Voir Notice
See Notes

Numéro de dossier
File number

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

Requête
Application

Human Rights Monitoring Institute v. Republic of Lithuania

présentée en application de l'article 34 de la Convention européenne des Droits de l'Homme,
ainsi que des articles 45 et 47 du règlement de la Court

under Article 34 of the European Convention on Human Rights and Rules 45 and 47 of the Rules of the Court

TABLE OF CONTENTS

I. THE PARTIES

The Applicant

1. Name: Human Rights Monitoring Institute
2. Address: 5 Didžioji street, LT-01228 Vilnius, Lithuania
3. Representatives:

James A. Goldston, *Attorney, New York Bar*, Executive Director

Darian Pavli, *LL.B, LL.M*., Senior Attorney

Amrit Singh, *Attorney, New York Bar*, Senior Legal Officer

Open Society Justice Initiative

400 West 59th Street

New York, NY 10019, U.S.A.

Tel.: +1 212 548 0660

Fax: +1 212 548 4662

Henrikas Mickevičius, Executive Director

Karolis Liutkevičius, Legal Officer

Mėta Adutavičiūtė, Legal Coordinator

Human Rights Monitoring Institute

5 Didžioji Street, LT-01228

Vilnius, Lithuania

Tel.: +370 2 314 676

Fax.: +370 2 314 679

The High Contracting Party

4. Republic of Lithuania

II. SUMMARY

5. This case challenges the Lithuanian Customs Department's blanket withholding of information relating to Lithuania's possible participation in human rights violations associated with the CIA's secret detention and extraordinary rendition programme, despite the significant public interest in disclosure.
6. The applicant, the Human Rights Monitoring Institute (HRMI), is a non-governmental organization which acts as a human rights watchdog in Lithuania. On 4 July 2011, HRMI submitted a freedom of information request to the Lithuanian Customs Department, seeking disclosure of regular aircraft and cargo inspection procedures as well as information relating to the customs inspection of specific and identified flights by planes associated with the CIA's secret detention and extraordinary rendition programme. On 29 July 2011, the Customs

Department denied that request in its entirety on the grounds that the requested information was confidential. The Department did not consider the significant public interest associated with disclosure of the requested information, which relates to possible human rights violations committed on Lithuanian territory in collaboration with the CIA. Nor did the Department attempt to determine whether it could disclose portions of the information or documents requested by the applicant, including for example, whether or not specific aircraft had been subjected to customs inspections at all.

7. The applicant challenged this refusal in Lithuania's administrative courts, and ultimately on 2 July 2012, the Supreme Administrative Court (SAC) issued a final ruling in this case. The SAC upheld the Customs Department's decision to withhold information, finding that the request for information relating to regular aircraft and cargo inspections was insufficiently specific, and that information relating to the inspection of specific flights that had been publicly associated with the CIA's secret detention and extraordinary rendition programme was confidential and could not be disclosed to third parties. This case has been filed within six months of the date of that final ruling.

8. By withholding the requested information, the Lithuanian government has violated the applicant's right to information under Article 10 and its right to a remedy under Article 13 of the Convention.

- *A. Article 10.* The reliance on a blanket ban to refuse access to information without any individualized consideration of the circumstances of the case is an unjustified and disproportionate interference with Article 10.
- *B. Article 13*. The lack of an effective domestic remedy by which to challenge the refusal to disclose Customs Department information in the public interest violates Article 13.

9. The applicant asks this Court to find that these rights have been violated.

III. STATEMENT OF FACTS

CIA Secret Detention and Extraordinary Rendition

10. After 11 September 2001, the U.S. government began operating a secret detention and extraordinary rendition programme under the auspices of which the Central Intelligence Agency (CIA), in cooperation with the governments of other countries, secretly transported prisoners without legal process to be detained and interrogated in detention facilities outside the United States where they were at risk of torture or cruel inhuman or degrading treatment.[1] President Bush publicly acknowledged the secret detention programme on 6 September 2006,[2] when he announced that "a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence

[1] Statement of Michael F. Scheuer, former Chief of Bin Laden Unit of the CIA, at United States House of Representatives—Committee on Foreign Affairs, "Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations", Serial No. 110-28, 17 April 2007, p. 12. Available at http://foreignaffairs.house.gov/110/34712.pdf.
[2] 2007 Council of Europe Report, Summary, para. 3.

Agency".[3] He also stated that fourteen prisoners had been transferred to Guantánamo.[4]

11. The European Committee for the Prevention of Torture has noted that, "[t]he interrogation techniques applied in the CIA-run overseas detention facilities have certainly led to violations of the prohibition of torture and inhuman or degrading treatment".[5]

12. This fact is confirmed by an official U.S. government document in the form of a CIA memorandum dated 30 December 2004 which describes the torture and abuse of "high value" detainees (HVDs) held in secret detention facilities known as "black sites."[6] According to the memorandum, during interrogation at black sites, the prisoners were subjected to "conditioning techniques" — including nudity, dietary manipulation, and prolonged sleep deprivation via vertical shackling (with or without the use of a diaper for sanitary purposes) — used in combination to "reduce . . . [them] to a baseline dependent state".[7] The prisoners were also subjected to "corrective techniques" designed to correct behaviour or startle detainees, which included slapping suspects across the face and abdomen, holding a suspect's face in an intimidating manner, and the use of "attention grasps", in which interviewers physically restrained suspects in an attempt to demand their attention.[8] In addition, prisoners held at black sites were subjected to "coercive techniques" in order to "persuade a resistant HVD to participate with CIA interrogators".[9] These techniques included shoving prisoners against a wall ("walling") up to twenty to thirty times, dousing them with water, placing them in stress positions, and holding them in "cramped confinement" in a large box for eight to as many as 18 hours a day, or in a small box for two hours. Interrogators were expressly permitted to use multiple interrogation techniques during a single interrogation session, and techniques such as walling could be used several times without interruption.[10]

Lithuania's Participation in CIA Secret Detention and Extraordinary Rendition

13. In August 2009, ABC News, a U.S.-based television media enterprise, reported that the CIA used a site in Lithuania as a secret detention facility for "high value" detainees.[11] According to that report, the CIA held up to eight "high

---

[3] President George W. Bush, "Transcript of President Bush's Remarks, Speech from the East Room of the White House", 6 September 2006. Available at http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.
[4] *Ibid*.
[5] European Committee for the Prevention of Torture, Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 18 June 2010, 19 May 2011. Available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.pdf.
[6] Central Intelligence Agency, "Memo to DOJ Command Center – Background Paper on CIA's Combined Use of Interrogation Techniques", 30 December 2004 (CIA Rendition Background Paper), available at http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf.
[7] *Ibid*. at at 4-5.
[8] *Ibid*. at 5-6.
[9] *Ibid*. at 7.
[10] *Ibid*. at 7-8.
[11] Matthew Cole, "Officials: Lithuania Hosted Secret CIA Prison to Get 'Our Ear,'" ABC News, 20 August 2009, available at http://abcnews.go.com/Blotter/story?id=8373807; see also Amnesty International, "European governments must provide justice for victims of CIA programmes," 15

value" detainees at the facility until late 2005.[12] Senator Dick Marty, Rapporteur on secret detentions for the Parliamentary Assembly of the Council of Europe, subsequently confirmed that U.S. "high value" detainees were held in Lithuania.[13] The Council of Europe's' former Commissioner for Human Rights, Thomas Hammarberg, also stated that Lithuania had hosted a CIA "Black Site," and that "the essential questions as to the timing and scope of the CIA's use of these facilities remain unanswered."[14]

14. In October 2009, ABC News reported that "on September 20th, 2004, a Boeing 707 with tail number N88ZL flew directly from Bagram Airbase to Vilnius. According to several former CIA officials, the flight carried an al Qaeda detainee, who was being moved from one CIA detention facility to another. Additionally, in July 2005, a CIA-chartered Gulfstream IV, tail number N63MU, flew direct from Kabul to Vilnius. Several former intelligence officials involved in the CIA's prison program confirmed the flight as a detainee transfer to Lithuania."[15] In November 2009, ABC news reported that the secret CIA prison was located inside what used to be (until March 2004) a riding school in Antaviliai, about twenty kilometres from Vilnius.[16]

15. A 2010 UN report cited flight data strings that appeared to confirm that Lithuania was integrated into the secret detention program in 2004.[17] The report also identified a flight on 20 September 2004 from Bagram to Vilnius, and another flight on 28 July 2005 from Kabul to Vilnius that both used dummy flight plans to disguise their true destinations. [18]

16. Abu Zubaydah, a stateless Palestinian, was reportedly transported to Lithuania on or about 17 February 2005, and held in the CIA "black site" on Lithuanian territory.[19] An application filed on his behalf before this Court alleges that Lithuanian officials were responsible for the establishment of the secret CIA prison and that they participated in and provided cover for the extraordinary

---

November 2010, available at http://www.amnesty.org/en/news-and-updates/report/european-governments-must-provide-justice-victims-cia-programmes-2010-11-15.

[12] Matthew Cole, "Officials: Lithuania Hosted Secret CIA Prison to Get 'Our Ear,'" ABC News, 20 August 2009.

[13] Parliamentary Assembly, Council of Europe, Legal Affairs and Human Rights, Press Release, "Dick Marty: time for Europe to come clean once and for all over secret detentions," 21 August 2009, available at http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=4859.

[14] Thomas Hammarberg, Europeans must account for their complicity in CIA secret detention and torture, 5 September 2011, available at http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=175.

[15] Matthew Cole, "Lithuanian President Announces Investigation into CIA Secret Prison," ABC News, 21 October 2009, available at http://abcnews.go.com/Blotter/lithuania-investigating-secret-cia-prisons/story?id=8874887.

[16] Matthew Cole and Brian Ross, "CIA Secret 'Torture' Prison Found at Fancy Horseback Riding Academy," 18 November 2009, available at http://abcnews.go.com/Blotter/cia-secret-prison-found/story?id=9115978.

