Written Comments on the Case of *Társaság a Szabadságjogokért v. Hungary*

A Submission to the European Court of Human Rights from the Open Society Justice Initiative, The Financial Times Ltd, and Access Info Europe

September 2008

Application no. 37374/05
TÁRSASÁG A SZABADSÁGJOGOKÉRT v. HUNGARY

WRITTEN COMMENTS OF
THE OPEN SOCIETY JUSTICE INITIATIVE
THE FINANCIAL TIMES LTD
ACCESS INFO EUROPE

Pursuant to leave granted on July 31, 2008 by the President of the Chamber, acting under Rule 44 § 2 of the Rules of Court, the Open Society Justice Initiative, the Financial Times Ltd and Access Info Europe hereby submit their written comments on the legal principles that should govern the resolution of the issues presented by this case.

RELEVANT PRINCIPLES

1. By way of context, this case involves the refusal of the Hungarian Constitutional Court to grant the applicant organization, the Hungarian Civil Liberties Union (HCLU), access to a motion for constitutional review filed with that Court by a Member of the Hungarian Parliament (MP) and other individuals. The MP's petition concerned the constitutionality of certain amendments to drug offenses under the Hungarian criminal code. The HCLU plays an active role in the national drug policy debate and occasionally intervenes, as a "friend of the court" or in other capacities, in proceedings before the Hungarian Constitutional Court. Both the Constitutional Court and the ordinary domestic courts rejected HCLU's access requests, ultimately holding that the constitutional petition filed by the MP constituted "personal data" that could only be disclosed with its authors' permission. HCLU argues that its rights under Article 10 of the Convention for "access to information of public interest" have been violated.

2. A fundamental legal issue raised by the case is whether Article 10 of the Convention grants individuals and groups a general right of access to information held by public authorities, including court records. It is notable that the Hungarian Government, in its June 20, 2008 observations on this case, "[did] not contest that there has been an interference with the applicant's freedom of expression,"[1] thus recognizing that Article 10 of the Convention guarantees a right of general access to the kind of information requested by the applicant organization. The present comments address (i) the status of the right to information in European and comparative law, including its close connection to the rights to freedom of expression and democratic participation; and (ii) comparative laws and practices on access to court records, including and especially records related to constitutional adjudication.

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

3. The right of access to government information has been closely linked to the broader right to freedom of expression from the outset. 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."[2] The United Nations General Assembly decreed, in one of its first resolutions, that the media and other information services should "be given the fullest possible direct access to the activities and official documentation of the Organization."[3]

4. 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."[4] In a modern democracy, a significant part of the totality of public information a "properly informed" citizenry

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[1] Para. 7.
[2] Ch. 2, art. 1 (adopted in 1766 & 1949, amended in 1976).
[3] *Resolution 13(I) on the Organization of the Secretariat*, adopted on February 1, 1946, Annex I, para. 3.
[4] *Sunday Times v. United Kingdom (no. 1)*, Judgment of April 26, 1979, para. 66.

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.

5. 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."[5]

6. 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.[6]

1. The Right to Information in European Law and Practice

7. 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.[7] 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.[8]

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. The Council of Europe is currently in the final phases of adopting a convention on access to official documents, which would guarantee a binding right of access in terms similar to those of the above-cited 2002 Recommendation.[9]

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[5] *Claude Reyes et al v. Chile,* Judgment of September 19, 2006, para. 86; available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_ 151_ing.pdf.

[6] 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, November 26, 1999. *See also* the 2004 Joint Declaration of the three mechanisms, adopted on December 6, 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…."

[7] 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 November 25, 1981.

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

[9] In May 2005, the Committee of Ministers tasked a group of experts with "drafting a free-standing legally binding instrument establishing the principles on access to official documents." Decision No. CM/866/04052005. The draft Convention developed by the experts is currently being considered by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe. Doc. CM/Del/Dec(2008)1025/4.3. The full text of the draft Convention is available as Council of Europe Doc. 11631.

