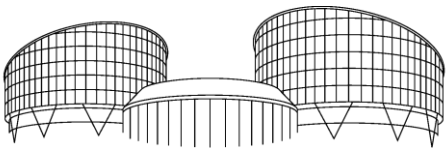

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ÖSTERREICHISCHE VEREINIGUNG ZUR ERHALTUNG, STÄRKUNG UND SCHAFFUNG EINES WIRTSCHAFTLICH GESUNDEN LAND- UND FORST-WIRTSCHAFTLICHEN GRUNDBESITZES v. AUSTRIA

(Application no. 39534/07)

JUDGMENT

STRASBOURG

28 November 2013

FINAL

28/02/2014

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria[1],

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Isabelle Berro-Lefèvre, *President*,
Elisabeth Steiner,
Khanlar Hajiyev,
Mirjana Lazarova Trajkovska,
Julia Laffranque,
Linos-Alexandre Sicilianos,
Erik Møse, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 5 November 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 39534/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an association registered in Austria, the Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes ("the applicant association"), on 24 August 2007.

2. The applicant association was represented by Mr R. Mutenthaler, a lawyer practising in Ybbs. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicant association alleged that the refusal of the Tyrol Real Property Transactions Commission to grant it access to all its decisions issued since January 2000 amounted to a violation of its right to receive information.

4. On 10 March 2010 the application was communicated to the Government.

[1] For citation purposes, the short title Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria should be used.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a registered association which has its seat in Vienna. Its aim is to research and study past and present transfers of ownership of agricultural and forest land in order to reach conclusions as to the impact of such transfers on society. The applicant association also gives opinions on draft laws falling within its field of interest.

6. In essence, agricultural and forest land transactions require approval by local and regional authorities. The latter are called Regional Real Property Transactions Commissions (*Landes-Grundverkehrs-kommissionen*). The aim of this requirement, laid down in the Real Property Transactions Acts of the *Länder*, is to preserve land for agricultural use and forestry and, in some of the regions including Tyrol, to avoid the proliferation of second homes. The applicant association states that it is sent all decisions issued by the Regional Real Property Transactions Commissions with the exception of the one for Tyrol. In the decisions it receives, the names of parties and other sensitive data are usually anonymised.

7. On 26 April 2005 the association asked the Tyrol Real Property Transactions Commission ("the Commission") to provide, by mail, all decisions issued since 1 January 2005 in anonymised form, the costs thereof to be reimbursed. By letter of 12 July 2005 the Commission replied that it could not comply with the request owing to lack of time and personnel.

8. On 18 July 2005 the applicant association submitted a further request, this time requesting the provision, by mail, of all decisions issued since 1 January 2000 in anonymised form. In the event of refusal of the application, it demanded a formal decision in accordance with the Tyrol Access to Information Act (*Tiroler Auskunftspflichtgesetz* - "the Information Act"). The applicant association argued that since the Commission's decisions concerned "civil rights" within the meaning of Article 6 of the Convention, the decisions should be either publicly announced or made public by other appropriate means.

9. In its decision of 10 October 2005 the Commission rejected the request, holding that the transmission of anonymised copies of its decisions did not constitute information within the meaning of section 1(2) of the Information Act, which defines information as "existing knowledge on matters known to the authority at the time it provides the information". Moreover, even if the request were to fall within the scope of that provision, the Information Act stated that pursuant to section 3(1) subparagraph (c) there was no duty to provide the information if doing so would require so many resources that the functioning of the authority would be affected. The

decision stated that complaints could be lodged with the Constitutional Court (*Verfassungsgerichtshof*) and the Administrative Court (*Verwaltungsgerichtshof*).

10. The applicant association complained to both the Constitutional Court and the Administrative Court. It relied on Article 10 of the Convention.

11. In its submissions in reply to the applicant association's complaint to the Constitutional Court and the Administrative Court, the Commission maintained that its decisions did not constitute information within the meaning of the Information Act. It argued that a decision contained the facts of the case and the legal conclusions the authority had drawn from them. Legal arguments could be discussed and decisions could be challenged and set aside if the legal conclusions were found to be wrong. Therefore, giving someone access to a decision was comparable to giving someone legal advice, as opposed to providing information as defined in the Information Act.

