

Written Comments
in the Case of
Bubon v. Russia

November 2010

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application no. 63898/09 – *Bubon v. Russia*

WRITTEN COMMENTS OF THE OPEN SOCIETY JUSTICE INITIATIVE

Pursuant to leave granted on 5 October 2010 by the President of the Chamber, acting under Rule 44 § 2 of the Rules of Court, the Open Society Justice Initiative hereby submits its written comments on the legal principles that should govern the resolution of the Article 10 issues presented by this case.¹

Introduction

1. The applicant in the present case is a legal researcher and regular contributor to various lawyerly publications. In that capacity, he requested from a regional police department purely statistical information on prosecution of sexual exploitation offenses during a specified nine-year period. The applicant relied on a Russian statute that he claimed gave citizens the right to request from state authorities “information on [their] activities” (other than data constituting state secrets), without having to explain the reason for the request or to prove a personal interest in obtaining such information.² The regional police department denied the applicant’s request, arguing that it was only required (or permitted) to provide such information to senior government officials. On judicial appeal, the domestic courts ruled against the applicant, finding that the police department’s denial of information did not affect his personal interests—despite the applicant’s claim that there was no such requirement under either Russian law or Article 10 of the Convention.³
2. The Court has invited the parties to submit observations on whether (a) there has been an interference with the applicant’s Article 10 “right to receive and impart information,” in light of its recent case law; and (b) if so, whether such interference was (i) prescribed by law and (ii) necessary in a democratic society, within the meaning of Article 10 § 2 of the Convention.
3. These written comments address first (A) the state of development of the right to information in European and comparative law; followed by a discussion of (B) the extent to which disclosure of statistical information on crime and criminal prosecutions is guaranteed in democratic practice.

A. The Right to Information is Well-Established in Comparative Law and Practice

4. The right of access to government information has been closely linked to the broader right to freedom of expression from the earliest articulation of a right of access. The Swedish Freedom of the Press Act of 1766, the world’s first access to information law, provides that “[e]very Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information.”⁴ The United Nations General Assembly decreed, in one of its first resolutions, that the media and other information

¹ The intervener would like to acknowledge the pro bono assistance of the US-based law firm Ropes & Gray LLP in researching comparative laws and practices concerning disclosure of crime statistics. In addition, the Canadian Media Lawyers Association and the Hungarian Civil Liberties Union provided information on relevant practices in their respective countries. The Justice Initiative is solely responsible for any inaccuracies.

² Statement of Facts and Questions to the Parties, 6 July 2010.

³ *Ibid.*

⁴ Ch. 2, art. 1 (adopted in 1766 & 1949, amended in 1976).

services should “be given the fullest possible direct access to the activities and official documentation of the Organization.”⁵

5. Courts around the world have similarly determined that the right to *receive* information, including information held by the government, is a central and separate element of freedom of expression. This Court has repeatedly held that Article 10 guarantees not only the right of speakers to impart information and ideas, but equally so “the right of the public to be properly informed.”⁶ In a modern democracy, a significant part of the totality of public information a “properly informed” citizenry requires is in the hands of the state. That body of information is produced, collected and processed using public resources, and it ultimately belongs to the public. The government should be subject to a general obligation to make it available, save when a compelling public or private interest dictates otherwise.
6. Comparative doctrine and jurisprudence have established that the right to information is also a precondition for the exercise of the basic rights of political participation and representation, guaranteed *inter alia* by Article 3 of Protocol No. 1 to the Convention, which requires contracting parties to “hold free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.” The Inter-American Court of Human Rights has held that “access to information held by the State may permit participation in public governance by virtue of the social oversight that can be exercised through such access.”⁷
7. In a democracy, citizens exercise their self-governance rights not only through free and periodic elections, but also through a myriad of other fora and means of influencing and interacting with those responsible for setting public policies. Both direct and indirect participation, during or outside election periods, would be greatly undermined by the lack of a right of access to government information, and the resulting inability to follow and engage in government decision-making. As the three specialized mandates on freedom of expression have noted,

