



Human Rights and The Public's Right to Know

- Briefing from the Campaign for Freedom of Information in Scotland

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Campaign for Freedom of Information in Scotland

<http://www.cfoi.org.uk/scotland.html>

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The public's right to know is a human right!

International law is quite clear that access to information is a human right. This means that all bodies that fall under State control are covered by the obligation of openness. This includes bodies that are substantially funded by the State, which are owned or controlled by the State or which undertake public functions. Human rights obligations, including in relation to access to information, cannot be avoided simply by delegating functions to arms length bodies.

Toby Mendel, Executive Director, Centre for Law and Democracy

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At lang an last, it is forby an important richt in a free society tae be free tae haud-haun tae the weel o society. But, for this tae gae forrit, it maun be possible for the state o society tae be something that awbody kens aboot an can openly crack aboot. Whaur this daesna happen, speak o leeberty isna worth a docken.

Dauvit Horsbroch at the Scots Language Centre

Introduction

The Universal Declaration of Human Rights in 1948 made the public's right to know a human right. Article 19 is the 'freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' The right complements Article 21 which is 'the right to take part in the government of his country'. Given that Sweden was the first country to have an access to information law in 1766, arguably the developments in 1948 were just consolidating a concept that was understood if not widely supported.

The European Convention on Human Rights (ECHR) affirms under Article 10 that we have the right to hold opinions and to receive and impart information. Given that the Scotland Act 1998 and the Human Rights Act 1998 places obligations to comply on the Scottish Government and on all public authorities in Scotland, can human rights assist each of us in exercising our 'right to know'?

This question is timely as the Campaign for Freedom of Information in Scotland (CFoIS) wants the Freedom of Information (Scotland) Act 2002 (FoISA) to continue to provide a robust framework for providing the public with an enforceable right to know. A major reason for the weakening of freedom of information rights is that promises to add named bodies and categories of bodies have not been honoured. CFoIS believes the current Freedom of Information (Amendment) (Scotland) Bill provides an opportunity to amend FoISA to maintain and develop the public's right to know. CFoIS now sets out the arguments for MSPs to amend FoISA via the Bill because it is the right thing to do and to satisfy human rights obligations.

Context

CFoIS has reflected on how people in Scotland can access information if the right contained in the Freedom of Information (Scotland) Act 2002 (FoISA) does not apply. For example there is not an enforceable right under FoISA to access information from Registered Social Landlord (RSLs). CFoIS believes there needs to be a better understanding about the role of human rights in assisting people to access information as a broad range of bodies are covered by the HRA including housing associations (RSLs).

- The Human Rights Act 1998 (HRA) requires all public bodies to comply with the European Convention on Human Rights (ECHR) eg the Office of the Scottish Information Commissioner.
- Article 10 of the ECHR states that everyone has the right to hold an opinion and to receive and impart information (see Appendix 1)
- It is the State's responsibility to protect ECHR rights.
- S29 of the Scotland Act 1998 requires MSPs to pass legislation that is ECHR compliant.
- S57 (2) of the Scotland Act 1998 places a positive duty on Scottish Government Ministers to comply with the ECHR.

It is acknowledged that the ECHR is a 'living treaty' capable of adapting to the world we live in and that includes the use of technology, a greater need to empower people and to hold the State to account. Article 10 of the ECHR, the 'right to receive and impart information, can evolve over time:

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. ...
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 necessary in a democratic society..."

European Court of Human Rights (ECtHR)

Dirk Voorhoof has observed that the ECtHR has ruled positively on "the right of the public to be properly informed" and "the right to receive information", but until recently was very reluctant to derive from Article 10 of the European Convention on Human Rights a right to have access to public or administrative documents.¹ The following selection of cases and trends are highlighted to enable discussion and consideration of what arguments people and groups can use to access information from bodies covered by the HRA so Article 10 could be used to access information rather than S1 of FoISA.

