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Henry H. Perritt Jr.
Chicago-Kent College of Law

Christopher J. Lhulier

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HENRY H. PERRITT, JR.†
CHRISTOPHER J. LHULIER††

INTRODUCTION

One of the greatest promises of the global information infrastructure is improved public access to government information. As court decisions, legislative enactments, and rules of administrative agencies become available through the Internet's World Wide Web, the rule of law is strengthened. The legitimacy of public institutions increases when the public knows what the institutions are doing. Compliance with the law increases when the law is available. Accountability and quality of government decision-making improves when members of the public have information allowing them to express meaningful views before decisions are made. Already, more than 850 federal agencies in the United States have Web sites providing information about their organizations and containing materials that make it easier for the public to participate in their proceedings.[1] All of the opinions of the federal appellate courts are available in full text form and in popular word processing formats on the World Wide Web,[2] and a growing number of state courts[3] and agencies[4] also publish information on the Web. Most major international institutions also have Web sites.[5]

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† Dean and Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; member of the bar, Virginia, Pennsylvania, District of Columbia, Maryland, United States Supreme Court. Dean Perritt appreciates the contributions of April M. Major, who presented this paper at the University at Buffalo Law School Cyberlaw Symposium held in spring 1997.

†† Villanova University School of Law, Class of 1998; law clerk to Professor Perritt; and coordinator for Open Government, Project Bosnia.

1. *See generally Villanova Center for Information Law and Policy*, Oct. 7, 1997 <http://www.vcilp.org/fedWeb> (Web site containing links to federal agencies) (on file with author and the *Buffalo Law Review*).

2. *See id.* at <http://www.vcilp.org/fedcourt>.

3. *Id.* at <http://www.vcilp.org/statecourts>.

4. *Id.* at <http://www.vcilp.org/stateWeb>.

5. *E.g.*, *Council of Europe*, Oct. 7, 1997 <http://www.coe.fr> (on file with author and the *Buffalo Law Review*); *European Union*, Oct. 7, 1997 <http://europa.eu.int> (on file

The effort to build the rule of law in former communist countries is supported by the development of constitutionalism, implemented through independent constitutional courts in the newly independent states.[6] Most of these constitutional courts have committed themselves to link to each other through the Internet, permitting each of them to build on international human rights texts as required by their domestic constitutions, and to share their own interpretations of human rights.[7]

Unfortunately, not all governments make their information resources available for electronic access. This reluctance of some governments stems from the communist era in which public access to information about government activities either was unnecessary or was actively opposed. In other cases, the motivation is not to discourage public participation in government, but to make money. Many government institutions recognize the economic value of government information in electronic form and also recognize that monopolists can extract more revenue by maintaining control and discouraging competition. Accordingly, they set up government-run or government-sponsored monopolies to sell access to their information resources while blocking access by others.[8]

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with author and the *Buffalo Law Review*); *G7 Summits*, Oct. 7, 1997 <http://utl1.library.utoronto.ca/www/g7> (information society projects arising out of Brussels summit) (on file with author and the *Buffalo Law Review*); *G7 Summits*, Oct. 7, 1997 <http://www.ispo.cec.be/g7/projidx.html> (information society projects arising out of Brussels summit) (on file with author and the *Buffalo Law Review*). A committee of experts is preparing material for higher level G7 consideration pertaining to harmful uses of the Internet. The author is a member of the committee of experts. *International Civil Aviation Organization*, Oct. 7, 1997 <http://www.cam.org/~icao> (summarizing legal basis and history of ICAO) (on file with author and the *Buffalo Law Review*); *International Telecommunications Union*, Oct. 7, 1997 <http://www.itu.ch> (on file with author and the *Buffalo Law Review*); *United Nations*, Oct. 7, 1997 <http://www.un.org/> (on file with author and the *Buffalo Law Review*); *NATO*, Oct. 7, 1997 <http://www.nato.int>; *Organization for Economic Cooperation and Development*, Oct. 7, 1997 <http://www.oecd.org/> (on file with author and the *Buffalo Law Review*); *Organization for Security and Cooperation in Europe*, Oct. 7, 1997 <http://www.fsk.ethz.ch/osce/> (on file with author and the *Buffalo Law Review*); *United Nations Committee on International Trade and Law*, Oct. 7, 1997 <http://www.un.or.at/uncitral/index.html> (on file with author and the *Buffalo Law Review*); *World Intellectual Property Organization*, Oct. 7, 1997 <http://www.wipo.org/eng/index.htm> (on file with author and the *Buffalo Law Review*); *World Trade Organization*, Oct. 7, 1997 <http://www.wto.org/> (on file with author and the *Buffalo Law Review*).

6. *See generally* Sara Wright Sheive, *Central and Eastern European Constitutional Courts and the Antimajoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201 (1995).

7. *See Central and Eastern European Civic Institution Locator*, Nov. 13, 1997 <http://www.vcilp.org/ceecil/whatis.html> (on file with author and the *Buffalo Law Review*).

8. *See* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information*, 4 WM. &

State sponsored monopolies over government information are undesirable for a number of reasons. Monopolies make it easier for censorship to occur. Monopolies usually perpetuate older information technologies because monopolists have no economic incentive to introduce new technologies, thus depriving consumers of the benefits of new technology. Monopolies rarely serve the needs of particular consuming communities as well as a competitive market structure because no monopolist can understand and cater to the needs of specialized communities as well as a competitive specialist.

Accordingly, information policy should commit to and encourage a diversity of sources and channels for government information.[9] This policy is best implemented by a legal framework that grants anyone a right of access to basic government information and also gives everyone a privilege to disseminate that information in other forms.[10] In some countries, such rights and privileges are deeply imbedded in current law. In the

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MARY BILL OF RTS. J. 179, 184 (1995) and Henry H. Perritt, Jr., *Should Local Governments Sell Local Spatial Databases Through State Monopolies?*, 35 JURIMETRICS J. 449, 454-55 (1995) (both explaining and criticizing agency temptations to set up state monopolies over government information).

9. A good example of a commitment to a policy of diversity is expressed in the Paperwork Reduction Act Amendments of 1996, Pub.L. 104-13, 109 Stat. 163 (1995), which amended 44 U.S.C. § 3506 to read:

> (d) With respect to information dissemination, each agency shall--
>
> (1) ensure that the public has timely and equitable access to the agency's public information, including ensuring such access through—
>
> (A) encouraging a diversity of public and private sources for information based on government public information;
>
> (B) in cases in which the agency provides public information maintained in electronic format, providing timely and equitable access to the underlying data (in whole or in part); and
>
> (C) agency dissemination of public information in an efficient, effective, and economical manner . . . .

10. The Paperwork Reduction Act amendments to 44 U.S.C. § 3506(d), appropriately continues:

> (4) [With respect to information dissemination, each agency shall] not, except where specifically authorized by statute—
>
> (A) establish an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public;
>
> (B) restrict or regulate the use, resale, or redissemination of public information by the public;
>
> (C) charge fees or royalties for resale or redissemination of public information; or
>
> (D) establish user fees for public information that exceed the cost of dissemination.

Id.

United States, this entitlement is codified in the Freedom of Information Act (FOIA),[11] and in similar state statutes in almost every state.[12] In Sweden, the entitlement is guaranteed by the Constitution.[13]

The European Commission presently is engaged in drafting a Green Paper on access to public information, under a mandate of the Maastricht Treaty, that requires the functions of European governmental institutions to become more transparent. While the exact content of the not-yet-released Green Paper cannot be known, the author of this Article has participated as a consultant in meetings of Directorate General 13 of the European Commission, responsible for drafting the paper, and knows that there is broad agreement on several basic propositions:

(1) European law and national law within Europe should provide a legal entitlement to access government information;
(2) Exceptions to such an entitlement should be enumerated and strictly construed;
(3) Access rights should extend to electronic formats; and
(4) There should be some appeal mechanism when access is denied.