[17] Human Rights Council, United Nations General Assembly, 13th Session, Agenda Item 3, "Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" A/HRC/13/42, at para. 120, 19 February 2010 (U.N. Joint Experts' Report), available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf.

[18] *Ibid.*

[19] *Abu Zubaydah v. Lithuania*, ECtHR, Application of 28 October 2011, at 14, 17, available at http://www.interights.org/document/181/index.html.

rendition of individuals including Abu Zubaydah into and out of Lithuania, and their secret detention and torture on Lithuanian soil. [20]

Lithuanian Parliamentary Inquiry Into Lithuania's Participation in CIA Secret Detention and Extraordinary Rendition

17. In November 2009, following media reports on Lithuania's hosting of a secret CIA prison, the Lithuanian Parliament mandated that the parliamentary Committee on National Security and Defence ("CNSD") conduct an inquiry into Lithuania's participation in the CIA extraordinary rendition programme and present findings to the Parliament.[21] The inquiry was limited to the following issues: "(1) whether CIA detainees were subject to transportation and confinement in the territory of the Republic of Lithuania; (2) whether state institutions of Lithuania (politicians, officers, civil servants) considered the issues relating to the activities of secret CIA detention centres in the territory; and (3) whether secret CIA detention centres operated in the territory of the Republic of Lithuania."[22]

18. In December 2009, the report of the parliamentary investigation concluded that the State Security Department (SSD) "had received a request from the partners to equip facilities in Lithuania suitable for holding detainees," and that two potential detention facilities, identified as "Project 1" and "Project 2", had existed in Lithuania, but could not confirm that detainees had actually been held there.[23]

19. The report also confirmed that from 2002-2005, aircraft linked to the transportation of CIA detainees repeatedly crossed Lithuanian airspace and also landed in Lithuania, but failed to establish whether CIA detainees were transported through the territory of Lithuania, while noting that conditions for such transportation did exist.[24]

20. Significantly, the report noted that on three occasions, State Security Department (SSD) officers received the aircraft and escorted, transported and/or specifically permitted the entry of, its contents without any customs inspection:

> "During the investigation, three occasions were established on which, according to the testimony of the SSD officers, they received the aircraft and escorted what was brought by them with the knowledge of the heads of the SSD: 1) "Boeing 737", registration No N787WH, which landed in Palanga on 18 February 2005. According to the data submitted by the SBGS [State Border Guard Service], five passengers arrived in that aircraft, none of whom was mentioned by the former Deputy Director General of the SSD Dainius Dabašinskas in the explanations presented to the Committee at the meeting. According to the data of the Customs, no thorough customs inspection of the aircraft was carried out and no cargo was unloaded from or

[20] *Ibid.*
[21] Exhibit 1: Seimas of the Republic of Lithuania, Findings of the Parliamentary Investigation by the Seimas Committee on National Security and defense Concerning the Alleged Transportation and confinement of persons detained by the Central Intelligence Agency of the United States of American in the territory of the Republic of Lithuania (2009) at 3, available at http://www3.lrs.lt/pls/inter/w5_show?p_r=6143&p_d=100241&p_k=2.
[22] *Ibid.*, at 3.
[23] *Ibid.*, at 6-7.
[24] *Ibid.*, at 6.

loaded onto it; 2) "Boeing 737", registration No. N787WH, which landed in Vilnius on 6 October 2005. According to the data submitted by the SBGS, its officers were prevented from inspecting the aircraft; therefore, it is impossible to establish whether any passengers were on board the aircraft. No customs inspection of the aircraft was carried out; 3) "Boeing 737-800", registration No N733MA, which landed in Palanga on 25 March 2006. According to the data submitted by the Customs, no customs inspection was carried out. The documents of the SBGS contain no records of the landing and inspection of this aircraft."[25]

Criminal Investigation Relating to Secret CIA Prison

21. In January 2010, the Office of the Prosecutor General opened a criminal inquiry into whether Lithuanian officials involved with the secret CIA prison had committed possible criminal acts under Article 228 (Abuse of Official Position) of the Lithuanian Criminal Code.[26]

22. While the criminal inquiry was pending, the European Committee for the Prevention of Torture (CPT) examined the question of the alleged existence of secret detention facilities in Lithuania. In a report of June 2010, the CPT questioned whether the Lithuanian investigation was sufficiently prompt, thorough and comprehensive. [27] The Committee also observed its delegation did not receive information that it had requested from the Lithuanian authorities.[28]

23. On 14 January 2011, the Office of the Prosecutor General declared that the investigation was closed,[29] citing an absence of data regarding passengers aboard CIA flights that landed in Lithuania, a five-year statute of limitations on the criminal charge of abuse of official position, and the fact that the failure of SSD officials to inform higher level state officials did not constitute criminal activity.[30] The final justification rested on the determination that Lithuanian law did not require higher political actors to approve details of "intelligence cooperation" between Lithuanian intelligence services and foreign intelligence services.[31] Although the non-government organisations Reprieve and Amnesty International submitted additional evidence to the Prosecutor General's Office,[32]

---

[25] Exhibit 1: Seimas of the Republic of Lithuania, Findings of the Parliamentary Investigation by the Seimas Committee on National Security and defense Concerning the Alleged Transportation and confinement of persons detained by the Central Intelligence Agency of the United States of American in the territory of the Republic of Lithuania (2009) at 5.
[26] Amnesty International, "Unlock the Truth in Lithuania" (2011) at 11.
[27] Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 14 to 18 June 2010, at paras 64-74, available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm.
[28] Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 14 to 18 June 2010, at para. 72, available at http://www.cpt.coe.int/documents/ltu/2011-17-inf-eng.htm.
[29] "Lithuania terminates pre-trial investigation on a secret CIA prison," Lithuania Tribune, 15 January 2011, available at http://www.lithuaniatribune.com/2011/01/15/lithuania-terminates-pre-trial-investigation-on-a-secret-cia-prison/.
[30] Amnesty International, Unlock the truth in Lithuania (2011) at 17-18
[31] *Ibid.*
[32] Interights, Press Release, "Abu Zubaydah, Victim of CIA's Extraordinary Rendition, Seeks Accountability at the European Court of Human Rights," 27 October 2011, available at http://www.interights.org/document/180/index.html.

on 21 October 2011 the Prosecutor General's Office decided not to re-open the criminal investigation.[33]

24. The closure of the criminal investigation was criticized by human rights groups[34] and specialized international inquiries. On 11 September 2012, following an April 2012 visit to Lithuania by the Committee on Civil Liberties, Justice and Home Affairs (LIBE), the European Parliament issued a resolution that:

> "Notes that the parliamentary and judicial inquiries that took place in Lithuania between 2009 and 2011 were not able to demonstrate that detainees had been secretly held in Lithuania;
>
> calls on the Lithuanian authorities to honour their commitment to reopen the criminal investigation into Lithuania's involvement in the CIA programme if new information should come to light, in view of new evidence provided by the Eurocontrol data showing that plane N787WH, alleged to have transported Abu Zubaydah, did stop in Morocco on 18 February 2005 on its way to Romania and Lithuania;
>
> notes that analysis of the Eurocontrol data also reveals new information through flight plans connecting Romania to Lithuania, via a plane switch in Tirana, Albania, on 5 October 2005, and Lithuania to Afghanistan, via Cairo, Egypt, on 26 March 2006;
>
> considers it essential that the scope of new investigations cover, beyond abuses of power by state officials, possible unlawful detention and ill-treatment of persons on Lithuanian territory;
>
> encourages the Prosecutor-General's Office to substantiate with documentation the affirmations made during the LIBE delegation's visit that the 'categorical' conclusions of the judicial inquiry are that 'no detainees have been detained in the facilities of Projects No 1 and No 2 in Lithuania.'"[35]

Applicant's Efforts to Uncover the Truth Relating to Allegations of Lithuania's Participation in Secret Detention and Rendition

25. The applicant, the Human Rights Monitoring Institute (HRMI), is a non-governmental organization which acts as a human rights watchdog in Lithuania. Founded in 2003 with the purpose of promoting an open democratic society through implementation of human rights and freedoms, it carries out research, undertakes strategic litigation, drafts alternative reports to international human rights bodies, raises human rights awareness, and advocates for greater accountability of the Lithuanian government.

26. Since allegations relating to Lithuania's participation in the CIA rendition and secret detention programme first surfaced in 2009, the issue of this participation

---

[33] *Ibid.*

[34] See Amnesty International, Lithuania must reopen CIA secret prison investigation, 18 January 2011, available at http://www.amnesty.org/en/news-and-updates/lithuania-must-reopen-cia-secret-prison-investigation-2011-01-18;

[35] European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0309%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN.

has remained the subject of extensive domestic and international media coverage and ongoing public debate.[36] HRMI has been actively involved in researching, disseminating information, raising public awareness, informing public debate, and conducting advocacy on this subject. It continues to publish information relating to Lithuania's role in CIA secret detention and rendition on its website.[37]

27. In January 2010, HRMI requested the Prosecutor General's Office to initiate a criminal investigation into allegations of Lithuania's participation in CIA secret detention and rendition. In 2010, 2011, and 2012 HRMI submitted shadow reports to the UN Human Rights Committee and UN Human Rights Council, drawing attention to the ineffectiveness of domestic investigations into this participation.[38]

28. Throughout 2010-2012, HRMI served as the primary source of information on the latest developments in Lithuania with respect to secret detention and rendition for foreign and international non-governmental organisations as well as official bodies, such as the European Parliament's LIBE Committee. HRMI also provided relevant information on Lithuania's role in secret detention and rendition to local and foreign media. In addition, HRMI gave commentaries and interviews on this subject to investigative journalists, news reporters and documentary film makers from various countries including Denmark, Finland, Latvia, Romania, and the United Kingdom.

