISA/FOIA does not in itself allow the recipient to re-use the information or disclose it further. But what in reality is to stop this? At the least, the recipient can advertise the availability of the information.
- On the other hand, the PSI Regulations<sup>15</sup> do generally allow re-use of material obtained under FOISA/FOIA, generally after a specific request. At this point, the data protection principles may require to be considered for a second time, and the answer will not necessarily be the same as on the initial disclosure.

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<sup>14</sup> ‘The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.’

<sup>15</sup> The Re-use of Public Sector Information Regulations 2005, SI 2005/ 1515, implementing Directive 2003/98/EC.