There is less agreement on the question whether a legitimate interest must be shown, and whether commercial motives might disqualify a requester or result in conditions being imposed on access.

As national and regional sources of information access rights are being worked out, international human rights law provides a useful framework for realizing freedom of information and open government. This Article explains the basic sources of a right to access and republish government information found in international human rights texts, including the Universal Declaration of Human Rights,[14] the International Covenant on Civil and Political Rights,[15] and the European Convention on Human

11. 5 U.S.C. § 552 (1994 & Supp. 1996).

12. *See e.g.*, MINN. STAT. ANN. §§ 13.03, 13.99 (1997); OKLA. STAT. ANN. tit. 51 § 24.A.5. (1988 & West Supp. 1996); *see also* Perritt, *Sources of Rights to Access Public Information*, *supra* note 8, at 190-97.

13. SWED. CONST. (The Instrument of Government, 1989), ch. 2, art. 1 (2) (guaranteeing freedom of information); SWED. CONST. (Freedom of the Press Act), ch. 2, art. 2 (guaranteeing access to official documents).

14. Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

15. International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 [hereinafter ICCPR].

Rights.[16] It also briefly reviews the provisions of the constitutions of the former communist countries that grant rights or recognize the privilege of accessing and disseminating government information.

While there is little case law interpreting these provisions in the context of efforts to publish government information electronically, this Article suggests that the American Freedom of Information Act provides a useful analytical framework within which to evaluate rights of access and legitimate privileges for withholding access. It develops arguments in favor of broad access and dissemination rights based on European and International Human Rights law. The analysis grows out of the authors' work through Project Bosnia and CEECIL[17] to develop freedom of information, open government, and Internet-based legal and civic affairs information infrastructures in former communist countries.

I. UNITED STATES FREEDOM OF INFORMATION ACT

The United States Freedom of Information Act[18] has a bipartite structure. Subsection (a) affirmatively grants a right of access and affirmatively imposes a duty for government agencies to publish certain information.[19] Anyone has standing to request

16. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

17. *See Central and Eastern European Civic Institution Locator*, *supra* note 7. Project Bosnia is a student-faculty initiative jointly sponsored by Chicago-Kent College of Law at Illinois Institute of Technology and the Villanova University School of Law, organized by Perritt. It seeks to accelerate the development of the rule of law and civil society in Bosnia by connecting legal and civic institutions (including the media) to each other and to the world community through the Internet. The Eastern and Central European Network (ECEULnet) is a joint activity of the Chicago-Kent College of Law and the Center for Information Law and Policy, aimed at promoting constitutionalism in former communist countries in Eurasia by linking their constitutional courts to the Internet. The Central and East European Civic Institution Locator (CEECIL) complements Project Bosnia and ECEULnet by developing and assisting civic institutions to deploy compatible case management, electronic publishing and virtual library functions implemented through the Internet's World Wide Web. Author Perritt is the director of all three of these activities. Author Lhulier worked through Project Bosnia with the Government of Bosnia, the U.S. Agency for International Development and the American Bar Association CEELI office in Sarajevo to develop freedom of information and open government commitments for the State of Bosnia.

18. 5 U.S.C. § 552 (1994 & Supp. 1996).

19. *Id.* at § 552(a)(1) & (2) (obligating agencies to publish information about their organization); *Id.* at § 552(a)(3) (granting a residual right to access other types of agency records on request).

agency records without showing any particular interest.[20] The scope of the affirmative obligation to make information available is circumscribed by the definition of agency record. Covered agencies need not create records, but only provide access to existing ones.[21] Under 1996 amendments, "record" unambiguously includes electronic formats.[22] Agency is broadly defined, although it does not include the Congress or the courts.[23]

Under the 1996 Amendments,[24] the affirmative obligation to publish information extends to records requested on an ad hoc basis "which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent request for substantially the same record . . . "[25] Agencies must make a general index of such records available,[26] by computer telecommunications on or after December 31, 1999, and also must make available within one-year records created on or after November 1, 1996, by computer telecommunications or, if that is not feasible, by other electronic means.[27]

Agencies must honor format requests if the record is readily reproducible by the agency in that form, specifically including electronic forms or formats.[28] However, international public access law recognizes that the state may have a legitimate interest in denying access to certain classes of information.[29] The United States FOIA is no exception. It contains eight enumerated exceptions, protecting from disclosure national security information,[30] internal agency personnel rules and practices,[31] in-

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20. *Id.* at § 552(a).

21. Armstrong v. Bush, 924 F.2d 282, 290 (D.C. Cir. 1991).

22. 5 U.S.C. § 552(f)(2) (1994 & Supp. 1996).

23. *Id.* at § 552(f)(1) (Supp. 1996). "Agency as defined in § 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency . . . ." *Id.*

24. Pub. L. No. 104-231, 110 Stat. 3049 (1996).

25. 5 U.S.C. § 552(a)(2)(D).

26. *Id.* at § 552(a)(2)(E).

27. *Id.* at § 552(a)(2)(E)(7).

28. *Id.* at § 552 (a)(3)(B)-(D).

29. *See, e.g.*, SWED. CONST. (Swedish Freedom of the Press Act) ch. 2, art. 2 (authorizing restrictions on access necessary to protect security of realm; central finance policy; control of public authorities; criminal prosecution; public economic interest; protection of privacy; and the preservation of animal or plant species).

30. 5 U.S.C. § 552(b)(1).

31. *Id.* at § 552(b)(2).

formation that would invade personal privacy,[32] information that would compromise commercial secrets,[33] information clothed with executive privilege, the disclosure of which would chill candid internal deliberation and advice giving,[34] information explicitly protected from disclosure by other statutes,[35] information that would compromise criminal investigations and prosecutions,[36] information on the condition of financial institutions,[37] and geological and geophysical information.[38]

The exceptions are strictly construed under U.S. law. There is also a presumption favoring disclosure. Agencies resisting disclosure bear the burden of establishing coverage of information by one of the enumerated exceptions.[39] Under some state laws, but not under the federal FOIA, those seeking access to government information must demonstrate a "legitimate" interest in order to access the information. Some states deny access when the interest is purely commercial. Such a limitation places a significant burden on requesters,[40] representing a barrier to press access and access by those who seek to extend the reach of public information by republishing it.[41]

Another potential limitation under some state law, which also has been hinted at by some concurring and dissenting opinions authored by justices of the United States Supreme Court, would limit access to types of information that reveal the operations of government and would deny access as a matter of right to information that is of a commercial nature.[42] The problem with this distinction is that much of the information that repre-

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32. *Id.* at § 552(b)(6).
33. *Id.* at § 552(b)(4).
34. *Id.* at § 552(b)(5).
35. *Id.* at § 552(b)(3).
36. *Id.* at § 552(b)(7).
37. *Id.* at § 552(b)(8).
38. *Id.* at § 552(b)(9).
39. *See* United States Department of Justice v. Tax Analysts, 492 U.S. 136, 142 n.3 (1989) (noting that "[t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly withheld.'"); John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (denying access to law enforcement records under general principle).
40. *See* Sean E. Andrussier, *The Freedom of Information Act in 1990: More Freedom for the Government; Less Information for the Public,* 1991 DUKE L.J. 753 (1991) (criticizing drift in lower court decisions to weigh public interest in favor of disclosure in evaluating some FOIA requests; Act contemplates categorical (unconditional) disclosure of certain categories of information).
41. *See* Henry H. Perritt, Jr., *Sources of Rights to Access Public Information, supra* note 8, at 179.
42. *See generally* HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY ch. 11 (1996) (analyzing interpretations of state FOIA statutes).

sents government output, such as court decisions and legislative enactments, have commercial value. Other information that appears to be a commercial product produced by government, such as maps, charts, and land records, is necessary in order for citizens to participate meaningfully in governmental proceedings.