---

[36] See BNS ir lrytas.lt inf., "Netoli Vilniaus - slaptas kalėjimas'al Qaeda' kovotojams?"(Not far from Vilnius – a secret prison for "al Qaeda" fighters?"), 21 August 2009, available at http://www.lrytas.lt/-12507976821249191102-netoli-vilniaus-slaptas-kal%C4%97jimas-al-qaeda-kovotojams-papildyta-10-val-13-min.htm; ELTA ir lrytas.lt inf., "Nacionalinio saugumo ir gynybos komitetas tirs galimą CŽV sulaikytų asmenų kalinimą Lietuvoje"("The National Security and Defence Committee will investigate the alleged imprisonment of CIA detainees in Lithuania"), 5 November 2009, available at http://www.lrytas.lt/-12574167961257025752-nacionalinio-saugumo-ir-gynybos-komitetas-tirs-galim%C4%85-c%C5%BEv-sulaikyt%C5%B3-asmen%C5%B3-kalinim%C4%85-lietuvoje.htm; BNS, delfi.lt, "R.Juknevičienė apie tyrimą dėl CŽV kalėjimo: yra nusiteikimas atskleisti tiesą, kokia ji skaudi kam nors bebūtų"("R. Juknevičiene on the CIA prison investigation: There is a determination to reveal the truth, no matter how hurtful it would be for some"), 26 November 2009, available at http://www.delfi.lt/news/daily/lithuania/rjukneviciene-apie-tyrima-del-czv-kalejimo-yra-nusiteikimas-atskleisti-tiesa-kokia-ji-skaudi-kam-nors-bebutu.d?id=26120235; delfi.lt, "LNK: VSD darbuotojai paliudijo, kad CŽV kalėjimas buvo"("LNK [News]: SSD employees testified that the CIA prison has existed"), 30 November 2009, available at http://www.delfi.lt/news/daily/lithuania/lnk-vsd-darbuotojai-paliudijo-kad-czv-kalejimas-buvo.d?id=26278183; Liepa Pečeliūnaitė, "Laurinkus klausė Pakso dėl CŽV kalinių atvežimo į Lietuvą"("Laurinkus has asked Paksas about bringing CIA detainees to Lithuania"), *Alfa.lt*,11 December 2009, available at http://www.alfa.lt/straipsnis/10303987/?Laurinkus.klause.Pakso.del.CZV.kaliniu.atvezimo.i.Lietuva..papildyta.11.08.=2009-12-11_09-44; Liepa Pečeliūnaitė, "NSGK: patalpos CŽV kalėjimui buvo, apie tai žinojo Laurinkus ir Dabašinskas (papildyta) ("The CNSD: CIA prison facilities existed, this was known to Laurinkus and Dabasinskas (updated)"), 22 December 2009, *alfa.lt*, available at http://www.alfa.lt/straipsnis/10305733; BBC News, "Lithuania hosted secret CIA prison", 22 December 2009, available at http://news.bbc.co.uk/2/hi/europe/8426028.stm; Ian Cobain, "Lithuania faces legal action over prisons set up for CIA rendition programme", *Guardian*, 27 October 2011, available at http://www.guardian.co.uk/world/2011/oct/27/lithuania-cia-rendition-prisons-european-court.

[37] Available at https://www.hrmi.lt/en/research/other/cia-secret-detention-and-extraordinary-rendition-programme/.

[38] The shadow reports are available at https://www.hrmi.lt/en/our-work/alternative-reports/.

Applicant's Request for Information on CIA Rendition Flights

29. On 4 July 2011, as part of its ongoing efforts to impart information to the public on the Lithuanian government's role in CIA secret detentions and renditions, and pursuant to the Lithuanian access to information law, HRMI submitted a freedom of information request to the Customs Department under the Ministry of Finance of the Republic of Lithuania (Customs Department).[39] HRMI also submitted requests to a number of other Lithuanian government agencies, and has published the responses of these agencies on its website.[40]

30. In its request to the Customs Department, HRMI requested that the Department provide information related to alleged CIA flights, referring to the findings of the parliamentary investigation into possible human rights abuses in Lithuania, and the significant public interest associated with the subject matter of the investigation. HRMI requested the Customs Department to provide the following information:

    a) A description of the regular inspection procedure of foreign aircraft and cargo, both state/official and privately operated, and allowed exceptions under the law;

    b) Information regarding the inspection of the aircraft and (or) cargo of the following planes: N1HC, N1016M, N120JM, N157A, N168BF, N168D, N173S, N187D, N196D, N212CP, N2189M, N219D, N219MG, N221SG, N227SV, N259SK, N299AL, N312ME, N313P, N331P, N368CE, N379P, N4009L, N404AC, N4456A, N4466A, N4476S, N4489A, N44982, N4557C, N475LC, N478GS, N486AE, N50BH, N505LL, N510MG, N5139A, N5155A, N541PA, N547PA, N549PA, N588AE, N58AS, N600GC, N6161Q, N63MU, N719GB, N733MA, N787WH, N8068V, N8183J, N8213G, N829MG, N837DR, N845S, N85VM, N88ZL, N961BW, N964BW, N965BW, N966BW, N967BW, N968BW;[41]

    c) With respect to the aforementioned flights, HRMI requested the Customs Department to indicate:

        i) whether the flights were privately or state/officially operated;

        ii) whether an inspection of the aircraft and (or) cargo inspection was carried out;

        iii) if an inspection was carried out, HRMI requested information on what was found during the inspection and copies of all underlying documents;

        iv) if an inspection of the aircraft and (or) cargo was not carried out, HRMI requested that the Customs Department state the reasons for not carrying out the inspection and describe what alternate procedures were used, if any;

---

[39] Exhibit 2: Human Rights Monitoring Institute, Request for Information, No. IS-VI-24, 4 July 2011.
[40] Available at https://www.hrmi.lt/en/our-work/strategic-litigation/. In addition to the Customs Department, the information request was filed with the Ministry of Foreign Affairs, State Border Guard Service under the Ministry of Internal Affairs, Parliamentary Committee for National Security and Defence, State Security Department, Air Navigation, and the Civil Aviation Administration. The responses can be accessed under the link labeled "Freedom of Information Case - CIA Rendition Programme (2012)."
[41] These aircraft had been identified in public sources as being linked to the CIA's secret detention and extraordinary rendition operations.

d) With regard to a possible Customs Department's decision to withhold relevant information or documents, HRMI requested the Department to indicate if the materials had been reviewed to determine whether portions could be segregated or redacted so as to allow for the disclosure of at least part of the document;

e) In the case that the Customs Department declined to provide the requested documents because they were classified, HRMI requested that the Department consider declassifying the document or portions of it in light of the great public interest in the disclosure of relevant information;

f) In case that the Customs Department declined to provide the requested documents because they were classified, HRMI asked the Department to indicate the number of classified documents being withheld.

g) For each classified document that was withheld, HRMI asked the Customs Department to provide: the title, date and description of contents of the document; the authority that classified the document and the level and term of classification; reasons for classification; conditions for declassification; information regarding whether the authority responsible for the classification of the document has recommended that it be de-classified; and indication whether the classified document is currently in the Customs Department's possession; if the document was in the possession of another authority, HRMI requested the name of that authority and copies of any communications with the named authority concerning the classified document.

h) In case that the Customs Department refused to provide the requested information and documents for reasons other than classification, HRMI requested the Department to indicate the number of such documents.

i) For each document withheld for reasons other than classification, HRMI requested the title of document, date and description of its contents, reasons for withholding the document from public access, conditions for dissemination of the document, and information regarding whether the document was in the Customs Department's possession; if the document was in the possession of another authority, HRMI requested the name the authority and copies of any communications with the named authority concerning the document.[42]

31. On 29 July 2011, the Customs Department sent a half-page-long reply consisting of two paragraphs, informing HRMI of the general laws governing customs activities, and stating that

> "[p]ursuant to Article 12 Paragraph 2 of the Customs Law of the Republic of Lithuania, customs authorities, in accordance with the procedure set out in the laws of the Republic of Lithuania, shall provide information regarding the actions, accomplished or being accomplished by persons, whose supervision is within the competence of the Customs authorities, only to the appropriate competent law enforcement institutions of the Republic of Lithuania and courts, Tax Disputes Commission under the Government of

[42] See Exhibit 2: Human Rights Monitoring Institute, Request for Information, No. IS-VI-24, 4 July 2011.

the Republic of Lithuania and State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania".[43]

The response also contained a citation to the provisions of Article 15 of the Community Customs Code (Council Regulation No. 2913/92), regulating the protection of confidential information.[44]

Appeal against Refusal

32. On 30 August 2011, HRMI filed a complaint before the Vilnius Regional Administrative Court arguing that the Customs department's withholding of the requested information was unlawful, and asked the court to order the Customs Department to provide the requested information.[45] On 7 September 2011, the Customs Department submitted a response to HRMI's complaint before the administrative court, arguing that the Department's refusal to disclose the requested information was lawful, and asking the Court to dismiss the complaint.[46]

33. On 14 October 2011, HRMI submitted written explanations to the court in support of the complaint and enclosed a copy of a 14 December 2009 letter from the Customs Department responding to the CNSD's request for information during the parliamentary inquiry.[47] HRMI had retrieved that letter from the public parliamentary archives.[48] In that letter, the Customs Department provided the CNSD with detailed information on the outcomes of customs inspections of two CIA-related airplanes that were under the CNSD's investigation. On 8 December 2011, the court upheld HRMI's complaint in part and ordered the Customs Department to re-examine the information request.[49]

34. On 22 December 2011, the Customs Department appealed the decision to the Supreme Administrative Court of Lithuania (the final instance court for administrative disputes), asking it to reverse the judgment of the first instance court and dismiss HRMI's complaint.[50] On 26 January 2012, HRMI submitted a