“[i]mplicit in the freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.”⁸

1. The Right to Information in European Law and Practice

8. The recognition of a right of access to information held by public authorities is well supported by state practice and international law. In the European context, the Council of Europe adopted its first recommendation on the right of access more than twenty years ago.⁹ In 2002, the Committee of Ministers adopted a new recommendation providing for a right to access official documents in the following terms:

“Member states should guarantee the *right of everyone* to have access, on request, to official documents held by the public authorities. This principle should apply without discrimination on any ground, including national origin.”¹⁰

The preamble to this 2002 Recommendation notes that access to official documents “allows the public . . . to form a critical opinion on the state of the society in which they live and on the authorities that govern them,” and enhances informed participation in public affairs.

⁵ *Resolution 13(I) on the Organization of the Secretariat*, adopted on 1 February 1946, Annex I, para. 3.

⁶ *Sunday Times v. United Kingdom (no. 1)*, Judgment of 26 April 1979, para. 66.

⁷ *Claude Reyes et al v. Chile*, Judgment of 19 September 2006, para. 86; available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.

⁸ Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, 26 November 1999. See also the 2004 Joint Declaration of the three mechanisms, adopted on 6 December 2004, which affirms that “[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation. . . .”

⁹ The 1981 recommendation provides that “[e]veryone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities . . .” *Recommendation (81) 19 on Access to Information Held by Public Authorities*, adopted by the Council of Ministers on 25 November 1981.

¹⁰ *Recommendation (2002)2 on Access to Official Documents*, 21 February 2002, para. III (emphasis added).

9. In November 2008, the Council of Europe adopted the Convention on Access to Official Documents, the first of its kind in the world, which guarantees a binding right of access in terms similar to those of the above-cited 2002 Recommendation.¹¹
10. In the 27-member European Union, the Charter of Fundamental Rights grants a right of access to documents held by Union institutions to “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State.”¹² Considering that the Charter is based on the constitutional traditions of the member states, the inclusion of the right of access to information therein suggests that this right has not only become ubiquitous, but is widely perceived as a basic right on the European continent. State practice confirms this conclusion: some 42 Council of Europe member states recognize a constitutional and/or statutory right of access to state-held information, and have adopted access to information laws to secure its practical implementation.¹³ At least seventeen Council of Europe member states have granted the right of access constitutional status by including it in their bills of rights, or by imposing equivalent constitutional obligations upon public authorities, thus formally recognizing the right’s essential role in the proper functioning of a democratic system.¹⁴ Worldwide, some ninety countries and major territories have adopted some form of legal recognition of the right of access to state-held information.
11. This Court’s jurisprudence has long recognized a conditional right of access to state-held information under circumstances in which the failure to provide such information adversely affects the enjoyment of other Convention rights, such as the right to respect for private and family life (Article 8).¹⁵ The Court has traditionally held that, in such cases, Article 8 imposes on the authorities a positive obligation to grant individuals access to relevant information in their possession—but without conferring any general rights to seek or receive information held by the state under Article 10 of the Convention.¹⁶ The position of the *Guerra* line of cases was that the freedom to receive information, referred to in Article 10 § 1, was only a horizontal one: it “basically prohibit[ed] a government from restricting a person from receiving information that others wish or may be willing to impart to him.”¹⁷
12. However, the Court’s jurisprudence on this question has evolved substantially in recent years. In at least two 2009 cases concerning Hungary, the Court has now recognized that Article 10 gives rise to an independent right to receive information relevant to public debate that is held by public

¹¹ Council of Europe Treaty Series No. 205. The Convention was adopted by the Council of Europe on 27 November 2008 and opened for signature on 18 June 2009. To date, it has been ratified by three Member States and signed by another ten. It requires ten ratifications for entry into force.

¹² *Charter of Fundamental Rights of the European Union*, 7 December 2000, art. 42. The Charter became fully binding with the adoption of the Lisbon Treaty.