The basic FOIA rights are complemented by agency obligations under the Paperwork Reduction Act not to restrict redissemination and to promote a diversity of sources and channels for dissemination of government information.[43]

II. INTERNATIONAL HUMAN RIGHTS LAW

The International Covenant on Civil and Political Rights, The European Convention on Human Rights and The Universal Declaration of Human Rights all refer to the right "to receive information and ideas." Article 10 of the European Convention reads:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[44]

Under protocols 9 and 11 of the European Convention, individuals may now bring claims before the European Court of Human Rights (ECHR). Previously, only states had standing.

Article 19 of the International Covenant on Civil and Political Rights states that:

> Everyone shall have the right to hold opinions without interference.
> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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43. *See supra* notes 9-10.

44. European Convention, *supra* note 16, at art. 10.

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> For respect of the rights or reputations of others;
> For the protection of national security or of public order (*ordre public*), or of public health or morals.[45]

The Committee of Ministers of the Council of Europe adopted a "Declaration on the Freedom of Expression and Information in 1982,"[46] declaring the goal of, among other things, "the pursuit of an open information policy in the public sector, including access to information, in order to enhance the individual's understanding of, and his ability to discuss freely political, social, economic and cultural matters."[47] Moreover, the declaration committed itself to a diversity of channels and sources: "the existence of a wide variety of independent and autonomous media, permitting the reflection of diversity of ideas and opinions."[48] The Declaration also opposed access restrictions on intermediaries: "the availability and access on reasonable terms to adequate facilities for the domestic and international transmission and dissemination of information and ideas."[49] Finally, it committed, "to ensure that new information and communication techniques and services, where available, are effectively used to broaden the scope of freedom of expression and information."[50] The declaration specifically references article 10 of the European Convention and article 19 of the Universal Declaration of Human Rights.[51]

The new constitutions of former communist countries in Central and Eastern Europe adopt freedom of information principles. According to the Constitution of the Russian Federation:

> (1) The basic rights and liberties in conformity with the commonly recognized principles and norms of the international law shall be recognized and guaranteed in the Russian Federation and under this Constitution.
> (2) The basic rights and liberties of the human being shall be inalienable and shall belong to everyone from birth.

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45. ICCPR, *supra* note 15, at art. 19.

46. Declaration on the Freedom of Expression and Information, Comm. of Ministers, 70th Sess. (April 29, 1982).

47. *Id.* at art. II(c).

48. *Id.* at art. II(d).

49. *Id.* at art. II(e).

50. *Id.* at art. III(e).

51. *Id.* at ¶ 2.

(3) The exercise of rights and liberties of a human being and citizen may not violate the rights and liberties of other persons.[52]

According to article 18:

The rights and liberties of man and citizen shall have direct effect. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local self-government, and shall be secured by the judiciary.[53]

The Russian Constitution continues, stating that:

(1) It shall be forbidden to gather, store, use and disseminate information on the private life of any person without his/her consent.
The bodies of state authority and the bodies of local self-government and the officials thereof shall provide to each citizen access to any documents and materials directly affecting his/her rights and liberties unless otherwise stipulated under the law.[54]

Finally, the Russian Constitution states that:

(1) Everyone shall have the right to freedom of thought and speech.
(2) Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden.
(3) No one may be coerced into expressing one's views and convictions or into renouncing them. Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means. The list of information constituting the state secret shall be established by the federal law. The freedom of the mass media shall be guaranteed. Censorship shall be prohibited.[55]

The Constitution of Slovakia provides that:

International treaties on human rights and basic liberties that were ratified by the Slovak Republic and promulgated in a manner determined by law take precedence over its own laws, provided that they secure a greater extent of constitutional rights and liberties.[56]

Article 19 guarantees the right to privacy:

(1) Everyone has the right to the preservation of his human dignity and personal honor, and the protection of his good name.
(2) Everyone has the right to protection against unwarranted interference in his private and family life.

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52. RUSS. CONST. art. 17.
53. *Id.* at art. 18.
54. *Id.* at art. 24.
55. *Id.* at art. 29.
56. SLOVK. CONST. art. 11.

(3) Everyone has the right to protection against the unwarranted collection, publication, or other illicit use of his personal data.[57]

Article 26 guarantees freedom of expression:

(1) The freedom of speech and the right to information are guaranteed.
(2) Everyone has the right to express his views in word, writing, print, picture, or other means as well as the right to freely seek out, receive, and spread ideas and information without regard for state borders. The issuing of press is not subject to licensing procedures. Enterprise in the fields of radio and television may be pegged to the awarding of an authorization from the state. The conditions will be specified by law.
(3) Censorship is banned.
(4) The freedom of speech and the right to seek out and spread information can be restricted by law if such a measure is unavoidable in a democratic society to protect the rights and liberties of others, state security, public order, or public health and morality.
(5) State bodies and territorial self-administration bodies are under an obligation to provide information on their activities in an appropriate manner and in the state language. The conditions and manner of execution will be specified by law.[58]

Freedom of expression is also guaranteed in the Hungarian Constitution:

(1) In the Republic of Hungary everyone has the right to the free declaration of his views and opinions, and has the right of access to information of public interest, and also the freedom to disseminate such information.
(2) The Republic of Hungary recognizes and protects the freedom of the Press.
(3) The law on the publicity of data and information and the law on the freedom of the Press require the support of two-thirds of the votes of the Members of Parliament present for ratification.
(4) For the adoption of the law on the supervision of public radio, television and news agency services, and on the appointment of their leaders; the law on the licensing of commercial radio and television stations, and the prevention of monopolies on information, the votes of two thirds of the Members of Parliament present are necessary.[59]

Both the European Convention and the ICCPR protect the right to receive information and the right to impart information.[60] The ICCPR specifically extends to any media.[61] However,

57. *Id.* at art. 19.
58. *Id.* at art. 26.
59. HUNG. CONST. art. 61.
60. European Convention, *supra* note 16, at art. 10(1); ICCPR, *supra* note 15, at art. 19(2).

both texts contemplate limitations prescribed by law and to protect a number of public interests.[62] The structure of the limitation paragraph of the European Convention makes it unclear whether the criterion "necessary in a democratic society" must be present even when the enumerated interests are established, or whether "necessary in a democratic society" is an alternative basis for restricting the rights even when the enumerated interests cannot be established. The ICCPR has a catchall for protection of public order or of public health or morals.[63]

The Russian Constitution guarantees the right to get, produce and disseminate information,[64] but the means must be "lawful,"[65] and federal law can enumerate state secrets, which presumably are exempt from disclosure.[66] Government authorities must provide access unless "otherwise stipulated under the law."[67] Also, hate speech is prohibited.[68] The Slovak Constitution similarly provides limitations when "unavoidable in a democratic society to protect," among other things, "public order."[69] Similarly, the obligation of government bodies to provide information "in an appropriate manner" are subject to conditions and manner of execution specified by law.[70]

The Hungarian Constitution does not expressly condition the right of access and the freedom of dissemination, except that the right of access extends only to "information of public interest."[71] The constitutions of Russia, Slovakia, and Hungary incorporate the international human rights corpus,[72] but only the Slovak Constitution expressly establishes that as a superior source of law to Slovakian provisions.[73] There is, in any event, room to argue that broader information rights under interna-

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61. ICCPR, *supra* note 15, at art. 19(2).

62. *Id.* at art. 19(3); European Convention, *supra* note 16, at art. 10(2).

63. ICCPR, *supra* note 15, at art. 19(3)(b).

64. RUSS. CONST. art. 29(4).

65. *Id.*

66. *Id.*

67. *Id.* at art. 24(2).

68. *Id.* at art. 29(2).

69. SLOVK. CONST. art. 26(4).

70. *Id.* at art. 26(5).