8. 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."[10] 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 thirty-nine 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.[11] Worldwide, some eighty countries have adopted such legal regimes. 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.[12]

9. These developments notwithstanding, this Court has not as yet construed Article 10 or other provisions of the European Convention on Human Rights as providing for a right of general access to state-held information.[13] Until recently, the Court had recognized only a right to state-held information under circumstances in which the denial of information affects the enjoyment of other Convention rights, such as the right to respect for private and family life, under Article 8 of the Convention. In *Guerra v. Italy*, the Court held that Article 8 imposed on the authorities a positive obligation to inform individuals living near a chemical factory about the risks of potentially devastating accidents. Failure to do so had left the applicants unable to assess the risks and make informed decisions about living near the hazardous facility.[14]

10. Nevertheless, the Court did not consider Article 10 to be applicable in *Guerra* or earlier cases addressing access to information. In *Guerra*, the Court ruled, in language similar to that employed in earlier cases, that

> [the] freedom to receive information, referred to in paragraph 1 of Article 10 of the Convention, "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him" .... That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.[15]

11. In a July 2006 admissibility decision, however, the Fifth Section of the Court, in an apparent departure from the *Guerra* line of cases, held that Article 10 did grant the applicant, a Czech environmental group, a right of access to documents regarding the design and construction of a nuclear reactor.[16] The *Sdruženi* Court referred to the *Guerra* and *Roche* precedents, and noted that "it is difficult to deduce from the Convention a general right of access to data and documents of an administrative nature." This

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[10] *Charter of Fundamental Rights of the European Union*, December 7, 2000, art. 42. The Charter is not legally binding but can be invoked by EU and national courts.

[11] *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.

[12] *Id*. 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, Spain, and Sweden.

[13] 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."

[14] *Guerra and Others v. Italy*, Judgment of February 19, 1998. The Court found that similar positive obligations existed in *Gaskin v. United Kingdom*, Judgment of July 7, 1989 (involving refused access to case records to an adult who had been in the care of the local authorities as a child); and *McGinley and Egan v. United Kingdom*, Judgment of June 9, 1998 (involving refused 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).

[15] *Guerra*, para. 53 (references omitted, emphasis added). *See also Roche v. United Kingdom*, a case similar to *McGinley,* where a unanimous Grand Chamber again held Article 10 to be inapplicable, noting that "it [saw] no reason not to apply this established jurisprudence." Judgment of October 19, 2005.

[16] *Sdruženi Jihočeské Matky v. Czech Republic*, Decision of July 10, 2006 (Admissibility).

notwithstanding, the Court held that, under the circumstances of the case – in which the applicant was a party to an administrative proceeding reviewing the environmental impact of the reactor – the rejection of the applicant's request for information amounted to an interference with "its right to receive information" under Article 10.[17] Such an interference ought to be subjected to the usual test of paragraph 2 of Article 10, which allows for restrictions of the right to receive information in order to protect certain enumerated interests, such as national security, public safety, or the rights of others. As in other contexts, the Member States enjoy a certain margin of appreciation in striking the balance between the right to information and protected interests.[18]

12. The *Sdruženi* Court recognized an apparently independent Article 10 right to receive documents held by public authorities. It nevertheless stopped short of defining the contours of this right, or reconciling its holding with the Court's prior case law. The current case gives the Court a renewed opportunity to clarify these aspects of its jurisprudence, in line with the clear trends of European and international law.[19]

13. 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 a positive obligation 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.[20] 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. 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. <u>The Right to Information in Other Regional and Domestic Legal Systems</u>

14. 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.

15. 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 information generally as is the very right to impart his own opinion."[21] In 2000, the Inter-American Commission on

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[17] *Id*., at 10. In the French original: "Dans ces conditions, la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations." The Court declared inadmissible – for failure to raise within the 6-month deadline – the applicant's claim that the denial of information also violated its rights under Article 6.1 of the Convention. Thus, the Court's ruling on this point was based exclusively on Article 10.

[18] *Id*., at 11. The Court held that, under the facts of the case, the refusal of the Czech authorities to provide the requested information was justified on the grounds of public safety and commercial confidentiality. In addition, the requested data were not sufficiently relevant to the administrative proceedings at stake.

[19] See also *Geraguyn Khorhurd Patgamavorakan Akumb v. Armenia* (app. no. 11721/04), another case pending before this Court, which involves the failure of the Armenian election authority to grant the applicant organization, an election watchdog, access to certain electoral information. The Justice Initiative was granted leave to intervene in this case as a third party, and submitted written comments in October 2006, available at http://www.justiceinitiative.org/db/resource2?res_id=103453.