¹³ See David Banisar, *Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws*, at www.freedominfo.org. These laws provide for a general, unconditional right to access state-held information or documents, as opposed to a right of access that depends upon a showing of a personal or legal interest in the relevant administrative process.

¹⁴ *Ibid.* This group represents a diverse mix of both new and older democracies; it includes: Albania, Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, Greece, Hungary, Moldova, Norway, Poland, Portugal, Romania, Slovakia, and Sweden.

¹⁵ See, *inter alia*, *Guerra and Others v. Italy*, ECtHR, Judgment of 19 February 1998 (involving the state’s failure to inform individuals living near a chemical factory about the risks of potentially devastating accidents); *Gaskin v. United Kingdom*, Judgment of 7 July 1989 (involving a denial of access to case records to an adult who had been in the care of local authorities as a child); and *McGinley and Egan v. United Kingdom*, ECtHR, Judgment of 9 June 1998 (involving a denial of access to records regarding the potential health hazards resulting from nuclear radiation tests to which the applicants had been exposed while serving in the British army).

¹⁶ Article 10 provides, in the relevant part, that “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.”

¹⁷ *Guerra*, para. 53.

authorities—irrespective of any personal interest of the requestor in the information other than an interest to contribute to public debate.¹⁸

13. Thus, in the *Társaság* case, the Court held that the media and other social watchdogs, such as civil society organizations, enjoy such an Article 10 right of access to information of public interest—especially if the information is in the exclusive possession of the State. Denial of access to such information would amount to a state “information monopoly,” which would impermissibly hinder the free flow of information and ideas that is the oxygen of any democratic society.¹⁹ A month later, in *Kenedi*—a case with facts similar to those of the current application—the Court granted a right of access to an individual scholar who had spent years trying to obtain access to historical records held by the Hungarian secret service.
14. The *Társaság* Court invoked earlier case law in noting that “it is difficult to derive from the Convention a general right of access to administrative data and documents,” but recognized that “the Court has recently advanced towards a broader interpretation of the notion of ‘freedom to receive information’ ... and thereby towards the recognition of a right of access to information.”²⁰ It is clear from these passages that the Court’s right of access doctrine is, in some respects, in continuing evolution. Open questions remain about the precise scope of the right, including as to what categories of state-held information, if any, are *not* covered, under what circumstances, and in relation to which information requesters. Furthermore, the Court has yet to provide any extensive interpretation of the Article 10 § 2 restrictive clauses in relation to the newly-established right of access. The current case grants the Court an important opportunity to begin to clarify some of these questions.
15. In this respect, it is sometimes argued that Article 10 of the Convention is cast in negative terms – guaranteeing a right “to receive and impart information and ideas without interference by public authority” – which bar the construction of any broad positive obligations for states to grant access to their own information. But this textual feature has not prevented the Court from establishing positive state obligations in other contexts of free expression law. For example, in *Ozgur Gundem v. Turkey*, this Court held that the failure of Turkish authorities to take steps to protect a newspaper from attacks by private persons, which had effectively silenced the publication, amounted to a violation of Article 10.²¹ The state’s obligation to release information in its own possession that properly belongs in the public domain is at least as compelling as the requirement – which this Court, in *Ozgur Gundem*, has already recognized – that the state halt and/or punish private interference with the free flow of information. As the *Társaság* judgment recognizes, the state’s refusal to provide access amounts to an interference with the free flow of public information, a sphere that clearly includes data held by the state on behalf, and for the benefit, of the citizenry.