71. HUNG. CONST. art. 61(1).

72. *Cf. id.* ch. XII (enumerating fundamental rights and duties of citizens); RUSS. CONST. ch. 2 (enumerating rights and liberties of man and citizen); SLOVK. CONST. ch. 2 (enumerating basic rights and freedoms).

73. SLOVK. CONST. art. 11. This article states that "[t]he international agreements on human rights and basic freedoms which were ratified by the Slovak republic and which have been declared legal, take precedence over its laws whenever they guarantee a wider scope of constitutional rights and freedoms." *Id.*

tional human rights texts might entitle citizens of the former communist countries to broader rights than are expressly provided in their own constitution and laws. The issue would arise if someone claimed that a restriction of access or dissemination imposed by the government of one of those countries violated treaty obligations. If the treaty obligations have direct effect in the country in which such a complaint is made, the matter could be resolved by the national courts of that country, otherwise it would be cognizable by the ECHR for any country that is a member of the Council of Europe.

The Constitution of the Federation of Bosnia and Herzegovina recognizes the importance of the right to receive information. Its preamble establishes that the constitution is "guided by the principles of the Universal Declaration of Human Rights."[74] Furthermore, article 2 of the constitution's human rights section provides that the "Federation shall ensure the application of the highest level of internationally recognized rights and freedoms provided in the instruments listed in the Annex."[75] The UDHR recognizes the importance of the right "to seek, receive, and impart information and ideas through any media and regardless of frontiers."[76] The UDHR's commitment to this principle, as well as the Federation's commitment to ensure the application of the UDHR, leads to the conclusion that the Federation should recognize a broad right to receive information.

With respect to the Republic of Bosnia-Herzegovina, the Dayton Peace Accords provide that the parties to the agreement "shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms."[77] This will be secured by adhering to a number of treaties including the European Convention[78] and the ICCPR.[79]

III. DECISIONAL LAW

In a recent case, the European Union Court of First Instance annulled a decision by the European Council to deny to a newspaper access to certain EU documents.[80] The court held

74. BOSN. & HERZ. CONST. preamble.

75. *Id.* at § II (human rights and fundamental freedoms).

76. UDHR, *supra* note 14, at art. 19.

77. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, annex 6, 35 I.L.M. 75, 130 [hereinafter Dayton Peace Accords].

78. *Id.*; *see also* European Convention, *supra* note 16, at art. 10.

79. Dayton Peace Accords, *supra* note 77, at annex 6; *see also* ICCPR, *supra* note 15, at art 19.

80. *See* Case T-194/94, Carvel and the Guardian Newspaper v. Council of the Euro-

that the Council must weigh the interests of the citizens in gaining access to documents against its own interest in confidentiality of its deliberations.[81] Considering the general policy to allow public access to documents of the institutions of the EU and this specific Council Decision, the court correctly annulled the refusal when it found that the Council had not genuinely weighed the interests of both sides.

Nevertheless, there are two ECHR decisions that some commentators have interpreted to hold that "the European Convention does not encompass freedom of information in the sense that public authorities are obliged to give information at the request of the citizen."[82] The Swedish Government in the *Leander Case* denied Leander employment at a naval Museum on the grounds that he did not meet certain security requirements.[83] Leander requested information about the contents of the government's file on him in order to deny or rebut any inaccuracies.[84] The government denied his request.[85] Among other claims, Leander argued that his "right to receive information" under article 10 of the European Convention had been violated.[86] The ECHR held that article 10 "does not . . . confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual."[87]

In the *Gaskin Case*, Gaskin was put into public care at an early age by a local authority.[88] During the time Gaskin was in care he was boarded out with various foster parents.[89] He contended that he was ill-treated.[90] Preparing to bring proceedings against the local authority for negligence, Gaskin made a request for the local authority's case records.[91] Discovery was refused on the ground that these records were private and confi-

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pean Union, 1995-9/10 E.C.R. 2765 (Ct. First Instance 1995).

81. *Id.* at 2789.

82. FRANCIS G. JACOBS & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 223 (2d ed. 1996).

83. Leander Case, 116 Eur. Ct. H.R. (ser. A) at 9 (1987).

84. *Id.* at 10.

85. *Id.* at 10-11.

86. *Id.* at 21.

87. *Id.* at 29. Commentators have interpreted *Leander* as rejecting the proposition that article 10 confers a right of access to government information vis-a-vis the government. *See* Michael O'Boyle, *Right to Speak and Associate Under Strasbourg Case-Law with Reference to Eastern and Central Europe*, 8 CONN. J. INT'L L. 263, 280 (1993).

88. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 8 (1989).

89. *Id.*

90. *Id.* at 9.

91. *Id.*

dential.[92] The ECHR, quoting its previous decision in *Leander*, wrote:

> the right to freedom to receive information basically prohibits government from restricting a person from receiving information that others may be willing to impart to him. Also in the circumstances of the present case, [a]rticle 10 does not embody an obligation on the state concerned to impart the information in question to the individual.[93]

The Court held that Gaskin's article 10 rights had not been violated.[94]

Although the request for information was denied in both cases, and both cases are problematic in basing an American-style freedom of information right on article 10, neither case supports the proposition that the right of access conferred by article 10 is narrower than that conferred by the American FOIA. When each case is analyzed under the (FOIA), the result is the same.

IV. ANALYSIS OF THE *GASKIN CASE* UNDER THE FOIA FRAMEWORK

A. *Agency*

Under the United States FOIA every "agency" is obligated to make certain records available for public inspection.[95] The 1996 FOIA amendments define the term "agency," establishing which institutions are subject to the FOIA requirements.[96]

Signatories to the European Convention agree to abide by its principles.[97] Later in the Convention, article 10 states that "(e)veryone has the right to freedom of expression," which includes the right "to receive information and ideas without interference by public authority . . . ."[98] These provisions establish a duty on States parties to the Convention not to interfere with any individual's right to receive information and ideas.

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92. *Id.*

93. *Id.* at 21 (quoting *Leander Case*, 116 Eur. Ct. H.R. (ser. A) at 29 (1987)).

94. *Id.* at 23.

95. 5 U.S.C. § 552(a)(2) (1994 & Supp. 1996).

96. *Id.* According to the FOIA, " 'agency' includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment of the executive branch (including the Executive Office of the President), or any independent regulatory agency . . . ." *Id.* § 552(f)(1) (Supp. 1996).

97. *See* European Convention, *supra* note 16, at preamble (indicating that "[t]he Government signatories hereto . . . Have agreed as follows . . . .").

98. *Id.* at art. 10.

In the *Gaskin Case*, the local authority, which kept records on Mr. Gaskin, was under a duty not to interfere with his requests to access those records. The case took place in Great Britain.[99] As a Member State, the British government is prohibited from interfering with an individual's "right to receive information." The Liverpool City Council, which is part of the British government, maintained custody of Mr. Gaskin and created and obtained records concerning him until his 18th birthday.[100] As a part of the British government, the Liverpool City Council was obligated by the terms of the European Convention to not interfere wit Mr. Gaskin's right "to receive information."

B. *Improperly Withholding Agency Records*

When agency records are improperly withheld under the FOIA, federal district courts are empowered to enjoin the agency from withholding the records.[101] A broadly similar provision in the European Convention gives the ECHR the authority to settle disputes regarding article 10 and the right to receive information.[102]

Under the FOIA, any requested agency records that are withheld that do not fall within one of the nine exemptions are "improperly" withheld.[103] When a complainant establishes that an agency has withheld a requested agency record, the agency has the burden to show that the withheld record is exempted from access under section 552(b) of the FOIA and thus has not been "improperly" withheld.[104]

Similarly, article 10 of the European Convention provides certain exceptions to the general rule that everyone has "the right . . . to receive . . . information . . . without interference by public authority."[105] It can be inferred that the requestor has a right to receive information if the request does not fall under within an "exception" of article 10. Deciding whether a record

99. The United Kingdom of Great Britain and Northern Ireland ratified the Convention on March 8, 1951. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 n.1.