[20] Judgment of March 16, 2000, paras. 44-45.

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

Human Rights, the Court's auxiliary body, expressly recognized that "access to information held by the state is a fundamental right of every individual."[22]

16. 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….[23]

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, on a case-by-case basis.[24]

17. 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 Banjul Charter grants a right of access to official information. It has nevertheless held that Article 9 of the Charter[25] 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.[26] 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."[27]

18. Numerous 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 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.[28]

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

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[22] *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission's 108th regular session, October 19, 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 July 8, 2005, para 69.

[23] *Claude Reyes v. Chile,* note 5 supra, para. 77.

[24] *Id*., 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."

[25] 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."

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

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

[28] *Ullmann,* Judgment of April 29, 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.

> 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.[29]

20. 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 Indian 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.[30]

21. 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 Korean Court argued 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.[31] This and subsequent freedom of information decisions of the Korean Court influenced the legislature to adopt in 1996 a comprehensive access to information law.[32]

22. 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.

B. Access to Constitutional Litigation Records is Widely Guaranteed

23. Publicity of judicial proceedings is a fundamental tenet of the rule of law and due process.[33] This Court has long held that, under Article 6 of the Convention, publicity of court proceedings is essential to the protection of litigants' rights and the maintenance of public confidence in the administration of justice.[34] Therefore, any exceptions to the right to a public hearing must be construed strictly and applied in a manner proportionate to the objective pursued.[35]

24. Granting third parties (or the general public) access to court records, including party pleadings and submissions, may raise legitimate issues of fair trial and the need to maintain the integrity of judicial proceedings. However, court records are public records, and as with other information in the

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[29] 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.

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

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

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

[33] We are aware that, in many countries, constitutional courts enjoy a special status and are not considered to be, strictly speaking, part of the judicial branch. For the purposes of this discussion, however, the rationale for publicity in proceedings in which constitutional tribunals or ordinary courts review the constitutionality of legislation are at least as, if not more, compelling than justifications for publicity of regular court proceedings.

[34] See inter alia *Pretto v. Italy* (1983) and *Diennet v. France* (1995).

[35] *Diennet v. France*, para. 34.

possession of the state, the public's right of access must be properly balanced against other legitimate public and private interests. Such rules of access are commonly defined in Europe by judicial and procedural codes, general access to information laws, or a combination of both. The draft Council of Europe Convention on Access to Official Documents allows restrictions on access that are "necessary in a democratic society" for protecting "the equality of parties in court proceedings and the effective administration of justice," among other interests.[36]

25. While specific rules of access may differ somewhat across the continent, the general principle of publicity of court records is well established in the laws and practices of many Council of Europe member states. Thus, in Sweden, the courts are considered public bodies and third parties have a constitutional right of access to court records, including party submissions, subject to limited exceptions established by law. Personal data contained in court records may be anonymized upon disclosure, but otherwise access to court records involving constitutional or public interest litigation is generally unrestricted, as a matter of both law and practice.[37] A similar regime applies in Finland.[38]

26. Even where ordinary courts or constitutional tribunals are not subject to the general access to information regime, the public is generally entitled to receive access to court records involving judicial proceedings of public interest. Under the Canadian Federal Court Rules, for example, there is a presumption of public access to all material filed with federal courts, unless otherwise ordered by the relevant court.[39] In 1989, the Canadian Supreme Court struck down, on free expression grounds, a provincial statute that unduly restricted public access to certain civil proceedings records: "the members of the public, as 'listeners' or 'readers', have a right to receive information pertaining to public institutions, in particular the courts."[40] The Canadian Judicial Council, which has authority over all federal judges, has proposed guidelines according to which access to court records should be restricted only when "needed to address serious risks to individual privacy and security rights, or other prominent interests such as the proper administration of justice."[41]

27. In line with the principles of separation of powers and judicial autonomy, national courts tend to have a certain amount of discretion in deciding whether to grant third parties access to their records. This is not inconsistent with the principle of publicity. Thus, the United States Supreme Court has recognized a common law right of access to federal court records and files, subject to judicial discretion to deny such access "when it would be used for improper purposes."[42] Likewise, in the United Kingdom, a third party may, on application to the relevant court, obtain a copy of any "document filed by a party or communication between the court and a party or another person."[43] On the other hand, absolute statutory rules that bar all access to categories of court records, or impose excessive restrictions on such access, should be deemed inconsistent with the principle of publicity of court proceedings.