12. On 21 September 2006 the Administrative Court declared that it did not have jurisdiction to deal with the case and rejected the applicant association's complaint. The Administrative Court held that it was only competent to deal with complaints against decisions regarding transfers of building plots and not with complaints brought against the Commission's decisions on transfers of agricultural or forest land. As the applicant association had not claimed to have been party to the transfer of a building plot, it could not base its complaint on that status. Neither did the Information Act contain any rule stating that complaints about decisions by the Commission pursuant to the Information Act were to be lodged with the Administrative Court. Therefore the matter was excluded from the Administrative Court's jurisdiction. Consequently, the statement in the Commission's decision that a complaint could be lodged with the Administrative Court was not correct.

13. On 27 February 2007 the Constitutional Court declined to deal with the case for lack of prospects of success from the perspective of constitutional law, and also because the matter was not excluded from the Administrative Court's jurisdiction. The decision was served on the association's representative on 4 April 2007.

14. After the Government had been notified of the present application, the applicant association, relying on the Government's argument in respect of exhaustion of domestic remedies (see paragraph 26 below), lodged an application under Article 138 of the Federal Constitution seeking a ruling from the Constitutional Court on the negative conflict of jurisdiction between it and the Administrative Court.

15. On 2 December 2011 the Constitutional Court issued a decision stating that it was competent to rule on the applicant association's complaint against the Commission's decision of 10 October 2005. Consequently, it set

aside its own decision of 27 February 2007 and awarded the applicant association reimbursement of the costs of the proceedings.

16. In a further decision of 2 December 2011, the Constitutional Court ruled on the merits of the applicant association's complaint. Referring to the Court's case-law and its own case-law, it held in particular that whilst the right to receive information enshrined in Article 10 of the Convention prohibited States from restricting the receipt of information that others wished to or might be willing to impart, it did not – by contrast – impose a positive obligation on States to collect and disseminate information of their own motion. The Constitutional Court added that, in accordance with its established case-law, Article 10 did not require the State to grant access to information or to make information available of its own motion. Consequently, the Commission's refusal to transmit anonymised copies of all decisions issued during a specific period of time to the applicant association did not constitute an interference with the latter's right under Article 10 of the Convention.

17. As to the applicant association's argument that the Commission's decision was arbitrary as it had failed to provide reasons, the Constitutional Court referred to the explanatory report on the Information Act and endorsed the Commission's view that the applicant association's request was not merely a question of obtaining information about one or more specific issues, but would require the Commission to compile – of its own motion – all decisions issued over a period of some years, to anonymise them, and to send paper copies thereof to the applicant association. The Commission had therefore rightly taken the view that the applicant association's request did not fall within the scope of section 1 of the Information Act. Moreover, the Commission had also dealt with the merits of the request in that it had concluded that the provision of information could be refused pursuant to section 3(1) subparagraph (c) of the Information Act as it would require investigations, calculations or preparations considerably impinging on the fulfilment of its other tasks.

18. Lastly, the Constitutional Court observed that the applicant association could be implicitly relying also on Article 6 of the Convention. It noted that neither the Court's case-law in respect of public access to court decisions nor its own case-law guaranteed the right to obtain anonymised copies of all decisions issued by the Commission over a lengthy period. According to the Constitutional Court's case-law, access had to be given to the judgments delivered by the highest courts which dealt with cases raising important legal issues. However, this did not apply to all the Commission's decisions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Information Act

19. The Information Act (Regional Law Gazette 4/1989) regulates the duty of the authority to provide information:

Section 1 provides as follows:

> "(1) The authority of the *Land*, municipalities, municipal associations and any other self-governing bodies regulated by regional law are under an obligation to provide anyone with information about their sphere of competence unless provided otherwise in section 3.
>
> (2) Information is the notification of existing knowledge on matters known to the authority at the time it provides the information."

Section 2, in so far as relevant, provides as follows:

> "(1) Anyone may require authorities of the *Land*, municipalities, municipal associations and any other self-governing bodies regulated by regional law to provide information orally, in writing, or by phone, telex or telegraph. ..."

Section 3, in so far as relevant, provides as follows:

> "(1) No information shall be provided if the provision of such information is contradictory to a statutory duty of confidentiality.
>
> (2) There is no duty to provide information if
>
> ...
>
> (c) the provision of information would require investigations, calculations or preparations considerably impinging on the proper fulfilment of the authority's other tasks..."