[43] Exhibit 3: Customs Department's Response to HRMI's Request for Information, Writ No. (20.2/07)3B-5370, 29 July 2011.
[44] *Ibid.*
[45] Exhibit 4: Human Rights Monitoring Institute's Complaint against Customs Department submitted to Vilnius Regional Administrative Court, Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 30 August 2011.
[46] Exhibit 5: Customs Department, Writ No. (4.5)3B-6139 "Response to the Human Rights Monitoring Institute's Complaint Regarding Obligation to Provide Information", Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 7 September 2011.
[47] Exhibit 6: Human Rights Monitoring Institute's Written Explanations to Vilnius Regional Administrative Court, No. IS-VI-41, 14 October 2011; Exhibit 7: Customs Department's Response to Request for Information from Seimas Committee on National Security and Defence, Writ No. 3B-17.1/02-11167, 14 December 2009. Exhibit 8: Seimas Committee on National Security and Defence, Request for Information, Writ No. S-2009-12988, 9 December 2009.
[48] Exhibit 9: The Office of Seimas of the Republic of Lithuania's, Writ in Response to Request for Access to Documents in Parliamentary Archives, Writ No. S-2011-6389, 20 July 2011.
[49] Exhibit 10: Judgment of the Vilnius Regional Administrative Court, Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 8 December 2011.
[50] Exhibit 11: Customs Department, Writ No. (4.5)3-8840 on "Appeal regarding Vilnius regional court's judgment of 8 December 2011", Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 22 December 2011.

response opposing the Customs Department's appeal and asking the court to leave the first instance court's decision unchanged.[51]

35. On 2 July 2012, the Supreme Administrative Court issued a final ruling upholding the Customs Department's appeal in part and annulling the first instance court's order that the Customs Department re-examine HRMI's request.[52] The Court ruled that the first part of HRMI's request, asking for a description of the procedure of regular inspection of aircraft and cargo and allowed exceptions under the law, was not sufficiently specific. With regard to the remainder of the information sought, relying primarily on Article 11.3 of the Lithuanian Customs Code,[53] the Court considered that the "content (nature)" of this information and the manner of its provision to the Customs Department made it plain and obvious that the information fell within the category of confidential rather than public information. The Court reasoned that under Article 15 of the Community Customs Code, confidentiality of information in itself implied that the information should be considered a service secret, and that this was sufficient legal grounds to conclude that the information sought by HRMI was a service secret. The Court concluded that the consent of the direct provider of information was a necessary condition for the Customs Department to disclose information of a confidential nature. However, the Court also held that Customs Department had no obligation to third persons to participate in any way in obtaining that consent.

IV. ALLEGED VIOLATIONS OF THE CONVENTION

36. By denying access to the requested information, the Lithuanian government has violated the applicant's right to information under Article 10 and its right to a remedy under Article 13 of the Convention.

- *A. Article 10.* The reliance on a blanket ban to refuse access to information without any individualized consideration of the circumstances of the case is an unjustified and disproportionate interference with Article 10.
- *B. Article 13*. The lack of an effective domestic remedy by which to challenge the refusal to disclose customs-related information in the public interest violates Article 13.

A. ARTICLE 10: RIGHT TO INFORMATION

37. Article 10 is violated where there has been an interference with the applicant's right of access to information under Article 10(1), and the interference was not

[51] Exhibit 12: Human Rights Monitoring Institute's Response to the Application on Appeal, Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 26 January 2012.
[52] Exhibit 13: Judgment of the Supreme Administrative Court of Lithuania, Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 2 July 2012.
[53] Article 11.3 provides in full: "All information provided to the Customs authorities that is confidential by its content or manner of its provision, is protected, disclosed and provided pursuant to Article 12 of this Law, Article 13 Paragraph 4 and Article 15 of the Community Customs Code, other laws of the Republic of Lithuania and international treaties [ratified by] the Republic of Lithuania." For the convenience of the Court, relevant provisions of Lithuanian law are attached hereto as Exhibit 14.

"prescribed by law," did not pursue a legitimate aim, or was not "necessary in a democratic society."[54]

38. HRMI is a non-governmental organization performing a watchdog function. (1) The Lithuanian authorities interfered with the right of HRMI to receive and impart information of clear public interest. (2) This interference was not in accordance with Article 10(2): (a) The interference was not prescribed by law, as there was no clear legal basis for refusing to disclose the information, either in the law or in the decision of the Supreme Administrative Court (SAC). (b) The interference served no legitimate aim, at least with respect to a part of the requested information – the SAC simply applied a blanket ban. (c) The interference was not necessary in a democratic society, as no justifications were provided, an absolute ban was applied, there was no consideration of the public interest, and there was no consideration of partial disclosure.

1. Interference with the Right to Receive and Impart Information

39. The Respondent interfered with the right of HRMI to receive and impart information of clear public interest. HRMI seeks to uncover facts relating to allegations that the Lithuanian authorities were complicit in the secret detention and rendition of terrorist suspects, a situation this Court has described as "anathema to the rule of law". HRMI was prevented from playing a role as public watchdog due to the interference with its right to access to information.

Relevant Standards: The Right of Access to Information under Article 10

40. The Court's jurisprudence on the question of access to government information has substantially evolved in recent years. It now recognises that the media, social watchdogs and others have a right of access to state-held information of clear public interest.

41. In *Társaság v. Hungary*, the Court noted that "it is difficult to derive from the Convention a general right of access to administrative data and documents," but recognized that "the Court has recently advanced towards a broader interpretation of the notion of 'freedom to receive information' … and thereby towards the recognition of a right of access to information."[55] The Court observed that "the most careful scrutiny is called for" with respect to a national authority's discouragement of participation of the press, "one of society's 'watchdogs', in the public debate on matters of public concern."[56] It noted that the applicant in that case was an association involved in human rights litigation, including the protection of freedom of information, and could "therefore be characterised, like the press, as a social 'watchdog'". As such, the Court found the applicant's activities warranted similar protection to that afforded to the press under Article 10.[57]

42. Observing that the applicant "was involved in the legitimate gathering of information on a matter of public importance," and that "the authorities interfered in the preparatory stage of this process by creating an administrative obstacle," the Court concluded that "[t]he [state institution's] monopoly of

[54] See *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para. 30.
[55] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para. 35.
[56] *Ibid.* at para. 26.
[57] *Ibid.* at paras. 26-27.

information thus amounted to a form of censorship."[58] Moreover, in light of the fact that the applicant's intention was to impart the requested information to the public and to contribute to a public debate, the Court found that the applicant's right to impart information was clearly impaired and that there had been an interference with its rights under Article 10(1).[59]

43. A month later, in *Kenedi v. Hungary*, the Court granted a right of access to an individual scholar who had spent years trying to obtain access to historical records held by the Hungarian State Security Service.[60]

44. More recently, in *Gillberg v. Sweden*, the Grand Chamber of the Court confirmed the central ruling in *Tarsasag* and *Kenedi* by holding that two independent researchers had an Article 10 right to obtain access to medical research data collected by a public university.[61]

The Refusal to Grant Access Interfered with the Applicant's Article 10 Rights

45. The current applicant, HRMI, is a non-governmental human rights "watchdog", essentially in the same position as the applicant in the *Tarsasag* case, the Hungarian Civil Liberties Union. Like the *Tarsasag* applicant, HRMI is "involved in the legitimate gathering of information on a matter of public importance," i.e., possible Lithuanian participation in CIA rendition and secret detention, and its intention is to impart the requested information to the public and to contribute to a public debate.[62]

46. Indeed, as set forth in the Statement of Facts, for the past several years, HRMI has been actively involved in disseminating information, raising public awareness, informing public debate, and conducting advocacy relating to allegations of Lithuanian participation in the CIA's extraordinary rendition and secret detention programme. These allegations are a matter of undeniable public interest, and have already resulted in a parliamentary investigation in Lithuania. It was following this investigation that the applicant filed its requests for information with several state agencies, including the Customs Department, for information that would shed further light on the allegations of Lithuanian involvement in CIA rendition and secret detention. The applicant did so in order to raise public awareness and inform public debate on the issue. HRMI continues to publish information relating to these allegations on its website, including the responses which it received from the state agencies to its requests for information.

47. The applicant provided a clear explanation of the context and rationale for its request to the Customs Department. The request sought disclosure of specific information that was readily available or that could be easily collated through existing materials in the possession of the Customs Department. There is no indication in the record that the requested information was not in the possession of that department, otherwise unavailable or technically impossible to collect.

48. The Customs Department denied the applicant's request for information in its entirety, and this denial was confirmed by Lithuania's Supreme Administrative

[58] *Ibid.* at para. 28.
[59] *Ibid.* at para. 28.
[60] *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009, at para. 43.
[61] *Gillberg v. Sweden*, ECtHR, Judgment of 3 April 2012, at para. 93.
[62] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para. 27.

Court. This denial amounted to an interference with the applicant's Article 10 right to receive and impart information.

2. The Interference Does Not Meet the Requirements of Article 10(2)

49. The denial of information did not satisfy the requirements of Article 10(2) as (a) it was not prescribed by law, (b) it did not pursue, in part, a legitimate aim, and (c) the interference was not necessary in a democratic society.

a. The Denial of Information Was Not Prescribed By Law

50. The applicant's request for information was denied because the Customs Department and the Supreme Administrative Court considered that the information was by its nature confidential, and therefore could not be disclosed. However, neither the Customs Law nor the Court defined what information should be considered "confidential" and is exempt from disclosure. The denial was therefore not "prescribed by law" within the meaning of Article 10(2).