Right to Access Information

Tarsasag v. Hungary 2009²

The ECtHR ruled that social watchdogs have a right to access government information if the information is relevant to matters of public interest and the government is the sole holder of such information. The ECtHR did not recognise a *general* right to access to information, but did indicate that in some situations the state is bound not to hamper the free flow of information which is readily available and which is solicited by social watchdogs, such as the press or even some NGOs (such as in this case). Importantly, in para. 37, the Court pointed out that it "considers that it would be fatal for freedom of expression in the sphere of politics if public figures could censor the press and public debate in the name of their personality rights, alleging that their opinions on public matters are related to their person and therefore constitute private data which cannot be disclosed without consent."

¹ European Court of Human Rights Case of Sdruženi Jihočeské Matky v. Czech Republic IRIS 2006-9:2/1 <http://merlin.obs.coe.int/iris/2006/9/article1.en.html>

² <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92171>

The decision recognized for the first time that Article 10 of the European Convention on Human Rights guarantees the "freedom to receive information" held by public authorities. The court noted the important role played by the media and other independent monitors in creating "forums for public debate" and emphasized that any interference with the ability of such groups to obtain information of public interest must be able to withstand the "most careful scrutiny." The court emphasized that governments have an obligation "not to impede the flow of information" on matters of public concern.³

Kenedi v. Hungary⁴

The ECtHR has provided clarification on access to information as it found: Article 6 ECHR (fair trial) was violated because of the total length of the proceedings and enforcement - over ten years. Article 10 was also violated. It reiterated that (para. 43) "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression." The interference with the applicant's right had not been prescribed by law and (para. 45) the obstinate reluctance of the respondent State's authorities to comply with the execution orders was in defiance of domestic law and tantamount to arbitrariness."

Article 13 ECHR (effective remedy) - in conjunction with Article 10 - had also been violated, since the Hungarian system did not provide for an effective way of remedying the violation of the freedom of expression in this situation. Once access to information on the national level is ordered such access should be effective and be given within a reasonable time.

Matky v Czech Republic⁵

Although ruled inadmissible, the ECtHR recognised Article 10 contains an explicit recognition that Article 10 applies in cases where a State has rejected a request for access to public or administrative documents. However the right to access administrative documents is not an absolute one and can be restricted under the conditions of Article 10 para. 2. The Czech Republic convinced the ECtHR that its refusal to supply the documents was in the interest of protecting the rights of others (industrial secrets), national security (risk of terrorist attacks) and public health.

Gillberg v Sweden⁶

In 2012, the ECtHR considered whether Mr. Gillberg, as a public employee, had an independent negative right within the meaning of Article 10 of the ECHR not to make the research material available. The material did not belong to him but to his public employer, the University of Gothenburg, and the University intended to comply with the final judgments of the Court granting K and E access to its research material but was prevented from so doing because Mr. Gillberg refused to make it available.

The ECtHR found that Mr. Gillberg's refusal to give access to the research material would run counter to the property rights of the University but "*it would also impinge on K's and E's rights under Article 10 to receive access to the public documents.*"⁷

³ Open Society Justice Initiative

⁴ Appl. no. 31475/05 <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92663> (2009)

⁵ 19101/03 ECHR 1205 (10 July 2006)

⁶ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110144>

Accessing Information to Enjoy a Human Right

ZORICA JOVANOVIĆ v. SERBIA 2013 (application no. 21794/08)⁸

Ms Jovanović complained about Serbia's continuing failure to provide her with any information as to the real fate of her son - had her baby boy died in hospital or been illegally adopted? The Court concluded that Ms Jovanović had "suffered a continuing violation of the right to respect for her family life (article 8) due to Serbia's continuing failure to provide her with credible information as to what has happened to her son." And the Court dealt with this as a "structural" matter ie "In view of the significant number of other potential applicants, the Court held that Serbia had to take measures to give credible answers explaining what happened to each of the children who disappeared and to provide the parents with appropriate compensation."

Hadzhiev v. Bulgaria (no. 22373/04)⁹

The applicant, Rumen Hadzhiev, complained about legislation in Bulgaria which authorises secret surveillance measures and that the legislation prevented the authorities from giving him any information as to whether he had been kept under secret surveillance and that he therefore could not claim damages. He relied in particular on Article 8 (right to respect for private and family life and the home) and Article 13 (right to an effective remedy) of the Convention. The ECtHR ruled there had been a violation of Article 8 and Article 13.