B. The Tyrol Real Property Transactions Act

20. The aim of the Tyrol Real Property Transactions Act as in force at the material time (Regional Law Gazette 61/1996 as amended by Regional Law Gazette 75/1999), was to preserve land for agricultural and forestry use and to avoid the proliferation of second homes.

21. Contracts concerning the transfer of ownership and certain other rights relating to agricultural or forest land therefore required approval by local real property transactions authorities. Appeals against their decisions could be lodged with the Commission either by the parties if they considered the decision had violated their rights or by the Regional Real Property Transactions Referee (*Grundverkehrsreferent*) if he considered that the decision ran contrary to the public interest. A complaint could be lodged with the Constitutional Court against decisions of the Commission relating to the transfer of agricultural and forest land. If approval was declined, the transfer of land was null and void.

22. The Regional Real Property Transactions Commission was composed of nine members and substitute members, who were appointed for five years and were not bound in the exercise of their functions by any instructions. As a rule the Commission held oral hearings in public.

23. An annual report on "The situation of real property transfers in Tyrol" published by the Regional Government includes a report containing general information on the Commission's activities. It can be seen from these reports that in the period from 2000 to 2005, between 119 and 160 appeals per year were lodged with the Commission, the majority of which concerned transfers of agricultural and forest land. It can also be seen that the Commission issued

- 86 decisions in 2000;
- 65 decisions in 2001;
- 106 decisions in 2002;
- 109 decisions in 2003;
- 109 decisions in 2004; and
- 105 decisions in 2005.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant association complained that its right to receive information had been violated as it was refused access to the decisions of the Tyrol Real Property Transactions Commission. The applicant association relied on Article 10, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. The Government contested that argument.

A. Admissibility

26. The Government had initially argued that the applicant association had not exhausted domestic remedies since it had failed to make use of an application under Article 138 § 1(b) of the Federal Constitution in order to resolve the negative conflict of jurisdiction which resulted from the Administrative Court's decision of 21 September 2006 and the Constitutional Court's decision of 27 February 2007. As the applicant association subsequently requested that the Constitutional Court rule on that conflict of jurisdiction and obtained a decision by the Constitutional Court on the merits on 2 December 2011 (see paragraph 16 above), the Government withdrew their objection based on the non-exhaustion of domestic remedies.

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

B. Merits

1. The parties' submissions

28. The applicant association asserted that Article 10 of the Convention required States, to a certain extent, to make information available to the public. In its view the decisions of judicial bodies such as the Commission should be publicly accessible. Given the possibilities of electronic data processing, the authorities could easily create an online information system providing access to the decisions of the Commission, while making provision for the protection of confidential data where necessary. Such a system, namely the Federal Legal Information System (*Rechtsinformations-system des Bundes*), existed at federal level and made decisions of the highest courts and various other courts and authorities available. Where such a system did not exist, the State should at least provide anonymised paper copies of decisions upon request. Regarding the Government's argument that Austrian administrative law did not make provision for unrestricted access to files, the applicant association submitted that it had not requested access to files but rather the provision of decisions in anonymised form.

29. In the applicant association's view, such interference with its right to receive information could not be justified. It asserted that interests in the rule of law and due process argued in favour of making decisions by judicial authorities available to the public, while the interests of confidentiality could be protected by anonymising them. In response to the Government's argument that granting the request would have demanded considerable

effort, the applicant association criticised the fact that the Commission had not provided any figures indicating the number of decisions to be made available or the actual amount of time needed to provide anonymised copies.

30. The Government argued that the Commission's refusal to provide anonymised paper copies of all decisions issued since 1 January 2000 could not be regarded as an interference with the applicant association's rights under Article 10. According to the Court's case-law, Article 10 of the Convention prohibited Contracting States from interfering with the receipt of information that someone wished to impart. However, it did not impose a positive obligation on the State to collect and disseminate information itself. Although the State had to set up its information system in such a way that an individual could obtain generally accessible information, it was not obliged to provide access to confidential information.

31. Access to files containing decisions issued in administrative proceedings was usually given only to parties with a special legal interest in the specific case. The applicant association could not claim to have a special interest in all decisions issued by the Commission over a lengthy period. Thus, the refusal to provide anonymised copies of all decisions issued since 1 January 2000 did not constitute an interference with its rights under Article 10 of the Convention. Moreover, a right to be provided with all decisions issued by the Commission over a lengthy period could not be inferred from Article 6 of the Convention either.