2. The Right to Information in Other Regional and Domestic Legal Systems

16. European states and supranational entities are not alone in recognizing a right to information. The Inter-American human rights system is probably the most advanced in guaranteeing, at a regional level, the right of the public to access information in the hands of the government. The African human rights mechanism has also confirmed the global trend toward acceptance of the right as a basic individual and collective entitlement.
17. The Inter-American Court of Human Rights acknowledged early on that the rights of listeners and receivers of information and ideas are on the same footing as the rights of the speaker: “For the average citizen it is at least as important to know the opinion of others or to have access to

¹⁸ See *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009; and *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009. See also *Sdruženi Jihočeské Matky v. Czech Republic*, Decision of 10 July 2006 (Admissibility), holding for the first time that Article 10 granted the applicant, a Czech environmental group, a right of access to documents regarding the design and construction of a nuclear reactor.

¹⁹ *Társaság*, paras 36-38.

²⁰ *Ibid*, para. 35.

²¹ *Ozgur Gundem v. Turkey*, ECtHR, Judgment of 16 March 2000, paras. 44-45.

information generally as is the very right to impart his own opinion.”²² In 2000, the Inter-American Commission on Human Rights, the Court’s auxiliary body, expressly recognized that “access to information held by the state is a fundamental right of every individual.”²³

18. In September 2006, upon referral of the *Claude Reyes* case by the Commission, the Inter-American Court issued a landmark judgment that confirmed and expanded upon the Commission’s ruling in the following terms:

“... the Court finds that, by expressly stipulating the right to ‘seek’ and ‘receive’ ‘information,’ Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it...”²⁴

The Court underscored the “indispensable” presumption in a democratic society that “all information is accessible,” subject only to restrictions that can be imposed, under paragraph 2 of Article 13 of the Inter-American Convention, on a case-by-case basis.²⁵

19. The right to information has also been expressly recognized by the African Commission on Human and Peoples’ Rights. The Commission has not yet had an opportunity to decide, in its adjudication procedure, whether the African Charter on Human and Peoples’ Rights grants a right of access to official information. It has nevertheless held that Article 9 of the Charter²⁶ protects not only the free speech rights of the speaker, but also the rights of those interested in *receiving* information and ideas from all lawfully available sources.²⁷ More recently, the African Commission issued a *Declaration of Principles on Freedom of Expression in Africa*, which contains a comprehensive statement of the principles applicable in this area, including that “[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.”²⁸
20. Numerous national courts in Europe and elsewhere have upheld a right of access to information held by public authorities, whether as part of free speech and participation rights or as a stand-alone guarantee. Thus, the French *Conseil d’Etat* held in 2002 that the right of access to

²² *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, para. 32.

²³ *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission’s 108th regular session, 19 October 2000, para. 4. The Commission affirmed that position in the 2005 case of *Claude Reyes et al v. Chile*, holding that Article 13 of the American Convention on Human Rights, guaranteeing the right to freedom of expression, includes a right of access to public information, which “places a positive obligation on governments to provide such information to civil society.” Case No. 12.108 *Claude Reyes et al v. Chile*, Commission Application of 8 July 2005, para 69.

²⁴ *Claude Reyes v. Chile*, note 5 supra, para. 77.

²⁵ *Ibid.*, para. 92. Article 13.2 of the American Convention allows restrictions to the right of freedom of expression “to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.”

²⁶ Article 9 of the African Charter on Human and Peoples’ Rights provides: “1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”

²⁷ See inter alia *Sir Dawda K. Jawara v. The Gambia*, Decision of 11 May 2000, para. 65.

²⁸ Adopted at the 32nd Ordinary Session, 17-23 October 2002, Banjul, Gambia, Principle IV.

administrative documents is among “the fundamental guarantees granted to citizens for the exercise of their public liberties,” in the meaning of Article 34 of the French Constitution.²⁹

21. The Hungarian Constitutional Court ruled in 1992 that freedom of information is a fundamental right essential for citizen oversight:

“The publicity and accessibility of data of public interest is a fundamental right guaranteed by the Constitution Free access to information of public interest promotes democratic values in elected bodies, the executive power, and public administration by enabling people to check the lawfulness and efficiency of their operations. Because of the complexity of the civic sphere, the citizens’ sway over administrative decisions and the management of public affairs cannot be effective unless public authorities are willing to disclose pertinent information.”³⁰