Guerra and Others v. Italy (application no. 14967/89)¹⁰

The ECtHR recalled that severe environmental pollution might affect adversely individuals' well-being and prevent them from enjoying their homes under Article 8 of the ECHR. The applicants had waited, right up until the production of fertilisers ceased in 1994, "for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory." The ECtHR held that Italy did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8.¹¹

Inter-American Court of Human Rights

Marcel Claude Reyes and Others v. Chile, 2007

The Court's decision affirmed the existence of the right of access to information as it ruled that *Chile* "must adopt the necessary measures to guarantee the protection of the right of access to State-held information...which is administered by duly trained officials".¹²

International Human Rights Law

⁷ <http://inform.wordpress.com/2012/04/14/strasbourg-case-law-gillberg-v-sweden-criminal-conviction-for-refusal-to-give-access-to-research-files-no-violation-of-convention-dirk-voorhoof-and-ronan-o-fathaigh/>

⁸ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118276>

⁹ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114076>

¹⁰ http://www.hrcr.org/safrica/environmental/guerra_italy.html

¹¹ Case decision issued on 19.02.1998 Council of Europe News Release "Environment-related cases in the Court's case law" http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf

¹² <http://www.article19.org/data/files/pdfs/analysis/chile-foi.pdf>

UN Human Rights Committee in the case of Toktankunov v. Kyrgyzstan

In 2004, Nurbek Toktankunov of the Youth Human Rights Group in Kyrgyzstan, requested the Central Directorate of Corrections of the Ministry of Justice to provide certain data concerning death sentences but was unsuccessful. Having subsequently exhausted domestic channels, the applicant filed a complaint before the Human Rights Committee under Article 19 of the ICCPR. The Human Rights Committee declared the case admissible.

The Committee considered that the information sought by the applicant is recognized as in the public interest, that criminal judgments are also generally public, and that Article 19.2 of the ICCPR recognizes the right for individuals and the media to receive State-held information. The Committee highlighted the special role of the media in creating "forums for public debate." The Committee cited Article 19.3 of the ICCPR and stated "the right to freedom of thought and expression includes the protection of the right of access to State-held information."¹³

Human Rights Committee - Article 19 ICCPR¹⁴

In 2011, the Committee issued a new General Comment on Article 19, freedoms of opinion and expression, which specifically extends the right to include access to information: *"To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation.¹⁵ The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant."*

Access to Information

A Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression¹⁶ confirms access to information as a human right: "The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."

Conclusion

CFoIS is impatient for change. There is a history of inactivity across successive administrations in Scotland to maintain and develop the public's enforceable right to know and ensure public services, despite a change in provider, are covered by FoISA. Since 2002, the public has been promised that FoISA would be extended to a range of new bodies: RSLs (housing associations) were removed from the Bill at Stage 3 but the Minister assured that "... the Executive recognises that larger and

¹³ Source Emi MacLean emaclean@justiceinitiative.org

¹⁴ Human Rights Committee 102nd session Geneva, 11-29 July 2011 General comment No. 34 Article 19: Freedoms of opinion and expression CCPR/C/GC/34

¹⁵ Concluding observations on Azerbaijan (CCPR/C/79/Add.38 (1994)).

¹⁶ http://www.right2info.org/resources/publications/instruments-and-standards/joint-declaration_2004

more formal RSLs might be appropriate for coverage by the Freedom of Information (Scotland) Bill, and they can be added to the bill. There is a statutory obligation to consult before that is done and we will consult the sector. ... I assure members that we expect the majority of organisations to be covered."¹⁷ Ten years later, we are still waiting.

Clearly because the right to know is a human right, whatever the Scottish Parliament or the Scottish Government decides on the current Bill, people can exercise their human rights to access information. That may be more complex but the result could be the same. Simpler just to reform FoISA!

¹⁷ Stage 3 Debate Freedom of Information (Scotland) Bill 24th April 2002, column 8206
<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=4372&mode=pdf>