32. In the alternative, assuming that there had in fact been an interference with the applicant association's rights under Article 10, the Government asserted that such interference had been justified. They pointed out in particular that it served legitimate aims: it protected the rights of others – namely their interest in non-disclosure of the contents of proceedings affecting them personally, which might for instance include personal data concerning the location and price of land that had been purchased – and prevented the disclosure of confidential information. Moreover, it served to preserve the proper functioning of the authority concerned. Had the applicant association's request been granted, compliance with it would have required substantial resources to anonymise numerous decisions issued over a number of years and would thus have jeopardised the fulfillment of the Commission's main tasks. A weighing up of interests showed that this latter interest had to prevail over the applicant association's interest in obtaining access to all these decisions in anonymised form. Consequently, the interference had also been proportionate.

2. The Court's assessment

(a) Whether there has been an interference

33. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom, the purpose of which is to impart information and ideas on such matters. The Court has emphasised that the most careful scrutiny on its part is called for when measures taken by the national authorities may potentially discourage the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern (see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 26, 14 April 2009, with references to *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 59, Series A no. 216; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Jersild v. Denmark*, 23 September 1994, § 35, Series A no. 298; and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 64, ECHR 1999-III).

34. Furthermore, the Court has held that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (see *Dammann v. Switzerland* (no. 77551/01, § 52, 25 April 2006). However, the function of creating forums for public debate is not limited to the press. That function may also be exercised by non-governmental organisations, the activities of which are an essential element of informed public debate. The Court has therefore accepted that non-governmental organisations, like the press, may be characterised as social "watchdogs". In that connection their activities warrant similar Convention protection to that afforded to the press (see *Társaság a Szabadságjogokért*, cited above, § 27, and *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013).

35. The applicant association is a non-governmental organisation the aim of which is to research the impact of transfers of ownership of agricultural and forest land on society. It also contributes to the legislative process by submitting comments on draft laws falling within its field of expertise. In the present case it wished to obtain information about the decisions of the Commission, that is to say the appellate authority approving or refusing transfers of agricultural and forest land under the Tyrol Real Property Transactions Act. The aims pursued by that Act – namely preserving land for agricultural and forestry use and avoiding the proliferation of second homes – are subjects of general interest.

36. The applicant association was therefore involved in the legitimate gathering of information of public interest. Its aim was to carry out research and to submit comments on draft laws, thereby contributing to public debate. Consequently, there has been an interference with the applicant

association's right to receive and to impart information as enshrined in Article 10 § 1 of the Convention (see *Társaság a Szabadságjogokért*, cited above, § 28; see also *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009).

(b) Whether the interference was justified

37. The Court reiterates that an interference with an applicant's rights under Article 10 § 1 will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph, and whether it was "necessary in a democratic society" in order to achieve those aims.

38. In dismissing the applicant association's request, the Commission relied on sections 1 and 3(1) subparagraph (c) of the Information Act. The Court is thus satisfied that the interference at issue was "prescribed by law" within the meaning of Article 10 § 2 of the Convention.

39. The Government argued that the interference served legitimate aims, namely the protection of the rights of others and the non-disclosure of confidential information. The applicant association argued that these interests could have been protected by anonymising the copies of the decision. The Court considers that the interference in question can be seen as having pursued the legitimate aim of the protection of the rights of others.

40. The Court must examine whether the interference was also "necessary" within the meaning of Article 10 § 2. In respect of the general principles concerning the necessity of an interference with the right to freedom of expression, the Court refers to its recent judgment in the case of *Animal Defenders International* (cited above, § 100).

41. In the specific context of access to information, the Court has held that the right to receive information basically prohibits a Government from preventing a person from receiving information that others wished or were willing to impart (see *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116). Furthermore, it has held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion (see *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I). However, in *Társaság a Szabadságjogokért* – which concerned a request for access to information by a non-governmental organisation for the purposes of contributing to public debate – the Court noted that it had recently advanced towards a broader interpretation of the notion of the "freedom to receive information" and thereby towards the recognition of a right of access to information (cited above, § 35). Furthermore it drew a parallel to its case-law concerning the freedom of the press, stating that the most careful scrutiny was called for when authorities enjoying an information monopoly interfered with the exercise of the function of a

social watchdog (ibid., § 36, with reference to *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004-VI).