28. In the special context of constitutional review of legislation, the democratic imperative for the highest possible degree of publicity is compelling. Whether one agrees or not with the characterization of judicial review as "negative legislation," there is no question that (abstract or incidental) constitutional adjudication of the kind that is now common in Europe has a formidable power to shape legislation and affect the rights and interests of large numbers of people.

29. As a result, continental jurisdictions have increasingly recognized the importance of publicity in constitutional litigation. In Germany, for example, a 1999 amendment to the Federal Constitutional Court Act allows third parties to receive summary information about Constitutional Court files if they

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[36] Art. 3(i).
[37] See Freedom of the Press Act (1949); and the Secrecy Act (1980), chapter 12.
[38] See Laws 370/2007 and 381/2007 which regulate publicity of civil and administrative proceedings, respectively.
[39] Under Rule 151.2, "[b]efore making an order [that court submissions be treated as confidential], the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings."
[40] *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326.
[41] In addition, any restrictions should be "carefully tailored so that the impact on the open courts principle is as minimal as possible." *Model Policy for Access to Court Records in Canada*, September 2005 (emphasis added).
[42] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).
[43] Civil Procedure Rules, 5.4C; see also Practice Direction 5, para. 4A.

can "prove a justified interest," and unless "the party [to the case] involved has a justified interest in the information not being released." Third parties can request full access to the actual files of the Court (as opposed to summaries) if the Court is persuaded that this is necessary to satisfy their justified interests.[44] Similar regimes can be found in the new European democracies. Thus, Slovenian legislation allows the president of the Constitutional Court to grant third parties access to its files, at all stages of a proceeding. The president's denial of access can be appealed to the full Court.[45] The Constitutional Court of Bosnia and Herzegovina has also adopted guidelines that grant public access, in principle, to all "information in records under [its] control," in accordance with the Bosnian access to information law.[46] And the Rules of this Court itself recognize the key role of publicity in human rights litigation by providing that "[a]ll documents deposited with the Registry by the parties or by any third party in connection with an application … shall be accessible to the public unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise."[47]

30. In the recent case of *Sweden and Turco v. The Council*,[48] the Court of Justice of the European Communities reviewed the question of access to legal opinions produced by the EU Council's legal service in relation to EU law-making – a role comparable to that played by parties initiating judicial review of legislation in constitutional litigation. Ruling that the Council's legal opinions should, in principle, be made public, the Court of Justice rejected the argument that such disclosures would inevitably undermine legal certainty within the EU:

> Openness in that respect contributes to strengthening democracy by allowing citizens to scrutinize all the information which has formed the basis of a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.[49]

In addition, the Court of Justice confirmed that, even where disclosure of legal opinions or other internal records might cause some harm to protected interests, customary confidentiality would have to give way to "a prevailing public interest in disclosure,"[50] such as "increas[ing] the transparency and openness of the legislative process and strengthen[ing] the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act." EU institutions must engage in such a balancing whenever asked to disclose documents subject to the right of access.

31. Similarly, in the context of constitutional litigation, the general public, including potentially interested third parties, are entitled to the greatest degree of publicity in a process whereby private or public actors seek to modify or strike down national laws – and often change important public policies – through the mechanism of judicial review. Courts are, of course, more limited than lawmakers in terms of the kinds of arguments they can entertain in their constitutional decision-making. Nevertheless, for laws or constitutional tribunals themselves to unduly limit third party access to proceedings of such obvious general interest would be to undermine the very values confidentiality of records is supposed to serve: public confidence in, and the legitimacy of, constitutional justice and the rule of law generally.

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[44] Section 35b. There is no definition, and to date scarce interpretation, of what constitutes a "justified interest." In a case that generated the impetus for the 1999 regulation, the German Court granted litigants access to the videotaped testimony of a federal minister from an earlier case involving similar questions of law. See 12 BVerfGE 94, ("Land Reform II") Judgment of April 18, 1996.

[45] Constitutional Court Act (1994), as amended, art. 4, available at http://www.us-rs.si.