100. Gaskin Case, 160 Eur. Ct. H.R. (ser A.) at 8-9.

101. Kissinger v. Reporters Comm. for the Freedom of the Press, 445 U.S. 136, 139 (1980).

102. European Convention, *supra* note 16, at art. 53 (stating that "[t]he High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.").

103. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 151 (1989).

104. *Id.* at 151.

105. European Convention *supra* note 16, at art. 10.

has been "improperly" withheld is determined by answering the question whether the request falls under one of the accepted exemptions.

In determining the meaning of the word "withheld," as it is used in the FOIA, the United States Supreme Court has stated that "Congress used the word in its usual sense,"[106] and that "[n]othing in the history or purposes of the FOIA counsels contorting this word beyond its usual meaning."[107] The common meaning of the word "withhold" is "to keep back" or "to retain possession or control."[108]

Article 10 establishes that a member state may not interfere with an individual's right to receive information.[109] The duty not to interfere is a broader prohibition than the duty not to withhold. Withholding records is one way of interfering with an individual's right to receive information. Thus, the duty imposed by article 10 on the member states includes the duty not to "withhold" information and ideas.

The local authority in the Gaskin Case "withheld," and thus necessarily "interfered with" access to the requested documents.[110] The local authority was in possession of 352 documents pertaining to Mr. Gaskin, and denied him access when he requested it.[111]

The U.S. Supreme Court established a two-part test to determine if documents are "agency records" under the FOIA.[112] In order to satisfy this prong of the test a document must be (1) created or obtained by an agency and (2) under agency control at the time of the request.[113] Article 10 of the European Convention prohibits interference with the right to receive "information." Like the term "interfere," "information" is a sweeping term. The "agency record" term under the U.S. FOIA establishes a narrower standard for access.

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106. Kissinger v. Reporters Comm. for the Freedom of the Press, 445 U.S. 136, 151 (1980).

107. United States Dep't. of Justice v. Tax Analysts, 492 U.S. 136, 150 (1989).

108. XX OXFORD DICTIONARY 455 (2d ed. 1989).

109. European Convention, *supra* note 16, at art. 10 (conferring "the right . . . to receive and impart information and ideas without interference by public authority and regardless of frontiers.").

110. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 26 (Walsh, J. dissenting) (noting applicability of article 10(2) to the proceedings and indicating that the withholding was permitted under the Convention).

111. *Id.* at 12.

112. United States Dep't of Justice v. Tax Analysts 492 U.S. at 144-45.

113. *Id.*

In the *Gaskin Case*, Mr. Gaskin's requests would have met this narrower U.S. standard. The local authority kept a case record on Mr. Gaskin pursuant to its statutory duty.[114] Gaskin's case record consisted of 352 documents contributed by 46 persons.[115] Although the details of the local authority's record maintenance procedures are not made known by the report of the case, apparently these records were created and obtained on a running basis during the approximately 17 years that Mr. Gaskin was in the custody of the local authority. Mr. Gaskin's requests meet the first prong of the *Tax Analysts* test because the files in his case record were either created by the staff of the local authority or obtained from other contributors by the local authority.[116] Mr. Gaskin's requests meet the second requirement of the *Tax Analysts* test, even considering the recent decision of *Tax Analysts II*.[117] The records Mr. Gaskin requested were under agency control at the time of his request. Not only did the local authority have the requested records in its possession at the time Mr. Gaskin requested access to them, there was no claim by any of the contributors that the local authority's use of the documents was restricted by an agreement between the local authority and the contributor.[118] Both are important factors in de-

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114. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 9 (referring to the Boarding out of Children Regulations 1955, which establishes a duty for local authorities to keep a case record in respect of every child in care).

115. *Id.* at 12.

116. *Id.* at 9 (identifying "the principal contributors to those case records were medical practitioners, school teachers, police and probation officers, school workers, health visitors, foster parents and residential school staff.").

117. Tax Analysts v. United States Dep't. of Justice, 913 F.Supp. 599, (D.D.C. 1996), *aff'd*, 107 F.3d 923 (D.C. Cir. 1997)[hereinafter *Tax Analysts II*]. The District Court in *Tax Analysts* gave only general guidance as to the meaning of "control" by stating that the control inquiry focuses on an agency's possession of the requested materials, not on its power to alter the content of the material it receives. *Id.* at 602-603. This implies that an agency's possession of a document at the time of a FOIA request is determinative as to whether it has "control" of the document. However, the United States District Court for the District of Columbia found that " 'control' is not determined solely by possession. Rather the question is whether, considering all of the circumstances of the case including, of course, physical possession, the records at issue are 'subject to the free disposition of the agency.' " *Id.* at 603 (quoting Goland v. CIA, 607 F.2d 339, 347 (D.D.C. 1979)).

118. *See* Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 12. Nineteen of the 46 contributors to the case record consented to disclosure. The records from those contributors were sent to Mr. Gaskin. The other contributors refused to waive confidentiality stating as reasons that third party interest could be harmed,; that the contribution would be of no value if taken out of context; that professional confidence was involved; that it was not the practice to disclose reports to clients; and that too great a period of time had elapsed for a letter or report still to be in the contributors recollection. *Id.* at 12.

termining whether requested records are under agency control.[119] The documents that Mr. Gaskin requested fall under the FOIA as "agency records" and thus would be required to be disclosed under U.S. law.

Under the FOIA an agency is not obligated to create records or retain records before a request has been made.[120] Nor is there any indication in the text of the European Convention that there is an affirmative duty to create records or retain records before a request has been made. However, this element was not at issue in the *Gaskin Case*. Mr. Gaskin requested records that already existed.[121] In addition, Mr. Gaskin's request did not impose an extra burden on the local authority to retain any records.[122]

The purpose, interest, identity, or status of the person seeking information has no bearing on whether that person has a right to request agency records under the FOIA.[123] As one court noted, in an opinion written during the Cold War, a Soviet embassy military attache could file FOIA requests for information from the CIA and the Federal Bureau of Investigation on the same basis as a citizen of the United States.[124]

The European Convention establishes that everyone has the right to receive information.[125] The term "everyone" implies that the right to receive information is not based on one's identity. In addition, there is nothing in the language of article 10 implying that the purpose for which one seeks information affects the right to receive the information. The only limiting language in article 10 is the provision which establishes exceptions to the

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119. *Tax Analysts II*, 913 F. Supp. at 602.

120. Kissinger v. Reporters Comm. for the Freedom of the Press, 445 U.S. 136, 152 (1980) (indicating that the only obligation on an agency is "to provide access to those [documents] which it in fact has created and retained."); Armstrong v. Bush, 721 F. Supp. 343, 345 (D.D.C. 1989), *aff'd in part and rev'd in part on other grounds* 924 F.2d 282 (D.C.Cir. 1991) (citing *Kissinger*, 445 U.S. at 152 (1980)).

121. *See* Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 12.

122. *See id.* at 9. Under the Boarding out of Children Regulations 1955 (which were made under section 14 of the 1948 Act) the local authority was under a duty to keep a case record in respect of every child in care for at least three years after the child to whom it relates has turned 18 years of age or has died before attaining that age. *Id.*

123. Doherty v. United States Dep't of Justice, 596 F. Supp. 423, 425 (S.D.N.Y. 1984) (undocumented alien had FOIA standing; purpose of 1966 amendments in removing "persons properly and directly concerned" limitation from statute was to broaden standing); Nixon v. Sampson, 389 F. Supp. 107, 121 (D.D.C. 1975) (requesting party need show no particular interest in requested records).