22. The Supreme Court of India addressed the issue as early as 1982 in a case involving the government’s refusal to release intra-agency correspondence regarding transfers and dismissals of judges. Recognizing a “right to know which seems implicit in the right of free speech and expression,” the Supreme Court reasoned that,

“[w]here a society has chosen to accept democracy as its creedal faith, it is elementary that the citizens ought to know what their government is doing. . . . No democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of government. . . . The citizens’ right to know the facts, the true facts, about the administration of the country is thus one of the pillars of a democratic State.”³¹

23. The Constitutional Court of (South) Korea reached a similar conclusion in a 1989 case involving a municipal office’s unjustified refusal to grant the applicant access to certain real estate records he had requested. The Court concluded that unhindered access to state-held information was essential to the “free formation of ideas,” which is itself a pre-condition for the realization of genuine freedom of expression and communication.³² This and subsequent freedom of information decisions of the Constitutional Court influenced the legislature to adopt in 1996 a comprehensive access to information law.³³

24. This overview of comparative and international law and practice shows that the right of access to government information has become widely accepted in the democratic world, including in the Council of Europe area, as a basic political right. Whether as part of traditional free expression guarantees or as an important entitlement in its own right, it is perceived as an integral and imperative component of the broader right to democratic governance. Indeed, it has become untenable to argue that the public should *not* have a general right to know what their government knows and does, subject only to compelling exceptions.

3. No Need to Prove Personal Interest or Harm

25. One of the questions of principle raised by this case is whether the applicant should have been required by the domestic authorities to prove a justified interest in the information he requested. The recent jurisprudence of this Court strongly suggests that the government cannot condition disclosure of information of public interest upon the identity of the requester, or a showing of personal interest or specific harm resulting to the latter from denial of access. The applicants in

²⁹ *Ullmann*, Judgment of 29 April 2002, No. 228830, para. 2. Constitutional Article 34 provides that “civic rights and the fundamental guarantees granted to citizens for the exercise of their public liberties” can only be regulated by an act (loi) of Parliament.

³⁰ Decision 32/1992 (V.29) AB, at 183-184 (*as translated by* the Office of the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information). In 1994, the Hungarian Court struck down a state secrets law, ruling that it imposed impermissible restrictions on the right to information. In so doing, the Court found that free access to data of public interest, including those held by the state, is one of the preconditions for the exercise of the right to free expression. Decision 34/1994 (VI.24) AB.

³¹ *S.P. Gupta v. Union of India* [1982] AIR (SC) 149, at 232.

³² *Forests Survey Inspection Request Case*, 1 KCCR 176 (4 September 1989).

³³ Disclosure of Information by Public Agencies Act (no. 5242), 31 December 1996.

both the *Társaság* and *Kenedi* cases – a human rights watchdog group and a historian, respectively – requested access to the information at issue out of a presumed desire to contribute to societal debate on matters of public interest. Whatever other personal or institutional motives there may have been at play, they had no role in the Court’s analysis, whose primary focus was the nature of the requested information. By the same token, it cannot be left to the government to decide, in a democracy, which of its citizens may properly contribute to public debate.

26. The Inter-American Court also made clear in *Claude Reyes*, in unambiguous terms, that the requested information “should be provided without the need to prove direct interest or personal involvement.”³⁴ The Council of Europe Convention on Access to Official Documents, which culminated some twenty years of European standard-setting in the field, similarly provides that “an applicant for an official document shall not be obliged to give reasons for having access to the official document.”³⁵ In fact, the Convention provides that state parties may even allow applicants to remain anonymous, “except when disclosure of identity is essential in order to process the request [for information].”³⁶
27. The great majority of national access to information laws in Europe also specify that the exercise of the right should not be conditioned upon a showing of any “legitimate” interest in the requested information. These include the current Russian federal law on access to information—adopted after the Strasbourg filing of the application which gave rise to this case—which provides that information users have the right “not to substantiate the necessity of receiving the requested information on the activities of government bodies and bodies of local self-government, provided access to this information is not restricted.”³⁷
28. It is, indeed, questionable whether a statute that requires a showing of personal interest can be deemed consistent with the requirements of Article 10. It is clear from the findings of this Court and other leading tribunals around the world that the right of access to state-held information of public interest is a component of the fundamental right to freedom of expression, if not a separate basic right. Requesting a justification for the ability to exercise the right of access is therefore tantamount to asking individuals to justify expressing their opinions freely, or to limiting the right of access to information only to certain people chosen by the authorities.

