The Human Rights of Access to Information and the Tromsø Convention

Speaking notes

1. The right to access information as a human right and a tool for the rule of law

Since its very first appearance in legal text, in the Swedish Freedom of the Press Act of 1766, the right to access information held by public authorities was very clearly related to the principles of constitutionalism and the protection of the freedom of expression and freedom of the press and media.

With the human rights revolution in international law, this right became embedded in the protection of freedom of expression in those treaty regimes where the latter was drafted to include a "right to seek information", and not just the right to receive and impart it.

This was the case of Article 19 of the ICCPR, as interpreted by the HRC in its GC n. 34 of 2011, and Article 13 of the Inter-American Convention of Human Rights.

The process of recognising access to information as a corollary of freedom of expression under article 10 of the ECHR was more complex, as the omission from its text of the component of "seeking" information was considered for quite a long time an obstacle to the full integration of the right to accesso information into the right to freedom of expression in the European system.

With the landmark judgement of 2016 in the case of the *Magyar Helsinki Bizottság v. Hungary*, the European Court of Human Rights marked a watershed in this respect: while falling short of recognising a full-fledged

right to access information held by public authorities. However, it did bring such a right within the remit of Article 10

> *in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right*

This needs to be assessed on a case-by-case basis taking into account,

a) **The purpose of the information request** → whether it is to enable the exercise of the freedom to "receive and impart information and ideas";
b) **The nature of the information sought** → whether it is in the public interest relating to matters of public concern and whether disclosure provides transparency on the manner of conduct of public affairs and matters of interest for society as a whole and thereby allows participation in public governance by the public at large;
c) **The role of the applicant** → particular weight to the applicant's role as a journalist or as a social watchdog;
d) Whether the information is **ready and available**.

When these conditions are met, Article 10 enters into play and any restriction to a request of access must be assessed against the well-known tripartite test (legality-public aim-necessity in a democratic society) to determine its compatibility with the right to freedom of expression.

The evolution in the Court's interpretation of Article 10 ECHR was largely based on a contextual reading of it, which took into account – besides the

law and practice under other international human rights regimes – the widespread diffusion of FOI legislation in Europe, as well developments in the field of international treaties.

Among the latter, the 1998 UNECE Aarhus Convention – which provides a broad and detailed right of access, but limited to "environmental information" – and the 2009 Council of Europe Convention on Access to Official documents, also known as the Tromsø Convention, notwithstanding that the latter was, at the time not in force.

2. The Tromsø Convention: the first treaty recognising and promoting the right of access to information and establishing an international monitoring mechanism

The Tromsø Convention eventually entered into force on 1 December 2020 and currently has 14 States Parties.

Based on earlier recommendations of the Committee of Ministers, the Tromsø Convention establishes a **common minimum standard** at the European level. However, the Convention does not justify any regression in domestic standards existing at the time of it entry into force and encourages transparency and wider access to information.

The Convention also provides for an **institutional mechanism** through which the effective implementation of such a standard is monitored and facilitated and possibly the standard itself is developed through interpretation, comparative analysis and formal amendments.

3. The right to access and the definition of "official document" held by "public authorities"

Despite its title, the Tromsø Convention defines "official documents" broadly, as any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, emails, information stored in electronic format such as electronic databases, etc.).

"Public authorities", besides administrative bodies at the national and local levels, covers legislative bodies and judicial authorities as well, insofar as they perform administrative functions, as defined by national law, and natural or legal persons are also covered insofar as they exercise administrative authority.

This means that, in the absence of a specific declaration to this effect to be made at the time of ratification or at any time after, access to documents pertaining to the judicial and legislative functions as such are excluded from the scope of the obligations of the Convention, and judicial and legislative authorities must only provide access to information that is administrative in nature, such as information on human resources, tender procedures for general services, statistics produced, etc…

The same goes with information that are held by private entities, included those owned by the State. They are covered insofar as they exercise administrative authority as such. However, given that many services of

public interest are delivered through private companies, the Convention allows, through the said declaration, to extend the scope to

> *"natural or legal persons insofar as they perform public functions or operate with public funds, according to national law".*

It should be noted that the Government of Albania has not made such a declaration. This means that access to information collected by those entities performing public functions, remains outside of the scope of the Convention, except when those performing the functions have an obligation to transmit the information to a body amounting to a public authority as per the Conention's definition. However, it should also be recalled that more stringent requirements may derive from the Aarhus Convention, whose broad definition of "environmental information" and "public authorities" may cover information held by a significant number of private entities performing public functions in fields such as transportation and energy.

4. Grounds for refusals and the two-tiered test of "harm" and "public interest"

The right of access to information, like almost all rights, is not absolute and its exercise may be subject to certain limitations. Thus, a particularly important provision in the Tromsø Convention is that it sets out a limited list of the only grounds that can be used to deny access to information (Article 3). There are eleven (11) such limitations to the right of access to information. There is an additional possible limitation for Royal Families and Heads of State.

Article 3.2 Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

a. national security, defence and international relations;

b. public safety;

c. the prevention, investigation and prosecution of criminal activities;

d. disciplinary investigations;

e. inspection, control and supervision by public authorities;

f. privacy and other legitimate private interests;

g. commercial and other economic interests;

h. the economic, monetary and exchange rate policies of the State;

i. the equality of parties in court proceedings and the effective administration of justice;

j. environment; or

k. the deliberations within or between public authorities concerning the examination of a matter

These exceptions can only be applied, however, if two conditions are met:

1) If it is ascertained that the release of the information would harm the protected interest (**harm test**), and

2) provided that there is no overriding public interest in disclosure (**public interest test**).