124. Military Audit Project v. Casey, 656 F.2d 724, 730 n.11 (D.C. Cir. 1981) (rejecting possibility of wholly fictitious entity having standing under FOIA).

125. *See* European Convention, *supra* note 16, at art. 10.

right to receive information.[126] Neither the purpose for receiving information nor the identity of the requestor is mentioned. In the *Gaskin Case*, Mr. Gaskin was a British citizen who requested discovery of information in order to bring proceedings against the local authority for damages for negligence for the time he was under the local authority's care.[127] The interest and identity of Mr. Gaskin are irrelevant under the European Convention just as they would be under the FOIA.

Similarly, in *Attorney-General of Antigua v. Antigua Times, Ltd.*,[128] the court held that article 10 of the European Convention covers expression by legal or artificial persons as well as of natural persons. In *De Geillustreerde Pers N.V. v. Netherlands*, the court held that the right to impart information belongs only to the owner of the intellectual property in the information, while also holding that the value to be preferred by article 10 of the European Convention is the free flow in information to the public in general.[129]

An FOIA record must be "reasonably described" in a written request in order to obligate the agency to make the requested record available.[130] If "the agency is able to determine 'precisely what records are being requested,'" the record is "reasonably described."[131] As a practical matter, it is a necessary requirement that a request for information be described in a manner which allows the government to identify the record being requested. It would be unreasonable to obligate the searcher to find a document that has been vaguely or inadequately described.

In the *Gaskin Case*, Mr. Gaskin's request for information was specific and reasonable. He made an application under section 31 of the Administration of Justice Act 1970 for discovery of the local authority's case records made during his period in care.[132] The local authority was under statutory obligation to maintain a case file on every child under its care during the time the child is in its care.[133] This would imply that every child has a file under which all contributed documents are placed and

126. *Id.* at art. 10(2).

127. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 9 (1989).

128. [1975] 3 All E.R. 81 (Privy Council), *as reported in* PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 331 (1983).

129. (5178/71) Report: DR 8,5, *as reported in id.* at 337.

130. 5 U.S.C. § 552(a)(3)(A) (1996 & Supp. 1997).

131. Yeager v. Drug Enforcement Admin., 678 F.2d 315, 326 (D.C. Cir. 1982) (rejecting argument that request for computer records did not reasonably describe records; test is whether agency can determine which records are sought).

132. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 9 (1989).

133. *Id.* at 9.

could be easily identified and accessed upon a request for all records pertaining to a particular child. This is the type of request made by Mr. Gaskin. In addition, the local authority made no argument that it was too difficult or burdensome to identify the records requested by Mr. Gaskin.[134]

The FOIA lists nine exemptions which, if asserted properly, serve to justify an agency's refusal to grant a request for an agency record.[135] An agency must disclose agency records to any person under § 552(a) "unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b)."[136] These exemptions are generally interpreted very narrowly [137] and are "explicitly exclusive."[138]

Similarly, article 10(2) of the European Convention, lists exceptions to the rights established in the previous section. Section 2 establishes that the rights of section 1, may be:

> subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[139]

In *Observer and Guardian v. United Kingdom*, the ECHR rejected a national security justification for an injunction against publication of an English spy's memoirs after the information was in the public domain.[140] The case generally supports the proposition that article 10 exceptions must be narrowly construed, permitting restrictions only to the extent necessary to

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134. *Id.* at 12. The facts of the *Gaskin Case* point out that Gaskin's record "consisted of some 352 documents contributed by 46 persons." The ability of the local authority to identify that Mr. Gaskin's record consisted of 352 documents, a very specific determination, would preclude the local authority from arguing that it is not able to precisely determine the records being requested.

135. 5 U.S.C. § 552(b)(1-9) (1996 & Supp. 1997). Exempted matters include: (1) certain matters of national security; (2) internal agency personnel rules; (3)matters exempted by another statute; (4) trade secrets; (5) inter- or intra-agency memorandums; (6) files which if disclosed would be an invasion of personal privacy; (7) records compiled for law enforcement purposes; (8) financial audit information and;(9) geological data. *Id.*

136. United States Dep't. of Justice v. Julian, 486 U.S. 1, 8 (1988).

137. FBI v. Abramson, 456 U.S. 615, 630 (1982).

138. Administrator, F.A.A. v. Robertson, 422 U.S. 255, 262 (1975).

139. European Convention, *supra* note 16, at art. 10(2).

140. Case of the Observer and Guardian v. United Kingdom, 216 Eur. Ct. H.R. (ser. A) at 34-35 (1992).

protect the interests recognized thereby.[141] This concept of proportionality is usually expressed in terms of the "margin of appreciation" for national interests, and the need to defer to a showing of "necessity" by the government justifying the restriction.[142] The Court's supervision of a state's margin of appreciation "must be strict" and the "necessity for restricting [those rights] must be convincingly established."[143]

The ECHR's ruling in the *Gaskin Case* is consistent with the European Convention. The local authority's primary reason for not granting Gaskin access to the requested files was that the many people who created the file were assured that the information they contributed would be kept in confidence.[144] Article 10(2) establishes that rights conferred in section 1 are subject to restriction in order to "preven[t] the disclosure of information received in confidence."[145]

This result is also consistent with the principles of the U.S. FOIA. Section 552(b)(7)(D) establishes that a "record or information compiled for law enforcement purposes (are not subject to disclosure if it) . . . could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis."[146] Admittedly, the exception under the FOIA is narrower than the one established by the European Convention. More importantly, both the FOIA and the European Convention recognize the principle that access to certain information must be restricted when a third party has been assured confidentiality.

V. ANALYSIS OF THE *LEANDER CASE* UNDER THE FOIA FRAMEWORK

Conducting the same analysis with respect to the *Leander Case*,[147] another ECHR decision, one finds the same consistency between the U.S. FOIA and the European Convention. The FOIA framework is also appropriately used to analyze the *Leander Case*.

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141. *Id.* at 33-34.

142. MARK W. JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW: TEXT AND MATERIALS 167-68 (1995); *see also* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE 13-15 (1996) (defining the national margin of appreciation doctrine).

143. Autronic A.G. v. Switz., 178 Eur. Ct. H.R. at 26-27 (ser. A)(1990).

144. Gaskin Case, 160 Eur. Ct. H.R. (ser. A) at 11-12 (1989).

145. European Convention, *supra* note 16, at art. 10(2).

146. 5 U.S.C. § 552(b)(7)(D) (1994).

147. 116 Eur. Ct. H.R. (ser. A) (1987).

A. *Agency*

In the *Leander Case*, the Swedish government was part of the burdened class that was under a duty not to interfere with Mr. Leander's right to receive information. Sweden is a Contracting State to the European Convention.[148] This obligates Sweden to abide by its provisions.

B. *Improperly Withholding Agency Records*

In the *Leander Case*, the Swedish Government "withheld" and necessarily "interfered with" access to the information which Mr. Leander requested. Mr. Leander made several requests to have access to the information on which the Navy based its decision to not grant him a security clearance.[149] The Swedish National Police Board wrote that the information Mr. Leander sought had been entered into a secret register and could not be revealed for reasons of security.[150] Because the Swedish government possessed the information sought and held it back, the information was withheld from Mr. Leander.

Under the European Convention, the "right to receive information" is sweeping in its scope. Mr. Leander's request fell within the right conferred by the European Convention, and also satisfies the FOIA's more stringent standard that only documents that are (1) created or obtained by an agency and (2) under agency control at the time of the request[151] are subject to the FOIA. As discussed above, the Swedish government entered the information concerning Mr. Leander into a secret register,[152] thus satisfying the "create or obtain requirement." The "control" requirement of his request was satisfied, assuming that the secret register was in the possession of the National Police Board. The Police Board never argued that it did not possess the register or that it was under some obligation to another party not to release the contents of the register.