42. In the present case the applicant association requested paper copies of all decisions issued by the Commission from 1 January 2000 to mid-2005. It argued in essence that the State had an obligation either to publish all decisions of the Commission in an electronic database or to provide it with anonymised paper copies upon request. The Court does not consider that a general obligation of this scope can be inferred from its case-law under Article 10. However, its task in the present case is to examine whether the reasons given by the domestic authorities for refusing the applicant association's request were "relevant and sufficient" in the specific circumstances of the case and whether the interference was proportionate to the legitimate aim pursued.

43. Both the Commission and the Constitutional Court relied on a two-fold argument. Firstly, they considered that the applicant association's request did not fall within the scope of the Information Act. Secondly, they argued that, even if it did, the request could be refused on the grounds that its fulfilment would require substantial resources which would jeopardise the fulfilment of the Commission's other tasks. The Constitutional Court noted in particular that the applicant association's request was not concerned with obtaining information on one or more specific issues but would have required the Commission to compile, of its own motion, all decisions issued over a period of some years, to anonymise them and to send paper copies thereof to the applicant association. The Government also relied on this line of argument.

44. The Court observes that there is a difference between the present case and *Társaság a Szabadságjogokért*, which concerned a request by a non-governmental organisation to be given access to a particular document – a constitutional complaint for the review of certain provisions of the Criminal Code – lodged by a member of parliament. In reaching its conclusion that the refusal of access was in breach of Article 10, the Court had regard to the fact that the information sought was "ready and available" and did not necessitate the collection of any data by the Government (see *Társaság a Szabadságjogokért* cited above, § 36). However, in assessing whether the interference complained of in the present case was "necessary" within the meaning of Article 10 § 2, the Court must consider all the circumstances of the case.

45. The Court notes that the applicant association, by requesting anonymised copies of the Commission's decisions, accepted that the decisions at issue contained personal data which would have to be removed before the decisions could be made available. It also understood that the production and mailing of the requested copies involved a certain cost, which it proposed to reimburse. Nevertheless, the applicant association's request met with an unconditional refusal.

46. Given that the Commission is a public authority deciding disputes over "civil rights" within the meaning of Article 6 of the Convention (see, *Eisenstecken v. Austria*, no. 29477/95, § 20, ECHR 2000-X, with further references), which are, moreover, of considerable public interest, the Court finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form. Consequently, much of the anticipated difficulty referred to by the Commission as a reason for its refusal to provide the applicant association with copies of numerous decisions given over a lengthy period was generated by its own choice not to publish any of its decisions. In this context the Court notes the applicant association's submission - which has not been disputed by the Government - that it receives anonymised copies of decisions from all other Regional Real Property Commissions without any particular difficulties.

47. In sum, the Court finds that the reasons relied on by the domestic authorities in refusing the applicant association's request for access to the Commission's decisions - though "relevant" - were not "sufficient". While it is not for the Court to establish in which manner the Commission could and should have granted the applicant association access to its decisions, it finds that a complete refusal to give it access to any of its decisions was disproportionate. The Commission, which, by its own choice, held an information monopoly in respect of its decisions, thus made it impossible for the applicant association to carry out its research in respect of one of the nine Austrian *Länder*, namely Tyrol, and to participate in a meaningful manner in the legislative process concerning amendments of real property transaction law in Tyrol. The Court therefore concludes that the interference with the applicant association's right to freedom of expression cannot be regarded as having been necessary in a democratic society.

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

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

49. The applicant association complained that it did not have an effective remedy in respect of its complaint under Article 10. It relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

50. The Government contested that argument.

51. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

52. The applicant association asserted that, in their respective decisions of 21 September 2006 and 27 February 2007, the Administrative Court and

the Constitutional Court had refused to examine the merits of its complaint concerning the Commission's refusal to provide it with copies of all decisions issued over a specified period of time.

53. The Government submitted that a complaint to the Constitutional Court constituted an effective remedy. Even a refusal to deal with a complaint entailed a summary examination of the subject matter. Moreover, in the present case the applicant association had had the possibility of challenging the Constitutional Court's refusal to deal with the case by lodging an application under Article 138 of the Federal Constitution in order to resolve the negative conflict of jurisdiction between the Administrative Court and the Constitutional Court.