While it is not per se to be excluded that the legislator may identify in abstract and in advance information that, on those grounds, are excluded from public access, the Explanatory Report clearly indicates that this course of action is not to be encouraged: this decision should be made by

the relevant authority on a case-by-case basis, in light of all relevant circumstances of the case.

That is why, as stated in the Explanatory Report, access to information law should aim for the greatest possible guiding public officials in making decisions that correctly implement the Convention.

A number of domestic laws go even further than the general language of a public interest test and **identify specific cases when the public interest shall be deemed to exist**. For instance, if the information in a document is necessary for the protection of public health, or if it would reveal abuses of power such as corruption or violations of human rights.

In order to ensure proportionality, the Tromsø Convention also encourages States Parties to ensure that when there is a refusal to provide information based on a limitation, time limits are set beyond which the limitations no longer apply.

5. Abusive or unreasonable requests

Besides grounds that are linked to the content of the information sought the Tromsø Convention allows the rejection of an access request when this is "too vague" or "manifestly unreasonable".

While those terms are not precisely defined in the Convention, the Explanatory Report clearly indicates that this may cover cases in which the request is clearly vexatious, including when it is one of many requests intended to hinder a department's work or repeated requests for the same document within a very short space of time by the same applicant.

Any refusal on this ground needs to have a legal basis. This may derive – depending on the domestic legal framework and tradition – from a specific provision mirroring the Tromsø Convention's provision, from the direct application of the Convention when allowed by domestic law, from a general principle of administrative procedural law, as applied to access to information. What needs to be remarked in this respect, is that – in line with the case law of the European Court of Human Rights – the requirement of a "legal basis" must be seen in a "substantive" and "functional" perspective, i.e. to ensure predictability and avoid arbitrariness in the application of the law.

Also, in this respect, the legal basis – if any – should avoid rigidities that may result in an excessive compression of the right of access, the protection and promotion of which shall remain at the heart of any legal regulation.

6. Review Procedure and Oversight Bodies

An inherent part of any right, including the right of access to information, is the right of a person who is exercising that right to access an appeal procedure to review an administrative decision and to access justice in the case of an alleged violation of the right.

To this end, the Tromsø Convention establishes (Article 8) a review procedure, either before the court or before an impartial and independent body must be established. Furthermore, this procedure should be expeditious and inexpensive.

Among the countries which have ratified the Tromsø Convention to date, and across Europe more broadly, there are different models for the appeals procedures for access to information requests. These are internal appeals and/or independent oversight bodies and/or the courts.

While access to Court will have to be ultimately provided, the length and cost of court proceedings may not sufficiently meet the Tromsø Convention requirement to ensure an "expeditious" (rapid) and "inexpensive" route for requesters.

Therefore, the practice of setting up an independent oversight body may be seen as a best practice in the implementation of the Convention.

These include that the independent oversight body which:

- Issues binding decisions and can impose sanctions;
- Has oversight of all aspects of the access to information law, not just the request process;
- Can mediate and issue recommendations;
- Has powers of inspection and can review the contested information;
- Is able to review the classification of information or recommend a reclassification to the appropriate body;
- Can initiate ex-officio investigations with out the need to receive complaints or to investigate systemic breaches identified through complaints;

- Is able to issue guidance to public bodies and training to public officials;
- Is mandated to raise public awareness about the right of access to information;
- Can issue guidance and criteria for interpreting the access to information law and other relevant legislation;
- Is able to make recommendations on existing and new legislation;
- Regularly collects data from public bodies on the implementation of the access to information law;
- Conducts additional data collection, including surveys and public opinion polls;
- Issues reports to the Parliament at least annually and reports regularly to the public on its activity, decisions, and data gathered from public authorities.

Empirical data suggest that the implementation of access to information laws is better in countries which have an independent oversight body.

7. The multilateral and expert monitoring process: the Access Info

One of the most significative features of the Tromsø Convention is the establishment of an international monitoring mechanism, tasked with the mission of reviewing domestic implementation of the Convention and, through this process, assist States Parties in identifying those actions that are needed to better ensure the effectiveness of the right of access to

information. It is not to be seen as a confrontational process, but rather as an added value in the genuine effort by domestic authorities to implement the Convention and advance the effectiveness of the right to access of information.

The mechanism is based on periodic reporting requirement for Parties, the initial report being due within a period of one year following the entry into force of this Convention. For Albania this would expire on the 1st of November this year. I trust that it is redundant to underline that accurate and complete reporting – possibly based on an open process and consultation with relevant stakeholders and civil society – is a key for the States parties to make the most of what the monitoring mechanism can provide for them.

The process of considering the reports is a two-tired: they are first considered by a body composed of independent experts the Council of Europe Group on Access to information (less formally called the Access Info Group), that reports to an intergovernmental body, the Consultation of the Parties, composed of representatives of all Parties.

The Access Info Group has been established and will soon hold its third meeting. Its Rules of Procedures further detail the process of consideration of Parties' reports. Without entering into the details of it, I only whish to underline that the Group may seek information form domestic human rights institutions and civil society and may seek the co-operation of the national authorities dealing with the matters covered by the Convention.

8. Conclusions

The effort of the Albanian authorities