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148. *Id.* at 6; Sweden ratified the European Convention on Feb. 4, 1952. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 n.1.

149. *Leander*, 116 Eur. Ct. H.R. at 9-12.

150. *Id.* at 10.

151. *Compare id.* at 29 (holding that article 10 of the European Convention does not confer a duty on the government to impart information about an individual which is contained in a register to that person), *with* Department of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (establishing two prong test for requested materials to qualify as "agency records").

152. *Leander*, 116 Eur. Ct. H.R. (Ser. A) at 9-12.

Like the *Gaskin Case*, there was no dispute in *Leander* over whether the Swedish Navy had a duty to create records or retain records before a request was made. Also like the *Gaskin Case*, the interest and identity of the requestor are irrelevant under the European Convention just as they would be under the FOIA. In *Leander*, there was no issue as to whether Mr. Leander's request for information was specific enough. The Police Board knew what information Mr. Leander was requesting and where it was located.

The ECHR decided the *Leander Case* properly under the "national security" exception of the European Convention. This decision is also consistent with the U.S. FOIA. Article 10(2) of the European Convention provides that the right to receive information, which is conferred in article 10(1), may be restricted "in the interests of national security."[153] In the *Leander Case*, the government denied Mr. Leander's request because the information he sought was part of a secret police register.[154] The police kept the register to use in "the prevention and detection of offenses against national security," thus the contents of the register were made confidential.[155] The court reasoned that Sweden's interest "in protecting its national security must be balanced against the seriousness of the interference with the applicant's right . . . ." On this basis the court stated that the "interests of national security prevailed over the individual interests of [Mr. Leander]."[156] The U.S. FOIA recognizes the same "national security" exception.[157]

The analysis of the *Leander* and *Gaskin* cases using a FOIA framework underscores the consistency in principles between the rights conferred by the European Convention and those conferred by the U.S. FOIA. Both recognize a very broad general right for every person to receive information. Both establish exceptions to the right and interpret those exceptions narrowly.

C. *Information Monopolies*

In *X v. Sweden*, the European Commission on Human Rights held that the licensing privilege under article 10(1) does not bar monopoly licensing systems, at least with respect to

153. European Convention, *supra* note 16, at art. 10(2).

154. *Leander*, 116 Eur. Ct. H.R. at 12.

155. *Id.*

156. *Id.* at 27.

157. 5 U.S.C. § 552(b)(1). According to the FOIA, matters that are "specifically authorized . . . to be kept secret in the interest of national defense or foreign policy . . ." are exempt from disclosure. *Id.*

public television.[158] But, in *Informationsverein Lentia v. Austria*, the ECHR held that a public monopoly on broadcasting violates article 10 unless it can be justified for one of the permissible licensing objectives.[159] Ordinarily, the court reasoned, impartiality, balance and diversity are better assured by competition than monopoly.[160] In *Autronic AG v. Switzerland*, the Court held that Switzerland's prohibition of reception of satellite transmissions from Russia intended for the general public violated the Convention and were not justified by paragraph two.[161]

These cases, taken together, suggest that international human rights law should be skeptical of information monopolies, whether they are manifested by exclusive markets for television stations, or exclusive distribution rights for public information. A diversity of channels and sources is the best approach for disseminating information originating with public institutions, and is most consistent with the underlying right to receive such information.

VI. ENFORCEABILITY OF TREATY-BASED RIGHTS

Even if the two human rights treaties discussed in this Article grant a right to obtain access to governmental information and to disseminate it, that right is not necessarily directly enforceable by requesters in national court. When a treaty based obligation is directly enforceable in national courts, the treaty is said to have "direct effect."[162] While direct effect of a treaty is a matter ultimately to be determined by the intent of the drafters and signatories of the treaty, the traditional dualism theory of international law sharply separates "municipal" (national) law from international law. International law is a system of rights and duties between states. Only municipal law addresses rights and duties of individuals. But there are many exceptions, and there is some jurisprudential debate whether dualism is the ap-

158. X v. Sweden, App. No. 3071/67, 26 Eur. Comm'n H.R. Dec. & Rep. 71 (1968); *see also* X v. United Kingdom, App. No. 4750/71, 4750/71, 40 Eur. Comm'n H.R. Dec. & Rep. 29 (1972); Royal Decree No. 39 of 14 Nov. 1975, 1977 Y.B. EUR. CONV. ON H.R. (Council of Eur.) 771; Royal Decree No. 18 of 27 Dec. 1976, *id.* at 787, *as discussed in* SIEGHART, *supra* note 128, at 336.

159. Informationsverein Lentia and Others v. Austria, 276 Eur. Ct. H.R. (ser. A) at 14 (1993).

160. *Id.* at 16; *see also* JANIS, *supra* note 142, at 214.

161. Autronic AG v. Switzerland, 178 Eur. Ct. H.R. (ser. A) at 26-7 (1990).

162. *See generally* Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 41-42 (1996) (explaining direct effect and contrasting public and private international law).

propriate way of thinking about international law.[163] To give a treaty direct effect causes international law to reach into the internal (municipal) law of sovereign states. A broad example of direct effect of a treaty is the European Union, in which everyone accepts that community law, though based on the Treaty of Rome and its progeny, has direct effect within member states legal orders.[164] Frequently, in U.S. law, direct effect is referred to as "self-executing."[165] Under U.S. law, there are four factors to be considered in determining whether a treaty is self-executing:

> (1) the purposes of the treaty and the objectives of its creators;
> (2) the existence of domestic procedures and institutions appropriate for direct implementation;
> (3) the availability and feasibility of alternative enforcement methods; and
> (4) the immediate and long range social consequences of self - or non-self-execution.[166]

Great Britain does not recognize any treaties as self-executing: "treaties are only part of English law if an enabling act of parliament has been [enacted]."[167] In the United States, some treaties are self-executing,[168] though most are not.[169] Sometimes, municipal law makes certain treaties self-executing. A clear example is article 18 of the Russian Federation Constitution, which recognizes that rights and liberties derived under article 17 have "direct effect."[170] Conversely, the U.S. Senate's resolution

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163. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32-34 (4th ed. 1990) (discussing dualism and monism, associating Hans Kelsen with monism).

164. *See* David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L L.J. 97, 142 (1994); J.H. Weiler & Ulrich R. Heltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 412 (1996).

165. Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1274 (E.D. Va. 1996) (citing cases and distinguishing two meanings of self-executing: (1) not requiring implementing legislation before becoming federal law, and (2) conferring private rights of action on individuals).

166. International Association of Independent Tanker Owners v. Lowry, 747 F. Supp. 1484, 1490 n.3 (W.D. Wash. 1996) (enumerating factors).

167. BROWNLIE, *supra* note 163, at 48 (discussing conflicting case law about incorporation of customary international law).

168. Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974) (finding treaty to be self-executing); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (finding Warsaw Convention to be self-executing).

169. United States v. Fort, 921 F. Supp. 523, 526 (N.D. Ill. 1996) (Geneva Convention and Protocol 1 were not self-executing, thus providing no basis for enforcement of private rights in U.S. Courts).

170. RUSS. CONST. art. 18 (stating that "[t]he rights and liberties of man and citizen shall have direct effect . . .").

of ratification to the International Covenant on Civil and Political Rights "declares that the provision of articles 1 through 27 of the Covenant are not self-executing."[171]

The European Convention on Human Rights does not necessarily have direct effect within the national legal systems of member countries (the Russian Constitution provides an obvious exception).[172] Austria is characterized as having gone furthest in incorporating the convention, giving the convention the status of the national constitution and by applying the ECHR's decisions interpreting the convention through the Austrian constitutional court.[173] In Belgium, France, The Netherlands, and Switzerland, provisions of the convention have direct effect in national law and can override inconsistent national legislation.[174] In Germany and Italy, the provisions of the convention have the effect of ordinary legislation and thus cannot override contravening provisions of the constitution.[175] Denmark, Iceland, Sweden, and Norway enacted legislation in the mid-1990s giving direct effect to the convention.[176] The convention does not have direct effect in Ireland and the United Kingdom.[177] The Dayton Accords obligate the Republic of Bosnia and Herzegovina to secure to all persons the rights and freedoms provided in the European Convention.[178] The Constitution of Bosnia and Herzegovina further obligates all courts, administrative agencies, and governmental organs to apply international human rights law.[179] This suggests direct effect.