Legal Standards: Legality

51. Article 10(2) of the Convention requires that any interferences with the right to receive information, including information held by public authorities, be "prescribed by law." This requires that an interference should have some basis in domestic law, and that the law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[63]

52. Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by Article 10. In matters affecting fundamental rights, it would be contrary to the rule of law for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.[64]

The denial was not prescribed by law

53. In denying the applicant's request, the Customs Department and the Supreme Administrative Court relied primarily on Article 11.3 of the Lithuanian Customs Code,[65] which they both interpreted as preventing the Customs Department from disclosing to the public any third-party information that "is confidential by its content or the manner of its provision."[66] In its response to the applicant and submissions to domestic courts, the Customs Department suggested that the purpose of the denial of applicant's request was to protect personal data and third-party commercial interests.[67]

---

[63] See, among other authorities, *Maestri v. Italy* [GC], ECtHR, judgment of 17 February 2004, para. 30
[64] See *Hasan and Chaush v. Bulgaria* [GC], ECtHR, judgment of 26 October 2000, para. 84.
[65] For the convenience of the Court, relevant provisions of Lithuanian law are attached hereto as Exhibit 13.
[66] Article 11.3 provides in full: "All information provided to the Customs authorities that is confidential by its content or manner of its provision, is protected, disclosed and provided pursuant to Article 12 of this Law, Article 13, paragraph 4 and Article 15 of the Community Customs Code, other laws of the Republic of Lithuania and international treaties [ratified by] the Republic of Lithuania."
[67] See, inter alia, Exhibit 3: Customs Department's Response to HRMI's Request for Information, 29 July 2011.

54. However, neither the Customs Law nor the domestic courts in this case defined in any way the concept of confidentiality, or the nature of the information that ought to be considered confidential, under Article 11.3. Nor did the Supreme Administrative Court refer to any domestic jurisprudence or practice to provide such a definition. The formulation of the provision is circular in that the abstract concepts of "the content or manner of provision" of the information do not provide any clarity on the criteria to be used to assess whether a piece of information should be considered confidential and therefore denied to the general public or parts thereof.

55. Article 11.3 of the Customs Law includes a reference to Article 15 of the Community Customs Code (CCC) of the European Union (EU), which is directly binding on Lithuania as an EU member, and which provides as follows:

> "All information which is by nature confidential or which is provided on a confidential basis shall be covered by the duty of professional secrecy. It shall not be disclosed by the competent authorities without the express permission of the person or authority providing it. The communication of information shall, however, be permitted where the competent authorities are obliged to do so pursuant to the provisions in force, particularly in connection with legal proceedings."[68]

56. As is clear from its language, Article 15 of the CCC is not of much greater help in defining or clarifying the concept of confidentiality of information held by EU customs authorities. An extensive set of implementing regulations of the CCC adopted by the European Commission[69] also includes no further specifications on this issue.

57. Given the extensive nature of EU regulation of the customs union, EU member states tend to rely on directly applicable EU norms in this area of law.

58. However, unlike in Lithuania, the national laws of some other EU member states, including right to information laws, which are applicable in this area, help remedy to some extent the vagueness of the customs regulations.

59. The UK Right to Information Act 2000 provides, for example, that access to state-held information may be denied "if the information requested is a trade secret, or release of the information is likely to prejudice the commercial interests of any person."[70] An 11-page guidance note on this exemption issued by the UK's Information Commissioner includes six sets of non-exhaustive criteria that should be taken into account by public authorities in assessing harm to a person's commercial interests.[71]

---

[68] Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, as amended, art. 15, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1992R2913:20070101:EN:PDF.

[69] See Commission Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, as amended, at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993R2454:20120101:EN:PDF.

[70] Section 43.

[71] See UK Information Commissioner, *Freedom of Information Act Awareness Guidance No 5: Commercial Interests,* at: http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_-_commercial_interests.pdf.

60. In some non-EU jurisdictions it is the customs laws themselves that attempt to define confidentiality rules with greater precision. The relevant South African act, for example, defines customs "information that is by nature confidential" as

> "trade, business or industrial information that (a) belongs to a person or the State; (b) has a particular economic value; and (c) is not generally available to or known by others, and the disclosure of which could (i) result in a significant adverse effect on the owner, or on the person that provided the information; or (ii) give a significant competitive advantage to a competitor of the owner."[72]

61. In contrast, Article 11 of the Lithuanian Customs Code fails to properly define "confidential information" or formulate with "sufficient precision" the circumstances and conditions under which access to information held by the Customs Department can be denied.

62. The Lithuanian *Law on the Right to Obtain Information from State and Municipal Institutions and Agencies* might have also been of some assistance in this respect. However, the Supreme Administrative Court considered that law to be entirely inapplicable to the current case on the basis that the *lex specialis* provisions of Customs Law should be the applicable law.[73]

63. The SAC also failed to refer to, or apply, the relevant provisions of the Lithuanian Civil Code, which defines to some degree both "commercial secrets" and "professional secrets."[74] Although there is relevant domestic case-law on access to information which could be considered commercial secret as defined by the Civil Code, in the current case, however, the SAC chose to apply solely the insufficiently precise provisions of the Customs Law.

64. As such, domestic law as interpreted by the relevant administrative and judicial authorities in this case grants the Customs Department an unacceptably large amount of discretion and the ability to arbitrarily deny access to information of legitimate public interest. The ruling of the Supreme Administrative Court did nothing to properly circumscribe the discretionary powers of the Department in this area. The denial of the right to information was therefore not "prescribed by law" within the meaning of Article 10(2).

b. The Denial of Information Did Not Serve a Legitimate Aim

65. To be compatible with Article 10, an interference must be necessary in order to protect one of the public or private interests enumerated in Article 10(2). Such

---

[72] See International Trade Administration Act, 2002 (Act No. 71 of 2002), at http://www.acts.co.za/international_trade_administration_act_2002/1_definitions_and_interpretation.htm.

[73] Law VIII-1854 on the Right to Obtain Information from State and Municipal Institutions and Agencies (2000), by virtue of its own provisions, does not apply to "information the provision of which is regulated by other laws." Art. 1(3)(7).

[74] Article 1116(1) of the Code provides as follows: "Information shall be considered to be a commercial secret if a real or potential commercial value thereof manifests itself in what is not known to third persons and cannot be freely accessible because of the reasonable efforts of the owner of such information, or of any other person entrusted with that information by the owner, to preserve its confidentiality." Article 1116(5) provides that "[i]nformation shall be considered to be a professional secret if, according to the laws or upon an agreement, it must be safeguarded by persons of certain professions (lawyers, doctors, auditors, etc.). This information is received by the indicated persons in performance of their duties provided for by laws or contracts."

interests include the "protection of the reputation or rights of others". They also include "preventing the disclosure of information received in confidence", which applies to situations where a publication might violate intellectual property rights, professional secrecy (of lawyers, doctors etc) or related interests.[75]

66. In this case, the rejection of the entirety of the applicant's request based on a blanket denial of access to all "confidential information", so broadly defined, did not serve any legitimate aim. The categorical exemption of all Customs information from public access, which is the effect of the Department's and the Court's interpretation of the Customs Law, does not serve any legitimate aim.

The categorical exemption of all Customs information from public access serves no legitimate aim

67. The interpretation of the Lithuanian Customs Law by the Supreme Administrative Court had the effect of excluding altogether the Customs Department, and all information held by the department, from the scope of the Lithuanian access to information law. The Court concluded as follows:

> "Under Article 15 of the Community Customs Code the confidentiality of information itself implies that it should be considered a service secret. Therefore the application of this legal norm is sufficient legal ground to conclude that the information requested by the claimant is a service secret. This means that the disclosure of such information is possible only with the consent of the direct provider of the information…. Customs, as a subject of public administration, while performing the functions assigned to it, have no duty to third persons to participate [in securing the consent of the original provider of the information]."[76]

68. The practical effect of the Supreme Administrative Court's ruling is to categorically exempt all information held by Customs from disclosure, under any circumstances, to the public – indeed, to anyone other than the national and international public authorities specifically listed in Article 12 (namely, courts, tax and law enforcement authorities, and European customs authorities). Such wholesale exemptions of a public authority from any disclosure obligations, which tend to create totally obscure pockets of government, cannot be said to serve a legitimate aim under Art 10(2) of the Convention.

69. Treating all records held by a particular department as closed to the public is inherently arbitrary and devoid of a legitimate aim, since at least some records within any government department – even the most secretive ones – could potentially be or become of public interest at a given time and context. As this Court's case law shows, this includes even the records held by, or pertaining to, secret or intelligence services. In *Kenedi v. Hungary*, the Court held that the applicant historian was entitled under Article 10 to obtain access to certain historical records from the Communist period held by the Hungarian intelligence service. There is no reason to believe a customs department should be entitled to greater secrecy. The Court has also found a right of access to information of public interest held by a judicial body, a public university and an executive

[75] See *Stoll v. Switzerland*, ECtHR (GC), Judgment of 10 December 2007, para 61; and *Editions Plon v. France*, ECtHR, Judgment of 18 May 2004, at para. 34.
[76] See Exhibit 12: *HRMI v. Customs Dept*., Supreme Administrative Court of Lithuania, Judgment of 2 July 2012, p. 11 (own translation).

agency in charge of the development of a nuclear power station,[77] suggesting that a broad range of public authorities are subject, in principle, to the Article 10 right of access to information.

70. This Court's emerging approach that all government departments are subject to the right of access is consistent with prevailing European practice. The Council of Europe Convention on Access to Official Documents ("Access Convention") requires state parties to "guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities" (Art. 2.1).[78] Public authorities are defined to include, without exception, all "government and administration at national, regional and local level" (Art. 1.2(a)). The Convention's Explanatory Report further specifies that "government and administration" are meant to include "for example, central government, town councils and other municipal bodies, the police, public health and education authorities, public records offices, etc."[79]

71. A priori exempting an entire government department from the public's right to know is comparable, in Article 10 terms, to censoring all discussion of the affairs of that particular department—a measure that would be patently incompatible with Article 10. The existence of that possibility in the Lithuanian legal system constitutes a structural and systemic barrier to compliance with access rights under Article 10.