54. As the Court has held on many occasions, Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. The scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint; however, the remedy required by Article 13 must be "effective" in practice as well as in law. The "effectiveness" of a "remedy" within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see, for instance, *Kudła v. Poland*, no. 30210/96, § 157, ECHR 2000-XI).

55. The Court therefore has to examine whether Austrian law afforded the applicant association the possibility of complaining about the alleged violation of its right to freedom of expression and whether this remedy was "effective" in the sense that it could have afforded appropriate redress for the alleged violation.

56. The Court observes that the Administrative Court held that it was not competent to deal with the applicant association's complaint. The Constitutional Court in its turn also refused to deal with the case, making the assumption that the case was not excluded from the Administrative Court's jurisdiction. However, the applicant association had the possibility of bringing an application under Article 138 of the Federal Constitution which allowed this negative conflict of jurisdiction to be resolved. It made use of this option, with the result that the Constitutional Court set aside its previous decision and ruled on the merits of the applicant association's complaint under Article 10. The fact that the outcome was not favourable for the applicant association does not detract from the effectiveness of the remedy.

57. The Court is therefore satisfied that the applicant association had an effective remedy at its disposal in respect of its complaint under Article 10. Consequently, there has been no violation of Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Costs and expenses

59. Whereas the applicant association did not claim compensation for pecuniary or non-pecuniary damage, in its observations of 27 August 2010, it claimed a total of 5,579.66 euros (EUR) for the costs and expenses incurred in the domestic proceedings, comprising EUR 80 for expenses incurred before the Commission, EUR 2,940.78 for costs and expenses incurred before the Administrative Court and EUR 2,558.88 for costs and expenses incurred in the first set of proceedings before the Constitutional Court. The applicant association also claimed costs for a further set of proceedings to be conducted before the Constitutional Court - under Article 138 of the Federal Constitution - unless such costs were to be reimbursed by the Constitutional Court.

60. In respect of the Convention proceedings, the applicant association claimed "adequate compensation for the cost of representation" without specifying an amount.

61. The Government observed that the applicant association had failed to substantiate the expenses it claimed to have incurred before the Commission. They noted the claim for reimbursement of costs and expenses incurred before the Administrative Court and for the first set of proceedings before the Constitutional Court, without making any further comment. Moreover, they observed that the costs of a possible further set of proceedings before the Constitutional Court had not yet been actually incurred.

62. Lastly, the Government submitted that the applicant association had failed to substantiate the costs claimed in respect of the Convention proceedings, as required. They observed that the applicant's submissions before the Court were in any event largely similar to those already made before the domestic authorities.

63. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, taking into account the documents in its possession and the above criteria, the Court awards a total amount of EUR 5,499.66 for the costs incurred in the proceedings before the Administrative Court and the first set of proceedings before the

Constitutional Court. It notes that in the second set of proceedings before the Constitutional Court, the applicant association was awarded reimbursement of its costs and has not made any further claims in that respect in the proceedings before the Court. Furthermore, the Court dismisses the remainder of the claim for costs and expenses in the domestic proceedings and considers it reasonable to award the sum of EUR 2,000 for the proceedings before the Court.

64. Consequently, the Court, rounding up the amount, awards a total of EUR 7,500 under the head of costs and expenses.

B. Default interest

65. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there has been no violation of Article 13 of the Convention;

4. *Holds*, unanimously,
   (a) that the respondent State is to pay the applicant association, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant association's claim for just satisfaction.

Done in English, and notified in writing on 28 November 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro-Lefèvre
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Møse is annexed to this judgment.

I.B.L.
S.N.

PARTLY DISSENTING OPINION OF JUDGE MØSE

1. I agree that for the reasons set out in the judgment there was no violation of Article 13 but cannot follow my colleagues in finding that Article 10 has been violated (see paragraphs 37 to 48 of the judgment).

2. The general principles concerning freedom of expression are well known and have been summarised, for instance, in *Mouvement raëlien Suisse v. Switzerland* [GC], no. 16354/06, § 48, 13 July 2012. It is also common ground that the press exercises a vital role of "public watchdog" in imparting information of serious public concern. When measures are taken or sanctions imposed by national authorities in such matters, the most careful scrutiny on the part of the Court is called for (see, among many authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 64, ECHR 1999-III).