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171. 138 CONG. REC. S4781, S4784 (daily ed. Apr. 2, 1992) (¶ III(1) of the ratification resolution to the ICCPR).

172. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis in Proposed Synthesis*, 41 HASTINGS L.J. 805, 808 (1990). Nevertheless, the European Convention has significant effect on the domestic jurisprudence on many European countries by influencing interpretation of domestic law. *Id.* at 829 & n.112.

173. JANIS, *supra* note 142, at 448.

174. *Id.* at 448-49.

175. *Id.* at 449.

176. *Id.*

177. *Id.*

178. Dayton Peace Accords, *supra* note 77, at annex 6, art. 1. This Agreement also recognizes the rights and freedoms enumerated in other human rights agreements. *Id.* at art. 1 & appendix; *See also* BOSN. & HERZ. CONST. art. II(A)(2).

179. BOSN. & HERZ. CONST. art. 6; *but see generally* John H. Jackson, *Status of Treaties and Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992) (arguing that former communist countries should not rush to make treaties self-executing because the respective roles of domestic and international institutions is too little understood); *see also* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985) (overview of issues, concentrating on United States courts).

The absence of direct effect or self-executing status for the European Convention is mitigated by the existence of the ECHR, which has the power to enforce against states the obligations of that convention. While decisions of the court are not directly enforceable under the convention, "the high contracting parties undertake to abide by the decision of the court."[180] The Committee of Ministers supervises the execution of ECHR judgments.[181] Typically, a decision by the ECHR finding a member state in violation of the convention results in the enactment of legislation by the parliament of the offending state to bring it into conformity.[182]

As a matter of international law, there are several questions to be addressed in advancing the notion of a freedom of information and open government doctrine rooted in international human rights treaties. First, there is the question of direct effect. In Russia and the Bosnia Federation, both the European Convention and the ICCPR have direct effect and can be applied directly to the constitutional courts of those countries. Most Western European countries provide for some degree of direct effect of the provisions of the convention, although not decisions of the ECHR. In the former communist countries, now members of the Council of Europe, the question appears still to be open. The parliaments and constitutional courts of these countries can determine whether the human rights treaties have direct effect. They should do so with respect to freedom of information and open government because of the centrality of those norms to democratic political systems. Where the international human rights treaties do not have direct effect, claims of violations of rights of access to government information based on the European Convention can be brought in the ECHR against any nation that is a party to the Convention. This can potentially result in an ECHR decision that could obligate a parliament to enact appropriate freedom of information legislation.

Finally, and most modestly, the norms of the Convention and the Covenant in favor of freedom of information and open government can and should influence interpretation of national law when it exists, and is at least generally germane to the subject of freedom of information.

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180. European Convention, *supra* note 16, at art. 53.

181. *Id.* at art. 54.

182. *See generally* JANIS, *supra* note 142, at 433 (observing that the ECHR has consistently taken the position that a state is not required to incorporate terms of convention in national law (citing Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978)).

VII. CRITERIA FOR OPEN GOVERNMENT

The desire of former communist countries for U. S. support and for membership in the Council of Europe, NATO, and the European Union offer possibilities for extending open government and freedom of information. Imposition of the following criteria by the Council of Europe would be particularly beneficial because the Council already includes most of the former communist countries and because Council human rights criteria are often embraced as criteria by the other European institutions.

Freedom of information and open government must become the norm in all participating countries. Article 19 of the International Convention on Civil and Political Rights recognizes freedom of expression, including the right to receive information. It is cast in general terms, however, and is explicitly subject to an exception for "public order."[183] Human rights organizations such as the Council of Europe, which has responsibility for adopting recommendations to implement the European Convention on Human Rights, which interprets the European Convention, and other human rights organizations must flesh out the details of basic freedom of expression rights. It must be made clear that freedom of expression includes the right to have access to basic governmental documents, including legislation and judicial decisions.

An individual right to access is not enough if there is not an effective right to publish. Recent experience in Croatia and Serbia illustrate how important diversity can be in assuring affected channels for information about public affairs. Both Croatia and Serbia used fairly traditional broadcast licensing laws to shut down radio and television outlets for dissenting voices. In the case of Serbia, the World Wide Web was used to circumvent the license-based restriction. The international legal community needs to respond to this threat in two ways. First, freedom of information and open government policies must make it clear that a commercial publishing motive does not disqualify anyone from the right to obtain basic government information. Government-granted monopolies over public information dissemination cannot stand in the way of others' right to access and publish the information. Not only must there be a right to access information, but the government should not be allowed to monopolize its dissemination.

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183. ICCPR, *supra* note 15, at art. 19.

Second, monopoly and censorship operate at several different levels of the chain of production of information. Not only must publisher monopolies be disallowed in the new media, but telecommunications regulatory restrictions, including licenses and concessions, must not be extended to principal elements of the Internet, including routers,[184] domain name registries, and Internet Service Providers.[185] Even if national policy maintains monopolies for telephone and broadcasting, these monopolies must not be extended into the Internet layer. Recently completed World Trade Organization negotiations on telecommunications markets presented an opportune forum to crystallize these principles in international law.

Policy initiatives aimed at facilitating entry by diverse providers of information infrastructure elements proceed from the proposition that both the private and public sector must build the public information infrastructure. Relying on the public sector alone risks censorship, and is also inconsistent with the current rule of law. Relying on the public sector alone will also result in a much slower pace of innovation because of inadequate resources, and because competition is an effective spur to reduced prices.

It is essential that the Council of Europe and the international community, including the United States, recognize the potential of the Internet as a technology of freedom and of open government in all parts of the former communist world. The Internet, and especially the World Wide Web, have already demonstrated their power to circumvent totalitarian efforts to squelch the free press. B92, a Serbian radio station, was able to communicate its message even though its transmitters were shut down.[186] Mr. Matic, editor-in-chief of B92, explained how adequate Internet capacity allows independent radio stations to exchange programming, not only within Serbia, but also with Croatia and Bosnia.[187] Of course, the WWW, as a low-cost user-friendly medium, also represents a new distribution possibility

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184. *See* ED KROL, THE WHOLE INTERNET USER'S GUIDE & CATALOG 24, 512 (2d ed. 1994) (defining a router as a specialized computer switch that directs Internet packets to their destinations).

185. *See id.*, at 10 (noting that an Internet Service Provider connects users to the Internet).

186. *See* Bob Schmitt, Op-Editorial, *The Internet Answer to Repress*, WASH. POST, Mar. 31, 1997; *see also Opennet.Org*, Nov. 3, 1997 <http://www.opennet.org> (Website for Radio B92).

187. *Political Turmoil in Serbia: Hearing Before the Commission on Security and Cooperation in Europe*, 104th Cong. 7-9 (1996) (Statement of Veran Matic, editor-in-chief of Radio B92).

for journalists at the "retail" level given an adequate Internet infrastructure. An individual citizen can view the Web page posted by B92 as well as pages posted by other journalists.

Once the basic legal framework is in place, guaranteeing a right to access government information and to redisseminate it, information technology exemplified by the Internet's World Wide Web can reduce agency costs and improve practical public access. Agencies can set up small Web servers to hold their public information resources, including primary materials such as judicial decisions and statutes, permitting requestors to access them directly through the Web from anywhere in the world, without the necessity for costly processing of ad hoc requests.