Failure to justify denial of access to information not provided by third parties

72. The domestic authorities failed, in addition, to show that the totality of the information requested by the Applicant had to be denied in order to protect one or more legitimate interests under Article 10.2. They failed to examine how much of the information fell into the categories that they claimed to be protecting; and applied a blanket exclusion without examining whether partial disclosure could take place without endangering those interests, as the applicant had explicitly requested.

73. Thus, the Supreme Administrative Court treated all information requested by the applicant as information provided to Customs by third parties. However, part of the requested data, such as confirmation of the fact whether Customs had actually inspected a particular flight, is information generated and held by Customs, not third parties.

74. The only specific rationale put forward by the authorities – that of protecting personal data and/or commercial secrets – cannot plausibly apply to the entirety of the requested information. For example, confirming the mere fact of whether or not an inspection took place does not affect in any meaningful way commercially or personally sensitive information of the flight operators. In particular, the authorities provided no explanation for how the denial of the following categories of information served any legitimate purpose:

---

[77] See, respectively, *Tarsasag* judgment, note 54 above; *Gillberg v. Sweden*, note 61 above; and *Sdruženi Jihočeské Matky v. Czech Republic*, Admissibility Decision of 10 July 2006.

[78] Council of Europe Convention on Access to Official Documents No. 205, Art. 2.1 (not yet in force). Lithuania ratified the convention on 26 July 2012. The Convention represents the culmination of several decades of standard-setting work by the Council of Europe in the area of the right to information held by public authorities.

[79] Para. 8, at http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm.

a) a description of the regular inspection procedures for foreign aircraft and cargo;

b) whether the 62 listed flights were privately or state/officially operated;

c) whether an inspection was carried out in relation to each of those flights, and, if not, the reasons for not carrying out an inspection.

75. The applicant specifically asked in its original request that the Customs Department "indicate if the [denied] materials have been reviewed to determine whether portions could be segregated or redacted so as to allow for the disclosure of at least part of the document." That request was consistent with the generally accepted principle of "partial disclosure" in the field of freedom of information. Thus, the Access Convention provides as follows: "If a limitation applies to some of the information in an official document,[80] the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated." (Art. 6.2) Furthermore, any "public authority refusing access to an official document wholly or in part shall give the reasons for the refusal."[81] (Art. 5.6.)

76. The Lithuanian authorities treated the Applicant's requests for several different categories of information as one monolithic request, and issued a blanket denial that failed to specify on what legitimate ground each category was denied. The failure to conduct any individualized assessment of whether the information falls within the alleged exemption of confidential or third party information, and the consequential abuse of this exemption to exclude disclosure of information which had no meaningful relationship with the purported aim, shows that this restriction did not serve a legitimate aim, in violation of the second prong of the test established by Article 10.2 of the Convention.

The denial of access to already published information served no legitimate purpose

77. A part of the records requested by the applicant – including detailed information on the outcome of customs inspections of two of the CIA-related aircraft (N787WH and N961BW) listed by the applicant– were provided by the Customs Department to the Lithuanian parliamentary inquiry (see para. 30 above). These records are available to the general public through the parliamentary archive, and in fact the applicant was later able to obtain copies thereof from the parliamentary archive. It is submitted that their continued withholding by the domestic authorities serves no legitimate purpose whatsoever.

78. In the *Spycatcher* case, this Court held that an ongoing injunction against a book disclosing national security secrets was no longer justified once the book was published in another country and became available in the country of origin as well (the United Kingdom).[82] That rationale applies even more forcefully to the current case, wherein part of the information denied by Customs to the applicant had already been disclosed by the same department and had become lawfully available to the general public. The denial of that information served no legitimate purpose under Article 10(2).

---

[80] An "official document" is defined as "all information recorded in any form, drawn up or received and held by public authorities" (Art. 1(2)(b))

[81] Emphasis added.

[82] *Observer and Guardian Newspapers v. United Kingdom*, ECtHR, Judgment of 26 November 2001.

c. The Denial of Information Was Not "Necessary in a Democratic Society"

79. The denial of information was not necessary in a democratic society, as the domestic authorities (i) provided no justification with respect to the withholding of the bulk of the requested information, (ii) did not consider the public interest in disclosure of the information, (iii) failed to balance privacy protections with the right to information, including by not considering partial disclosure, and (iv) reached a decision that resulted in covering up potentially gross misconduct by public officials.

Legal Standards: Permissible Restrictions on Access to Information

80. It is for the government to show that an interference is also "necessary in a democratic society." Any interference must respond to a "pressing social need," be proportionate to the legitimate aims pursued, and supported by "relevant and sufficient reasons."[83] In handling requests for information, domestic authorities are required to weigh any legitimate considerations of secrecy, as contemplated in Article 10(2), with the public interest in disclosure, and to make a determination only after balancing all the relevant considerations in the light of the specific circumstances of each case and the surrounding context.

81. The Court's recent access to information jurisprudence has clarified some of the considerations applicable in this context, especially with respect to conflicts with privacy interests. In *Tarsasag*, for example, the Court noted "that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights," such as the right to privacy.[84] The same ought to apply to persons who are not public figures, if perhaps to a somewhat lesser extent. The Court observed that "the State obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions, where in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities".[85] Noting that the "social watchdog" applicant had sought information which was ready and available and did not require the collection of any data by the Government, the Court held that the State "had an obligation not to impede the flow of that information to the applicant". [86] Considering that obstacles created in order to hinder access to information of public interest may discourage "public watchdogs" from pursuing such matters, the Court concluded that the interference with the applicant's freedom of expression was not necessary in a democratic society. [87]

82. Similarly, in *Gillberg v. Sweden*, the Grand Chamber considered whether two independent researchers were entitled to obtain access to certain records collected by a public university, including raw research data on psychological disorders in children. A university administrator had denied access in order to protect the subjects' privacy rights. Considering that reasonable measures had been agreed to safeguard the privacy of the children and their families, the

[83] See *Sunday Times v. United Kingdom,* ECtHR, Judgment of 26 April 1979, para 62.
[84] *Társaság a Szabadságjogokért v. Hungary*, ECtHR, Judgment of 14 April 2009, at para. 36.
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.*

Grand Chamber found that the public interest in disclosure and debate over the research methods used by the university had to prevail.[88]

83. In *Kenedi v. Hungary*, the Court underscored the importance of "access to original documentary sources for legitimate historical research" – seen in the context of opposing state secrets claims – as an "essential element of the exercise of the applicant's right to freedom of expression".[89]

84. In the *Sdruženi Jihočeské Matky* case, the Court reviewed the denial to an environmental group of access to certain data related to the construction of a nuclear reactor. The Court itself conducted such a balancing exercise, and given that the nature of the information (technical information about a nuclear power station) was not of significant public interest – which the Court distinguished from information related to the nuclear's environmental impact -- it concluded that the denial was justified given the interests to be protected: the rights of others (industrial secrets), national security (due to risk of possible terrorist attacks) and public health.[90]

85. On the other hand, the Court has also suggested that where public interest in disclosure is sufficiently strong, domestic authorities may be required to provide transparency even if disclosure were to cause a certain degree of harm to secrecy interests, whether public or private. For example, in the interest of protecting public health from hazardous industrial activities, governments may be required to disclose information about the industrial operations at stake that might otherwise be protected, as a matter of law or custom, by commercial confidentiality or the economic interests of the state.[91]

86. Similarly, in the context of Article 8 protections for personal privacy, the Court has found that privacy rights may have to give in, to some extent, to the need to ensure open debate on matters of legitimate public interest.[92] The "decisive factor" in the balancing is the contribution that published information or images make "to a debate of general interest."[93]

87. This approach is consistent with what is known as the principle of overriding public interest, which is widely accepted in European law and practice. The Access Convention defines the principle as follows: "Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the [enumerated confidentiality] interests, unless there is an overriding public interest in disclosure" (Art. 3.2).

Application to the current case

88. The following arguments apply to the denial of all the information requested by the applicant. Where appropriate, we shall distinguish between those records or information requested by the applicant that affected, or might have affected, the confidentiality interests of third parties ("the rights of others") and records of information that did not, or were not likely to, affect such private interests.

---

[88] *Gillberg v. Sweden*, ECtHR, Judgment of 3 April 2012, at paras. 93-96.
[89] *Kenedi v. Hungary*, ECtHR, Judgment of 26 May 2009, at para. 43.
[90] Note 77 above, at p. 11.
[91] See e.g. *Guerra and Others v. Italy*, Judgment of 19 February 1998.
[92] See *Societe Plon v. France*, ECtHR, Judgment of 18 May 2004; and *Von Hannover v. Germany*, ECtHR (GC), Judgment of 24 June 2004.
[93] *Von Hannover*, at para. 76.

i) No justification provided for denying access to the bulk of the information sought

89. The domestic courts provided no justification whatsoever for withholding information that did not affect third-party interests. Such records include (a) neutral information, such as whether a particular landing aircraft was inspected or not by Customs, or whether it was a private or state/official flight; and (b) most information related to foreign state-operated aircraft, whose operations are not, as a rule, protected by personal privacy or commercial confidentiality (except perhaps any personal data of crew members).

90. It is submitted that most of the records requested by the applicant, including those pertaining to the results of any customs inspections of the listed flights, fall under one of the above categories. The aircraft listed in the applicant's request are notorious for, or at least strongly suspected of, being part of the CIA's "renditions fleet."[94] They would usually be disguised as privately-operated aircraft, often filing deliberately false flight plans in violation of international aviation laws, especially when carrying detainees. Occasionally, they would fly and seek landing permits as state or official aircraft.[95] In both cases, they should not be treated, including for freedom of information purposes, as private or commercial flights.

91. Given the nature of the suspected CIA flights listed in the applicant's request, the decision of the domestic court to treat them, by default and without proper investigation, as regular flights operated by private or commercial actors was unjustified.

