

## **Article 10 of the Convention includes the right of access to data held by intelligence agency**

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<http://strasbourgobservers.com/2013/07/08/article-10-of-the-convention-includes-the-right-of-access-to-data-held-by-intelligence-agency/>

8 July 2013

In its judgment of 25 June 2013 in the case of *Youth Initiative for Human Rights v. Serbia* the European Court of Human Rights has recognised more explicitly than ever before the right of access to documents held by public authorities, based on Article 10 of the Convention (right to freedom of expression and information). The judgment also recognises the importance of NGOs acting in the public interest and it contains a particularly important statement by the Court unambiguously reaffirming that in Europe security services and intelligence agencies are to respect the European Convention of Human Rights. The Court ordered the information held by the Serbian Intelligence Agency to be made accessible for the applicant NGO.

### **The right of access to information under Article 10 of the Convention**

The case concerns an NGO, *Youth Initiative for Human Rights*, that is monitoring the implementation of transitional laws in Serbia with a view to ensuring respect for human rights, democracy and the rule of law. The applicant NGO requested the intelligence agency of Serbia to provide it with some factual information concerning the use of electronic surveillance measures by that agency in 2005. The agency first refused the request, relying thereby on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue be nevertheless disclosed under the Serbian Freedom of Information Act 2004, the intelligence agency notified the applicant NGO that it did not hold that information. *Youth Initiative for Human Rights* complained in Strasbourg, under Articles 6 and 10 of the Convention, about the refusal to have access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour.

Referring to its judgment in *Társaság a Szabadságjogokért (TASZ) v. Hungary* (ECtHR 14 April 2009), the European Court recalls in its judgment of 25 June 2013 “that the notion of ‘freedom to receive information’ embraces a right of access to information” (§ 20). The European Court is of the opinion that as *Youth Initiative for Human Rights* was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression (§ 24). Although the exercise of freedom of expression and information may be subject to restrictions which can justify certain interferences, the Court went on emphasising that such restrictions ought to be in accordance with domestic law. In the present case the European Court found that the restrictions imposed by the Serbian intelligence agency, resulting in a refusal to give access to public documents, did not meet the criterion as being prescribed by law. The Court referred to the fact that the intelligence agency indeed informed the applicant that it did not hold the information requested, but for the Court it is obvious that this “response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency’s initial response”. The Court comes to the conclusion that the “obstinate reluctance of the intelligence agency of Serbia to comply with the order of the

Information Commissioner” was in defiance of domestic law and tantamount to arbitrariness, and that accordingly there has been a violation of Article 10 of the Convention. Having regard to the finding relating to Article 10 of the Convention, the Court considered that it was not necessary to examine the admissibility or the merits of the same complaint under Article 6.

It is also interesting to notice that the Court reiterated in robust terms that an NGO can play a role as important as that of the press in a democratic society: “when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press” (§ 20) (see also ECtHR (Grand Chamber) 22 April 2013, *Animal Defenders International v. the United Kingdom*, Appl. No. 48876/08, § 103).

### **UN-documents in support of the right of access to information**

Another interesting aspect of this judgment is the reference to several UN documents with regard to the right of access to information, as a kind of (quasi-)judicial dialogue between the European Human Rights system and the UN-level. As “relevant international documents” the judgment refers to Article 19 of the International Covenant on Civil and Political Rights, to the General Comment no. 34 of the UN Human Rights Committee (CCPR/C/GC/34 of 12 September 2011), to the Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression of December 2004 and to the Joint Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression of December 2006, all emphasising the right of access to public documents.

### **Article 46 of the Convention and the *restitutio in integrum***

Finally, as a measure under Article 46 of the Convention, the Court ordered the Serbian State to ensure, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, that the intelligence agency of Serbia provide the applicant with the information requested. Although the Court reiterated that by virtue of Article 46 the execution of its judgments are being supervised by the Committee of Ministers of the Council of Europe, it also emphasised the need that sometimes “general and/or, if appropriate, individual measures (are) to be adopted” in order to put an end to the violation found by the Court and to redress so far as possible the effects of its judgment (§ 31). The Court continues that “although it is in principle not for the Court to determine what remedial measures may be appropriate to satisfy the respondent State’s obligations under Article 46 of the Convention, the violation found in this case, by its very nature, does not leave any real choice as to the measures required to remedy it” (§ 31). Therefore Court is of the opinion that the most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum*, is to indeed secure that the intelligence agency of Serbia provide the applicant with the information requested (namely, how many people were subjected to electronic surveillance by that agency in the course of 2005).

### **Security and intelligence agencies need to respect human rights and fundamental freedoms**

In the light of the current discussion regarding the lack of transparency of the functioning of the National Security Agency in the US, and European intelligence agencies, it is reassuring to see how the European Court of Human Rights once more made very clear that national security and intelligence agencies are also to respect the rights and freedoms of the European Convention. National authorities are under the obligation not only to refrain from active infringements of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction. These positive obligations also include guaranteeing the compliance with the Convention by security services and intelligence agencies (see also ECtHR 22 November 2012, *Telegraaf Media Nederland Landelijke Media B.V. e.a. v. the Netherlands*, Appl. No. 39315/06 and ECtHR (Grand Chamber) 12 December 2012, *El-Masri v. the former Yugoslav Republic of Macedonia*, Appl. No. 39630/09).

### **Joint concurring opinion by Sajó and Vučinić : transparency, journalists and citizens**

In their concurring opinion, Judges Sajó and Vučinić refer to the legal developments regarding the right of access to information, including the Court's Grand Chamber judgment in *Gillberg v. Sweden* (3 April 2012) and the Council of Europe Convention on Access to Official Documents (2009, not yet in force). Being mindful of "the demands of democracy in the information society", they highlight certain implications that the Court should address in due course. Most interesting is their statement that "in the world of the Internet the difference between journalists and other members of the public is rapidly disappearing. There can be no robust democracy without transparency, which should be served and used by all citizens". A firm statement by the concurring judges, of which indeed one may hope it will soon become a majority principle within the European Court of Human Rights. That's why it is good to repeat it once more : **"There can be no robust democracy without transparency, which should be served and used by all citizens"**.

ECtHR (2<sup>nd</sup> Section) 25 June 2013 , *Youth Initiative for Human Rights v. Serbia*, Appl. No. 48135/06.