[46] "Guide on Access to Information within the Constitutional Court of Bosnia and Herzegovina," April 2006.

[47] Rule 33, para. 1 (documents deposited "within the framework of friendly settlement negotiations" are exempted from access). Under paragraph 2 of Rule 33, "[p]ublic access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the President in special circumstances where publicity would prejudice the interests of justice."

[48] Joined Cases C-39/05 P and C-52/05 P, Judgment of July 1, 2008.

[49] Para. 46.

[50] Under Article 4(2) of EU Regulation 1049/2001, "[EU] institutions shall refuse access to a document where disclosure would undermine the protection of … legal advice … unless there is an overriding public interest in disclosure."

32. Two important issues of law raised by this case, including by the Hungarian Government in its June 20, 2008 observations, are: (i) how to proportionately balance protection of the privacy rights of parties to (constitutional) litigation with the public's right to know; and (ii) the timing or stage of proceedings in which access to court records, including party pleadings and other submissions, may be granted to third parties.

1. Balancing Publicity and Privacy Interests

33. There are, of course, various kinds of judicial proceedings – including, but not limited to, personal or family law cases – that involve intimate aspects of the parties' private lives and are therefore protected by confidentiality of records, and even closed hearings. Such cases may even land, on occasion, on constitutional court dockets. We submit, however, that as a matter of principle, privacy protections should be reconciled with – and ultimately yield to – the imperatives of publicity in judicial review or similar general-interest proceedings. The case for publicity, and in particular access to party submissions, is even stronger when a politician or other public figure chooses to initiate judicial review proceedings – and strongest when such a case is set in motion by a Member of Parliament, who enjoys the special prerogative of shaping national law and policy in their first and natural forum, the legislative assembly. Partial access – through anonymization or other methods of withholding the most sensitive personal data from a court record – can go a long way toward reconciling the right to know with data protection. However, inflated or absolutist notions of privacy, which tend to protect even elements such as the style of a party submission – whatever their general merits in privacy law – should not be allowed to prevail over the public's right to follow and, if necessary, participate in, judicial review proceedings.

34. The European Union has developed one of the world's strongest regimes of personal data protection.[51] That notwithstanding, EU courts, like this Court and many Council of Europe Member State jurisdictions, have recognized that the right to privacy is not absolute. The EU Court of First Instance held, in a 2007 case, that personal data contained in EU documents should be disclosed to the public unless there is a clear risk of undermining enjoyment of the right to privacy: "the mere fact that a document contains personal data does not necessarily mean that the privacy or integrity of the persons concerned is affected."[52] As noted, this Court's own rules provide for restricting access to its records when the "protection of the private life of the parties so require[s]." That does not mean, however, that a party's claim of confidentiality should always prevail over disclosure, irrespective of how sensitive (or not) the personal data at stake truly are. Those factors are to be weighed by the President of the Chamber, with whom rests the final decision.

35. In addition, this Court has repeatedly recognized that the "right to be left alone" is rendered somewhat weaker as concerned citizens choose to participate in public affairs, thus relinquishing part – though certainly not all – of their personal sphere protections. In the context of Article 10 libel law, for example, politicians and other public figures,[53] and even otherwise private persons who enter the public arena,[54] are expected, as a matter of law, to cope with a greater degree of scrutiny and criticism than ordinary people. It is therefore disingenuous that politicians or other persons accustomed to the perils of public life should claim confidentiality of the style or content of their submissions in august constitutional proceedings involving matters that have nothing to do with their private lives, and everything to do with public affairs.

2. Timing of Access to Court Records

36. Lastly, it is essential in judicial review or similar proceedings, that the highest possible degree of access to party submissions and other parts of the record be granted as early as possible in the process – and certainly before a final decision is reached and the case file is archived. While the need for

[51] See inter alia Regulation (EC) No. 45/2001 on the Protection of Individuals With Regard to the Processing of Personal Data by the Community Institutions and Bodies and on the Free Movement of Such Data.
[52] *Commission v. Bavarian Lager and European Data Protection Supervisor*, Case T-194/04 (2007), para. 123.
[53] See, among multiple authorities, *Castells v. Spain*, Judgment of DATE 1992; *Feldek v. Slovakia*, Judgment of July 12, 2001; and *Jerusalem v. Austria*, Judgment of February 27, 2001.
[54] *Nilsen and Johnsen v. Norway*, Judgment of November 25, 1999.