3. The Grand Chamber has accepted that when a non-governmental organisation (NGO) draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 103, 22 April 2013). I agree with this point of departure. However, whether there is a violation or not depends on a concrete assessment. In *Animal Defenders*, which concerned the prohibition of paid political advertising on radio and television, the majority did not find a breach of Article 10.

4. At Chamber level, an NGO's role as a watchdog was raised in *Vides Aizsardzibas Klubs v. Latvia*, no. 57829/00, § 42, 27 May 2004; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 89, ECHR 2005-II; and *Riolo v. Italy*, no. 42211/07, § 63, 17 July 2008 (which related to a researcher in political science writing a newspaper article). The facts in those cases are very different from the present case.

5. As regards access to information, I agree with the initial recapitulation of relevant case law in paragraph 41 of the judgment, including the references to *Leander v. Sweden*, 26 March 1987, § 74, Series A no. 116, and *Guerra and Others v. Italy*, 19 February 1998, § 53, *Reports of Judgments and Decisions* 1998-I. The majority then refer to *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, 14 April 2009, which concerned access to information by an NGO. In my view, that case does not support a finding of a violation in the present case (see paragraphs 7-8 below).

6. In paragraphs 34-36 of the judgment, reference is made to *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006; the case of *Társaság a Szabadságjogokért*, cited above, §§ 26 and 27; and *Kenedi v. Hungary*, no. 31475/05, § 43, 26 May 2009. The first judgment concerns the conviction of a journalist who had taken certain preparatory steps to obtain information in alleged breach of the Swiss penal code, and is clearly

distinguishable from the present case. Nor is the third judgment comparable: the applicant – a historian – had obtained a court judgment granting him access to certain documents deposited with the Ministry of the Interior. In spite of subsequent court decisions in line with the original judgment, the authorities obstructed his access.

7. As mentioned by the majority (see paragraph 44 of the judgment), the case of *Társaság a Szabadságjogokért*, cited above, concerned a request by an NGO to be given access to a particular document – a constitutional complaint. The Court found that the refusal of access was in breach of Article 10, taking into account that the information sought was "ready and available" and did not require the collection of any data by the Government (ibid., § 36, with reference to *Guerra and Others*, cited above, § 53). Moreover, the Court held in that case that private data protection considerations could not justify the interference (ibid., § 37).

8. By contrast, the request made by the applicant association in the present case required the provision of anonymised paper copies of all decisions by the Tyrol Real Property Commission issued over a period of more than five years. The decisions were not in a state to be sent. It appears that the applicant association itself, by requesting anonymised copies, understood that the decisions concerned contained personal data which would have to be removed before they could be made available. The Commission refused the request on the grounds that its fulfilment, even if it were accepted that it fell within the scope of the Information Act, would require substantial resources which would jeopardise the fulfilment of the Commission's other tasks. The Constitutional Court endorsed this line of argument, finding that the Commission would have to compile all the decisions, anonymise them and send paper copies to the applicant association.

9. It is noteworthy that according to the annual report published by the Regional Government, the Commission issued between 65 and 109 decisions per year in the relevant period from 2000 to 2005 (see paragraph 23 of the judgment). The applicant association's request therefore related to several hundred decisions. In my view, there was thus no arbitrariness in the argument that complying with the applicant association's request would have had a negative impact on the fulfillment of the Commission's tasks. I therefore accept that the reasons given for the refusal of the applicant association's request were relevant and sufficient.

10. Lastly, it should be noted that the applicant association is not left completely without any possibility to obtain information about the Commission's decisions. A certain amount of information is available in the Regional Government's annual report. Moreover, the Commission is not an authority of last resort. A complaint against its decisions can be lodged with the Constitutional Court and a collection of the latter's decisions – which, as a rule, contain a summary of the challenged decision – is published in an

online database, the Federal Legal Information System. Consequently, the interference with the applicant association's right under Article 10 was also proportionate.

11. In my view, these considerations lead to the conclusion that the domestic authorities did not overstep their margin of appreciation when refusing the applicant association's request. The fact that all other Regional Real Property Commissions sent out anonymised copies is not sufficient to alter that conclusion.

12. There has accordingly been no violation of Article 10 of the Convention.