B. Public Access to Crime Statistics is Widely Guaranteed

29. Transparency of judicial proceedings in the broad sense is a fundamental tenet of the rule of law and due process. This Court has long held, for example, that, under Article 6 of the Convention, public knowledge of, and access to, court proceedings are essential for the protection of litigants’ rights and the maintenance of public confidence in the administration of justice.³⁸
30. Similarly, regular disclosure of information, including statistical data, about the operation of the criminal justice system contributes not only to democratic accountability in the field of law enforcement, but also to general respect for the rule of law. By the same token, arbitrarily denying the public access to such data feeds public distrust and may undermine good policing practices. Historically, a major incentive for the voluntary disclosure of crime statistics by police forces has been their desire to facilitate an informed public debate on crime, and to discourage sensational reporting.³⁹

³⁴ Para. 77.

³⁵ Art. 4.1. Note that the Convention’s definition of an “official document” includes all information held by a public authority, in whatever form it may be recorded.

³⁶ Art. 4.2. This would apply, for example, to requests for access to one’s own personal data.

³⁷ Federal Law On Providing Access to Information on the Activities of Government Bodies and Bodies of Local Self-Government, No. 8-FZ, February 9, 2009, art. 8.3 (unofficial English translation, available at <http://www.svobodainfo.org/en/node/439>).

³⁸ See inter alia *Pretto v. Italy* (1983) and *Diennet v. France* (1995).

³⁹ *Bridging Gaps in Police Crime Data: A Discussion Paper from the U.S. Bureau of Justice Statistics Fellows Program* (1999), p.4; at <http://bjs.ojp.usdoj.gov/content/pub/pdf/bgpcd.pdf>.

31. The Council of Europe has long recognized “the needs in both the public and private sectors for reliable statistics for analysis and understanding of contemporary society, and for defining policies and strategies ... in practically all aspects of daily life.”⁴⁰ With respect to policing, the European Code of Police Ethics recommends that “[p]olice organizations ... be ready to give objective information on their activities to the public, without disclosing confidential information.”⁴¹
32. Furthermore, both the raw data and the capabilities needed to generate crime statistics tend to be, by their nature, in the exclusive possession of government agencies, granting the state a genuine “information monopoly” in the field. As this Court noted in *Társaság*,⁴² such monopolies over information that is “ready and available” to the state tend to improperly interfere with the free flow of information and ideas. It is difficult, for example, to see how a debate on almost any aspect of criminology or criminal justice can be effective or complete in the absence of reliable statistical data on crime and criminal prosecutions. There is no indication in the current case that the information requested by the applicant was not already available to, or easily retrievable by, the Russian authorities.
1. Police Departments Must Disclose Information of Public Interest, Including Statistical Data
33. A recent study by a European right to information NGO found that, in the great majority of Council of Europe (CoE) jurisdictions, police departments are legally required to disclose, proactively and/or upon request, general information on their activities: of the 42 CoE countries that have right to information laws and regulations, only one (Ireland) specifically excludes the police from the scope of the relevant act.⁴³ The CoE Convention on Access to Official Documents includes in its binding scope all “government and administration [bodies] at national, regional and local level,”⁴⁴ making no exception for the police. The Convention’s Explanatory Report makes clear that “the police” are covered.⁴⁵
34. In most CoE countries, police departments are under the same general obligations of access as other executive agencies, subject to the common exemptions of personal privacy, and the integrity of the prevention and investigation of criminal activity. It is noteworthy that the Russian authorities do not appear to have raised or considered any such objections in the course of domestic proceedings in this case. In addition, as the comparative practices described below testify, disclosure of – if necessary, duly anonymized – criminal prosecution *statistics* is not generally considered to affect either of those interests. The only exception to that rule appears to arise when access is requested for detailed crime statistics broken down by small localities or small statistical samples, which, when coupled with other publicly available information, may lead to the identification of individual victims or perpetrators.⁴⁶ That does not appear to have been the case with the current applicant’s generally-formulated requests.