92. Domestic authorities provided no justification whatsoever for denying access to the above information, including by failing to identify any "pressing social needs" that demanded such secrecy. The only rationale put forward by the domestic authorities was that domestic law categorically precluded public disclosure of Customs information that "is confidential by its content or the manner of its provision." There was no consideration of the principles laid down by this Court. The domestic courts did not refer, either explicitly or in substance, to any of the legitimate interests enumerated in Article 10.2; or explain why the withholding of the requested information was otherwise necessary in a democratic society.

ii) No consideration of public interest in disclosures generally

93. With respect to the entirety of the applicant's request, the domestic authorities also ignored the nature and context of the request, and the role of the applicant as a human rights watchdog – including as one of the leading Lithuanian groups to advocate for shedding light on Lithuania's possible collaboration with CIA rendition and secret detention operations. Indeed, as noted in the Statement of Facts, this possible collaboration is the subject of ongoing public debate. HRMI has been actively involved in informing this debate, and disseminating information, raising public awareness, and conducting advocacy on this subject.

---

[94] See Exhibit 2.

[95] Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-state Transfers Involving Council of Europe Member States," Doc. 10957, 12 June 2006, paras. 44-55.

94. The rationale and context of the applicant's request to Customs was a particularly weighty one. As this Court has already recognised, "extraordinary rendition, by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention."[96] Collaboration with extraordinary rendition operations at the request, or for the benefit, of another state constitutes "collu[sion] in the violation of the most basic rights guaranteed by the Convention."[97] Allegations that Lithuania knowingly allowed the operation on its territory of a secret detention facility by, or on behalf, of another government are also extremely serious, and have been considered credible by several international inquiries (see Statement of Facts).

95. In this respect, this Court has acknowledged not only "the right of the victims and of their families and dependants to ascertain the truth about the circumstances of events involving large-scale violations of rights," but also "the importance for [the national] society to know the truth" about the same events.[98] With respect to the CIA rendition program, in particular, the Court has noted that "the issue of 'extraordinary rendition' attracted worldwide attention" and that "the concept of 'state secrets' has often been invoked to obstruct the search for the truth," adversely affecting the public's right to know what happened.[99] Independent watchdogs such as the applicant organization often play an important role in exposing the circumstances of gross human rights violations, working alongside with, and sometimes ahead of, official investigative bodies.

96. The work of the applicant and other human rights groups is particularly important in the Lithuanian context, where the full truth about the extent of Lithuania's collaboration with the CIA renditions program has yet to come out. The parliamentary investigation provided, at best, an incomplete picture; by its own admission, it was not able to conclusively confirm or deny whether CIA secret detention facilities operated in Lithuania at any given time, or provide details about the detainees who were held in such facilities (see Statement of Facts). The investigations by the Lithuanian prosecutors resulted in no criminal charges being brought, and the prosecutor's closure of the investigation has been seriously challenged by human rights groups and specialized international inquiries.[100] At least one application is currently pending before this Court on behalf of a person who claims to have been secretly detained by the CIA in Lithuania during that same period (see Statement of Facts).

97. The record shows that the domestic authorities took no account of the above considerations. They used an extremely formalistic approach, refusing to consider whether the flights in question were genuine private or commercial

---

[96] *Babar Ahmad and Others v. UK*, ECtHR, Admissibility decision of 8 July 2010, para. 114. The Court defined extraordinary rendition as "the extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there [is] a real risk of torture or cruel, inhuman or degrading treatment." *Ibid.* at para. 113.

[97] *Ibid.*, para. 114.

[98] *Association "21 December 1989" et al v. Romania*, Judgment of 24 May 2011, paras 144 and 194 (own translation). See also *Janowiec and Others v. Russia*, Judgment of 16 April 2012, para. 156 (noting that the applicants "were not allowed, for political reasons, to learn the truth about what had happened [during the Katyn massacre of Polish army officers] and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years."

[99] *El-Masri v. the former Yugoslav Republic of Macedonia*, ECtHR (GC), judgment of 13 December 2012, at para. 191.

[100] Amnesty International, "Unlock the Truth in Lithuania" (2011); CPT report, note 27 above.

flights, and whether any public interest would be served by disclosing the information.

iii) Unqualified protection for privacy rights at the expense of the right to information; no partial disclosure

98. Even to the extent that the domestic authorities invoked specific reasons for denying access – namely, for the protection of third-party interests – they failed to show that such interests should prevail over the public's right to know. According to this Court's Article 8 and Article 10 jurisprudence, protection of privacy rights cannot be absolute and unqualified (see above). This would apply, for example, to identifying information about the crew and passengers of the operated flights.

99. In fact, the domestic authorities adopted an absolutist approach to protecting the confidentiality of private or commercial data collected by Lithuanian Customs, irrespective of the level of sensitivity of the data or any countervailing public interests. There was no consideration whatsoever of the possibility of an overriding public interest in disclosure.

100. Customs and the top domestic court appear to have relied, in part, on the EU Community Customs Code. Even though, as noted, the definition of confidentiality issues in the Code is limited, there is nothing in the Code or its implementing regulations to suggest that confidentiality interests enjoy absolute protection, including vis-à-vis the general public.[101] In fact, they include several provisions that allow for disclosure of third-party data to the general public. For example, applications for binding tariff information are required to include the following:

> "[an] acceptance that the information supplied [by the applicant] may be stored on a database of the Commission and that the particulars of the binding tariff information, including any photograph (s), sketch(es), brochure(s) etc., may be disclosed to the public via the Internet, with the exception of the information which the applicant has marked as confidential; the provisions governing the protection of information in force shall apply."[102]

101. This provision clearly suggests that not all third-party information provided to Community customs authorities is to be treated as confidential; indeed, only information that is specifically designated as such by the provider. Furthermore, the designation of the provider must be subject to independent review in order to prevent abusive or overly broad self-declarations as well as to allow for meaningful consideration of Article 10 interests. That means that, under certain circumstances, personal or commercial confidentiality interests may have to give way to a sufficiently strong public interest in disclosure of such information. It

---

[101] There are multiple provisions in the CCC, as in the Lithuanian legislation, that require Customs authorities to share information, proactively or upon request, with other national or international public authorities.

[102] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, art. 6.3(k); at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1993R2454:20100701:EN:PDF (emphasis added).

also means that the right to information cannot be subject solely to the information provider's consent (veto).

102. Domestic courts have reached similar conclusions. For example, in *London Regional Transport v. The Mayor of London*, the Court of Appeal of England and Wales considered claims that a redacted report to be published by the mayor of the capital, critical of a proposed London Underground partnership, would harm the claimant's commercial confidentiality interests. The claimant relied in part on confidentiality agreements concluded by the parties. The British court ruled that such agreements could not interfere with Article 10 rights (under the Human Rights Act), and that it was clearly in the public interest for the materials to be made public given the controversies over the Underground proposal and the fact that the report had been redacted to exclude particularly sensitive commercial data.[103]

103. In contrast to the approach of the British court, the domestic authorities in the current case failed to consider the option of partial disclosure, whereby particularly sensitive personal or commercial data can be redacted (or made unidentifiable through other means) from records that are disclosed to the requester. As already noted, that is a widely used proportionality technique that guarantees access to information of clear public interest without violating core privacy protections (see para. 76 above).

iv) Denial has the effect of covering up official misconduct

104. The considerations adopted in the *London Regional Transport* case -- including in relation to third-party vetos – apply with full force here. For example, it would be absurd to argue, as the Lithuanian authorities suggest, that information regarding a flight covertly and illegally operated by the CIA should be disclosed only with the consent of the CIA or the operator fronting for the CIA. Likewise, crew members and passengers participating in operations that constitute gross violations of Convention rights, aviation law or other aspects of international law cannot claim the customary confidentiality protections to which regular, law-abiding operators may be entitled. That would be a recipe for gross impunity.

105. To bring just one example, a journalistic investigation into the travel and spending habits of a CIA "rendition team" staying in Palma de Mallorca hotels between rendition missions has proved critical to unveiling the circumstances of several CIA rendition operations in early 2004, which resulted in the illegal transfer, among others, of rendition victims Khaled El-Masri and Binyam Mohamed.[104] The details uncovered by the Palma journalist, including the

---

[103] *London Regional Transport v. The Mayor of London,* [2001] EWCA Civ 1491, para. 60.

[104] See REPRIEVE, "'Human Cargo': Binyam Mohamed and the Rendition Frequent Flier Programme," (10 June 2008), Appendices 2-5, at http://www.reprieve.org.uk/static/downloads/Microsoft_Word_-_2008_06_10_Mohamed_-_Human_Cargo_Final.pdf. On 13 December 2012, the Grand Chamber of the Court found that Mr. El-Masri was the victim of enforced disappearance and extraordinary rendition, holding that his claims, including about the flight that rendered him to CIA custody in Afghanistan, were "established beyond reasonable doubt." See *El-Masri* judgment, note 99 above. Mr. Mohamed reached a settlement with the British government in a civil case involving British involvement in his secret detention by US agencies.

aliases used by the crew and rendition teams, have greatly assisted the efforts of Spanish and German prosecutors investigating the same rendition operations.[105]

106. By the same token, the denial of the requested information in this case has hindered the applicant in further investigating the facts surrounding Lithuania's collaboration with CIA renditions as well as sharing such information with the public. The denial is particularly striking considering that the State border guards had earlier shared information with the parliamentary inquiry about the security services' failure to notify the border guards of the arrival of certain "special" flights or allow border guard personnel to inspect such flights.[106] It is not unreasonable to consider that the denial of similar information to the applicant was intended to avoid further embarrassment to the government.

107. As this Court emphasized in *Tarsasag*, social watchdogs play an essential role in shedding light on official misconduct, and access to government information is one the key instruments they use in fulfilling that role. It is no coincidence that the CIA's post-September 2001 extraordinary rendition operations were first disclosed by the media and human rights groups.[107] Securing accountability for human rights violations and other government abuses is not the sole responsibility of law enforcement authorities.