confidentiality is generally reduced, and greater access possible, with the conclusion of an ordinary (i.e. non-constitutional) court case, that cannot be considered an acceptable arrangement in judicial review. Granting third parties timely access to information about pending constitutional cases allows the public and its proxies, including the media, to more intelligently follow the case and exercise their traditional "watchdog" rights and responsibilities; it also enables interested third parties to seek to protect private or public interests that may be affected by the court's ruling. The EU Court of First Instance has acknowledged that, even in the context of its sometimes quite sensitive commercial proceedings, "disclosure of written submissions concerning pending cases does not necessarily undermine the principle of the proper administration of justice."[55]

37. It is quite common for various interest groups to intervene in constitutional litigation as interested third parties, "friends of the court," or in some other capacity. Such interventions – which would not be possible, or effective, without timely access to information about the case – not only bring a broad range of views and arguments to the attention of the judicial decision-maker, and help "justice be made"; they also help justice be seen to be made and thus confer greater legitimacy on judicial decisions. In this very case, this Court's Registry provided the third-party interveners with full copies of both parties' main submissions to date. There is, of course, some danger that disclosure of case information in the course of a constitutional proceeding may be abused in ways that are detrimental to the proper administration of justice or other interests. For that reason, disclosure should be subject to reasonable exceptions, such as those listed in the Rules of this Court. European judiciaries have long demonstrated the capacity to accommodate litigants' legitimate privacy and due process concerns while safeguarding the public's right to access information about cases of general interest.

CONCLUSION

38. We have argued 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, an actual prerequisite for the meaningful exercise of other rights in a modern democracy. Coupled with the principle of publicity of court proceedings, a basic tenet of the rule of law, the right to state-held information guarantees a broad degree of access to court records in constitutional and other proceedings of general interest – including access to party submissions requested in the course of the proceedings. Such access is not only essential to the ability of the public, the media, and other third parties to watch over the making of constitutional law; it is also instrumental to the preservation of public confidence in constitutional justice and the rule of law. This Court in *Sdruženi* recognized an Article 10 right to receive information held by public authorities in the circumstances of that case. We respectfully urge the Court to take the opportunity presented by this case to expound on the *Sdruzeni* ruling and make clear that Article 10 of the Convention grants individuals and other persons a right of general access to state-held information. This will bring the Court's jurisprudence into line with prevailing European and international law, and clarify for national courts throughout Europe the importance of access to information as a foundation for democratic government.

Respectfully submitted, on September 29, 2008,

For the Open Society Justice Initiative, The Financial Times Ltd, and Access Info Europe

James A. Goldston
Executive Director
Open Society Justice Initiative

Darian K. Pavli
Legal Officer
Open Society Justice Initiative

[55] *Association de la presse internationale (API) v. Commission*, Case T-36/04 (2008), para. 88. The Court found that, as a rule, party submissions to EU Courts are treated confidentially until oral procedure has taken place. It noted, however, that the parties themselves are not barred from making their submissions public, thus suggesting that publicity in the course of the case is not inconsistent per se with administration of justice.

APPENDIX

The third party interveners would like to acknowledge the pro bono contributions of the following experts to the development of this submission. The interveners are, of course, solely responsible for any inaccuracies.

Professor Christian Tomuschat of Humboldt University (Berlin), who has represented the Government of the Federal Republic of Germany in cases before the European Court of Human Rights, provided advice on the rules and practices governing access to the records of the German Federal Constitutional Court.

Advokat Ulf Öberg, Managing Partner, and **Gunnar Persson**, juris doctor, of the law firm **Öberg and Associés** (Stockholm) provided advice on access to court records in Sweden and Finland, as well as on the European Union's access to information jurisprudence.

Nataša Pirc Musar, Commissioner for Access to Public Information of the Republic of Slovenia (Ljubljana), provided advice on Slovenian laws and practices on access to court records, including those of the Slovenian Constitutional Court.

The US-based law firm **Ropes & Gray LLP** made available an analysis, commissioned by the Open Society Justice Initiative, of the rules and practices governing access to court records in various jurisdictions, including Canada and the United States.