⁴⁰ Preamble to the Committee of Ministers Recommendation No. R(97)18 Concerning the Protection of Personal Data Collected and Processed for Statistical Purposes, 30 September 1997.

⁴¹ CoE Committee of Ministers’ Recommendation Rec(2001)10 to Member States on the European Code of Police Ethics, 19 September 2001, para. 19. The Explanatory Memorandum to the Recommendation adds that a “readiness by the police to disclose information on its activities is crucial for securing public confidence.”

⁴² Para. 36.

⁴³ Access Info Europe, “The Right to Know: Europe and the Police” (November 2009), p. 3; available at: http://www.access-info.org/documents/Access_Docs/Using/Civil_Liberties/Europe_and_the_Police.pdf. Even the Government of Ireland is reportedly considering bringing the police within the scope of the Irish Freedom of Information Act. *Ibid*, pp. 12-13.

⁴⁴ Art. 1(2)(a)(i).

⁴⁵ Para. 11. Available at: <http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm>.

⁴⁶ Even in such cases, a statistical tool known as “barnardizing the data” may often render them sufficiently anonymous for purposes of public disclosure. See, e.g. *Common Services Agency v. Scottish Information Commissioner*, [2008] UKHL 47 (House of Lords) (regarding a request for statistics on the incidence of childhood leukemia in every census ward of two Scottish provinces).

35. There is no question that statistical data are among the “official documents” that must be disclosable, *in principle*, under the CoE Access Convention⁴⁷ and prevailing European practice. The Explanatory Report to the Convention notes that the Convention’s definition of “official documents” is “very broad” and that it includes “any *information* drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format.”⁴⁸

2. Access to Crime Statistics Is Widely Guaranteed in Law and Practice

36. This section summarizes the findings of our research into the laws and practices of twelve Council of Europe member states⁴⁹ and five other leading right to information jurisdictions⁵⁰ in relation to disclosure of crime statistics, either proactively or upon request.

37. *General practice.* We found that nearly all of these countries publish and disseminate statistical information concerning crime, as well as other types of statistics, as a matter of course, irrespective of any requests under their access to information laws, which explains the relative paucity of case law in this area.⁵¹ The same is true of Ireland, the only country among those researched that exempts the police from the scope of the national access to information act. In many cases, several of the very same parameters that the current applicant requested are available in the published statistics. Some countries, such as Canada, specifically *require* police and judicial authorities to submit information on crime statistics for analysis and publication by the national statistics agency.⁵²

38. *Jurisprudence and contentious proceedings.* Despite the generally limited jurisprudence in this area, courts and other authorities in a number of countries have considered questions related to disclosure of crime statistics, or general statistical data, unrelated to crime.

39. In Canada, the federal Department of Justice granted a media outlet general data on sexual exploitation charges brought against Canadian citizens overseas (where consular support had been requested), facilitating public debate on the problem of sex tourism.⁵³

40. In Hungary, the Budapest police agreed to grant a local rights group access to statistical data related to the instalment of closed-circuit TV cameras throughout the city (following the filing of a court case against the police department’s initial refusal to release the data).⁵⁴

41. In Scotland, the Information Commissioner considered whether to order the disclosure of statistical information concerning the number of registered sex offenders living in North and South Lanarkshire, in the face of objections by local police. The Commissioner held that the data was sufficiently anonymous and ordered the release of information.⁵⁵

42. In the United Kingdom, the Information Tribunal has held that a crime report used for policy making purposes was rightfully withheld from publication under a statutory exemption for information used for the formulation of government policy; however, the Tribunal ordered the

⁴⁷ See note 35 above.