108. Strikingly, the domestic authorities did not consider in any way the implications for the applicant's Article 10 rights. By effectively censoring the requested information from the sphere of open public debate, they foreclosed the possibility of an informed public discussion about what happened, why, and what should be done to prevent it from ever happening again.

B. ARTICLE 13

109. The respondent did not provide the applicant with an effective remedy to challenge the denial of its right to receive and impart information in this case. An effective remedy must allow courts to review any denial of information, and issue binding orders to disclose where appropriate. Exclusion of entire categories of information from review or disclosure orders, or an absolute requirement of third party consent for disclosure, does not provide an effective remedy.

Relevant principles: Right to a Remedy

110. Under Article 13 of the Convention, the applicant is entitled to "an effective remedy before a national authority" for violations of its Article 10 right to information, including the right to request and obtain information of public interest held by public authorities. The remedy must be effective, adequate and accessible, in both law and practice.[108]

---

[105] Jurist, *Spain prosecutor requests arrest warrants for CIA rendition agents*, 13 May 2010, at http://jurist.org/paperchase/2010/05/spain-prosecutor-requests-arrest-warrants-for-cia-rendition-agents.php.
[106] See Exhibit 1: Seimas Report.
[107] See Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *The Washington Post*, 2 November 2005; and Human Rights Watch, "Statement on US Secret Detention Facilities in Europe," 7 November 2005.
[108] See *Aydin v. Turkey*, Judgment of 29 January 2008, para. 103.

111. There is limited Strasbourg case law as to what would constitute an effective remedy, specifically, for violations of the right to (access) information held by public authorities. However, applying general principles of Article 13 jurisprudence,[109] an effective remedy should enable the applicant to demand access to all information that concerns – as a minimum – core government functions[110], irrespective of which specific government entity holds such information—and subject, of course, to limitations permissible under Article 10(2). If significant chunks of state-held information are, as a matter of law, entirely off-limits to individuals, the right to information would become an empty shell.

112. Domestic legal systems must therefore guarantee the right to challenge, before an impartial and independent authority, denials of access to any information that concerns – at the very least – activities that are generally considered to constitute core government functions. In addition, for the remedy to be binding and effective, a court or other independent authority should have the power to mandate the disclosure of requested information by government agencies.[111]

113. The obligation to disclose information, and to provide an effective ability to challenge and review any refusal to disclose, ought to apply both to information generated by government authorities and equally to third-party or private information collected by government authorities that is related – as it should normally be – to the performance of government functions. For example, the definition of "official document" in the Access Convention does not distinguish between information generated by public authorities themselves or collected from third parties or other sources—what matters is whether the information is in the possession of the public authority, and the Convention applies to all such information.[112]

114. In practice, certain categories of third-party information collected by the government may be protected by data protection laws or other confidentiality guarantees. However, even with respect to such information, the right to an effective remedy requires that an independent authority should have the final decision on whether to disclose it, upon request by a member of the public. A third-party veto on access is not consistent with the requirements of an effective remedy under Article 13.[113]

---

[109] See *Pine Valley Developments v. Ireland* (1992), para. 66 (applicant must be able to raise the substance of the Convention claim); and *Metropolitan Church of Bessarabia v. Moldova* (2002), para. 139 (remedy is inadequate if domestic court fails to consider key part of alleged breach of the Convention).

[110] As noted, the Access Convention applies to all information held by central and local government, and all information related to the "administrative functions" of legislative bodies and judicial authorities. This was considered by the drafters to constitute a minimum European standard. An optional provision invites state parties to extend the definition, upon ratification, to all information held by legislative and judicial bodies or by "natural or legal persons insofar as they perform public functions or operate with public funds, according to national law." Art. 1.2.

[111] See *Horvat v. Croatia*, Judgment of 26 July 2001, paras 41-45.

[112] Article 1(2)(b).

[113] See *London Regional Transport* case, note 103 above.

The Applicant was denied an effective remedy against the withholding of information

115. The Lithuanian legal system grants individuals a general right of access to information and documents held by public authorities, primarily through the Law on the Right to Obtain Information from State and Municipal Institutions and Agencies (2000). However, that law did not provide an effective remedy in this case because Article 1 paragraph 3.7 of the law limits its scope and makes the law inapplicable to "information the provision of which is regulated by other laws."

116. Applying that provision, the Supreme Administrative Court held that the Customs Law applied to the current case and displaced the operation of the Right to Obtain Information Law. The SAC then adopted an interpretation of the Customs Law that effectively exempts altogether the Customs Department, and all information held by the department – or at least all third-party information held by the department -- from the duty of disclosure to the general public or members thereof (see Legitimate Aim section above).

117. With respect to information provided to Customs by third parties, the SAC additionally ruled that such information cannot be disclosed to the public, under any circumstances, without the prior consent of the third party concerned. Such a position leaves no room for balancing the confidentiality interests of third parties with any public interests in discussion of matters of general concern.

118. The effect of this ruling by the Supreme Administrative Court, which has the final word on all administrative law disputes in Lithuania, is to deny the current applicants – and potentially future information requesters in Lithuania – an effective remedy against violations of the Article 10 right to access information held by the Customs Department, or other entities holding customs-related information, which is indisputably information concerning a core government function.

V. STATEMENT RELATIVE TO ARTICLE 35 OF THE CONVENTION

Victim Status

119. The Human Rights Monitoring Institute is the direct victim of violations of its rights under Convention.

Exhaustion of Available Remedies and Six-Month Rule

120. Article 35 (1) requires that applicants submit their complaint within six months of the final decision that represents the exhaustion of domestic remedies. This Court has stated that "[a]s a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies".[114]

121. The final decision in this case was the ruling of the Supreme Administrative Court on 2 July 2012. The Supreme Administrative Court is the final instance court for administrative disputes, and there is no appeal available from its decisions. The applicant has therefore exhausted domestic remedies.

[114] *Varnava and Others v. Turkey*, ECtHR (GC), Judgment of 18 September 2009, at para. 157 (citing *Dennis and Others v. the United Kingdom*, ECtHR, Decision of 2 July 2002).

122. This application has also been filed within six months of 2 July 2012, the date of the final judicial decision, and is therefore submitted in compliance with the six-month rule (Article 35(1)).

VI. STATEMENT OF THE OBJECT OF THE APPLICATION

123. The applicant seeks a declaration from the Court that the Lithuanian government, by withholding the requested information, violated Articles 10 and 13 of the Convention. It also seeks disclosure of the records requested in its 4 July 2011 freedom of information request. In addition, the applicant seeks a change in Lithuanian law and/or practice to guarantee an effective remedy for violations of the right to access information held by public authorities.

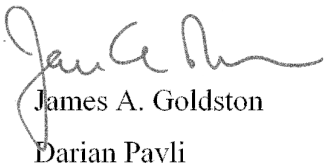
VII. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

124. The applicant has not initiated any other international proceedings relating to the withholding of information by the Lithuanian Customs Department. The subject matter of this application thus has not been submitted to any other international procedure (Article 35(2)(b)).

IX. DECLARATION AND SIGNATURE

125. I hereby declare that to the best of my knowledge and belief, the information I have given in the present application is correct.

New York, Vilnius
20 December 2012



James A. Goldston

Darian Pavli

Amrit Singh

Open Society Justice Initiative

Henrikas Mickevičius

Karolis Liutkevičius

Mėta Adutavičiūtė

Human Rights Monitoring Institute

X. LIST OF EXHIBITS

Exhibit 1: Seimas of the Republic of Lithuania, Findings of the Parliamentary Investigation by the Seimas Committee on National Security and defense Concerning the Alleged Transportation and confinement of persons detained by the Central Intelligence Agency of the United States of American in the territory of the Republic of Lithuania (2009), available at http://www3.lrs.lt/pls/inter/w5_show?p_r=6143&p_d=100241&p_k=2

Exhibit 2: Human Rights Monitoring Institute, Request for Information, No. IS-VI-24, 4 July 2011.

Exhibit 3: Customs Department's Response to HRMI's Request for Information, Writ No. (20.2/07)3B-5370, 29 July 2011.

Exhibit 4: Human Rights Monitoring Institute's Complaint against Customs Department submitted to Vilnius Regional Administrative Court, Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 30 August 2011.

Exhibit 5: Customs Department, Writ No. (4.5)3B-6139 "Response to the Human Rights Monitoring Institute's Complaint Regarding Obligation to Provide Information", Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 7 September 2011

Exhibit 6: Human Rights Monitoring Institute's Written Explanations to Vilnius Regional Administrative Court, No. IS-VI-41, 14 October 2011.

Exhibit 7: Customs Department's Response to Request for Information from Seimas Committee on National Security and Defence, Writ No. 3B-17.1/02-11167, 14 December 2009.

Exhibit 8: Seimas Committee on National Security and Defence, Request for Information, Writ No. S-2009-12988, 9 December 2009.

Exhibit 9: The Office of Seimas of the Republic of Lithuania's, Writ in Response to Request for Access to Documents in Parliamentary Archives, Writ No. S-2011-6389, 20 July 2011.

Exhibit 10: Judgment of the Vilnius Regional Administrative Court, Administrative file No. I-3663-624/2011, process no. 3-61-3-01830-2011-9, 8 December 2011.

Exhibit 11: Customs Department, Writ No. (4.5)3-8840 on "Appeal regarding Vilnius regional court's judgment of 8 December 2011", Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 22 December 2011.

Exhibit 12: Human Rights Monitoring Institute's Response to the Application on appeal, Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 26 January 2012.

Exhibit 13: Judgment of the Supreme Administrative Court of Lithuania, Administrative file No. A143-1985/2012, process no. 3-61-3-01830-2011-9, 2 July 2012.

Exhibit 14: Relevant Lithuanian Legal Provisions