⁴⁸ Para. 11 (emphasis added).

⁴⁹ These are Bulgaria, Denmark, Finland, Germany, Hungary, Ireland, the Netherlands, Norway, Romania, Slovenia, Sweden, and the United Kingdom (with Scotland treated as a separate right to information regime).

⁵⁰ Australia, Canada, India, New Zealand, and the United States of America.

⁵¹ See information collected at <http://www.right2info.org/cases/Bubon-Statistical-Crime-Data>.

⁵² Statistics Act, secs. 26-29.

⁵³ *Sex Tourism Thriving: Since 1993, Nearly 150 Canadians have been Charged with Sex Crimes*, HARBOUR CITY STAR, April 9, 2008.

⁵⁴ *Hungarian Civil Liberties Union v. Budapest Metropolitan Police Department* (2007), Judgment No. Pfv.IV.20.284/2007/4.

⁵⁵ *Decision 178/2006 Mr. John Rowbotham of the Hamilton Advertiser and the Chief Constable of the Strathclyde Police* (28 September 2006). In a similar case before the Scottish Court of Sessions, the Court directed the Information Commissioner (IC) to reconsider his decision that it was not possible to release statistics about the number of sex offenders in certain postal code districts without allowing their identification. The case is still pending before the IC. *Craigdsdale Housing Association v. Scottish Information Commissioner*, [2010] CSIH 43 (Scot.).

background statistics on crime that were included in the report to be released because factual information, such as statistics, explicitly fell outside of the stated exemption.⁵⁶ Furthermore, the release of the statistical information was unlikely to prejudice the effective conduct of public affairs, another statutory exemption to access.⁵⁷

43. In another UK case, the applicant had requested from Royal Mail statistics on the number of thefts of mail from private vehicles that delivered mail across the UK over several years. The request was denied by Royal Mail, which argued that the statistics were used to predict areas of vulnerability, and that public awareness of private vehicles delivering mail would lead to more theft.⁵⁸ Upon appeal, the Information Commissioner determined that no exemptions applied because the statistics merely *led to* (rather than constitute sensitive data of) theft investigations, and that their release into the general public would not cause more crime but rather enhance the public knowledge of Royal Mail's performance.⁵⁹ The Commissioner ordered the release of the statistics.

Conclusion

44. We have demonstrated that the right of access to information held by public authorities is firmly established in European and international law and practice. Courts and lawmakers throughout the democratic world have determined that the right to receive such information is an integral and separate element of freedom of expression, and, like the right to impart information and ideas, is an actual prerequisite for the meaningful exercise of other rights in a modern democracy. Access to statistical information collected by the state, and detailed crime statistics in particular, is widely guaranteed in the democratic world. Such disclosures play an important role in enhancing law enforcement accountability and public confidence in the criminal justice system.
45. This Court has already recognized that the media, researchers and other entities that seek to engage in or contribute to matters of general concern have an Article 10 right to receive information of public interest held by public authorities. We respectfully urge the Court to take the opportunity presented by this case to make clear that Article 10 of the Convention grants individuals and other persons a right of *general* access to state-held information, subject to any restrictions permitted by Article 10 § 2. This will bring the Court's jurisprudence into line with prevailing European and international law, and clarify for national courts throughout Europe the scope of access to information, as one of the foundations of democratic government.

1 November 2010

⁵⁶ *Cabinet Office v. Information Commissioner*, Information Tribunal Appeal No. EA/2008/0030 (21 October 2008), para. 40.

⁵⁷ *Ibid.*

⁵⁸ *Freedom of Information Act 2000 Decision Notice, FS50118873 (9 August 2007)*, paras 44, 52.

⁵⁹ *Ibid.*, paras 41, 61.