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LIST OF ABBREVIATIONS

ACHR – the American Convention on Human Rights

CEC – the Central Election Commission

CJEU – the Court of Justice of the European Union

CoE – the Council of Europe

CV – a curriculum vitae

ECHR – the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights)

ECtHR – the European Court of Human Rights

ICCPR – the International Covenant on Civil and Political Rights

NGO – a non-governmental organization

RIS – Romanian Intelligence Service

UDHR – the Universal Declaration of Human Rights

UN – the United Nations

INTRODUCTION

In the modern world, every piece of information is essential and valuable. Data is peoples' best friend and their worst foe at the same time.

It is convenient to receive reminders about meetings from our smartphone, to get notifications from the smart devices that we should stand up and stretch a bit, and to receive recommendations based on what movie we just watched. Life looks so much easier now: we have an entire world in our pockets filled with photos, videos, and other opinions on the issue that bothers our minds.

Yet any information is akin to a double-edged sword. It is of great convenience, but it also could play against us in numerous situations. We could hardly have imagined that information could be used to manipulate our opinion, exploit weaknesses, and the list goes way further.

From the technology perspective, life is just a dataset. Nevertheless, the most valuable data about entities and individuals are in the hands of states. States are well aware of where we live, know a lot about the business we do, about our bank accounts, and collect a significant amount of data about our family and friends. In some ways, they know more about us than we do.

Such power requires precautions to be taken, though. States have to protect information about their people by adopting and enforcing appropriate legislation. Every person wants to be sure that his or her critical information is secure, and the state protects it from breaches and arbitrary access.

Even though data protection should be a state's top-notch priority, there could be plenty of cases where access to stored information may be required. For example, individuals may want to know a bit more about their employer, journalists and academics may request some state-owned data for conducting their research, etc.

Potentially, the requested information may concern personal data, and the state has to decide what is more important: data owner's privacy or the requestor's interest. The situations could be quite complicated due to the insufficient regulations, authorities' failure to correctly interpret the laws or incorrect decisions made by state bodies.

In such cases, the tension between the interest to receive requested data and the interest to protect those data starts to grow. Both sides tend to seek resolutions in national courts, yet they do not always achieve a desired result. Therefore, one often seeks justice outside of their countries and the court that has the power to consider and resolve such conflicts is the ECtHR. We fully realize that other courts, such as the CJEU also judge

cases related to the balance between data access and data protection. However, this paper will be entirely devoted to the ECtHR case law and legal doctrine on the issue.

While the ECtHR acts as a balance keeper, it is crucial to have an understanding of its position in cases concerning the access to information and scientific discussions around judgments given. All of those could influence further theoretical research that could help to devise a way to improve existing approaches to situations, which the judicial practice of the ECtHR can highly benefit from. The practical relevance of the topic lies in generalizing the ECtHR's approaches that could strongly influence national legislation of states, where the initial balancing process took place.

This paper aims to analyze the ECtHR judicial practice and theoretical discussions involving the right of access to public information and the right to personal data protection.

The objective of the paper is to identify the correlation between rights outlined in Articles 10 and 8 and both the right of access to public information and the right to personal data protection, as well as to define the ECtHR approach to balancing in case of conflict between them.

The first task of the given paper is to determine whether the right of access to information falls under the scope of Article 10 and, if so, to identify whether there are potential limitations on the right. The second task lies in exploring if Article 8 encompasses the right to personal data protection as well as to find out whether there are any limitations on the right. The third task aims to outline the potential situation where the need for balancing may occur. The fourth task focuses on generalizing the ECtHR's approach to balancing between the right of access to information and the right to personal data protection. The final task is to analyze and generalize the suggestions given by theorists and judges and provide our suggestions for improving an approach existing in the current judicial practice.

The genetic method will be used for studying the evolution of the ECtHR's approaches to the scopes of Article 10 and 8, respectively. The generalization method will be applied for analyzing the ECtHR case law and drawing conclusions about its approach to balancing. The comparative method will help to explore and compare scientific views on the issue as well as various opinions given by the ECtHR judges in a number of cases. Finally, we will make an attempt to derive the most crucial criteria related to the balancing, and contribute our own suggestions applying the synthesis method.

The originality of this paper lies in generalizing the ECtHR's approaches to the right of access to information and the right to personal data protection as well as to balancing between them as the issue is largely unexplored by researchers. In order to achieve this, we

will analyze the existing judicial practice, from the first cases related to the rights mentioned up to the most recent judicial practice, such as *Centre for Democracy and the Rule of Law v. Ukraine*[1]. Finally, we will try to establish criteria that are crucial for resolving cases on balancing the rights relying on the ECtHR case law.

There are only several comprehensive papers on balancing the right of access to information and the right to personal data protection in the context of the ECtHR judicial practice. One of the most important substantive papers on the topic is Guidelines on Balancing Privacy and Access to Public Information written by V. Milašiūtė[2] .

The work of D. Banisar, The Right to Information and Privacy: Balancing Rights and Managing Conflicts[3] gives a general overview and analysis of the balancing between the rights.

In relation to the right of access to information and the scope of Article 10, we have used papers crafted by N. Tsukhishvili[4] and T. Mendel[5]. The paper that gives insights into the data protection and hardships related to it is the paper prepared by J. Kokott and C. Sobotta[6]. The Commentary, written by W. Schabas[7] laid the foundations of understanding the ECtHR judicial practice and its reasoning behind tests applied in cases involving Articles 10 and 8.

However, the core of the current research is the existing case law of the ECtHR. The cases such as *Társaság a Szabadságjogokért v. Hungary*[8], *Magyar Helsinki Bizottság v.*

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1 The European Court of Human Rights. 26 March 2020. Court judgment *Centre for Democracy and the Rule of Law v. Ukraine*, Case no. 10090/16.

2 MILAŠIŪTĖ, V. *Guidelines for Civil Servants on Balancing Privacy and Access to Public Information.* Kyiv, 2017. [interactive]. [reviewed in 20 March 2020]. Available at: <http://www.twinning-ombudsman.org/wp-content/uploads/2017/03/EN_Annex-9_Guidelines-on-balancing-privacy-and-access-to-public-info.pdf>

3 BANISAR, D. *The Right to Information and Privacy: Balancing Rights and Managing Conflicts*, 2011. [interactive]. [reviewed in 20 March 2020]. Available at: <https://www.ip-rs.si/fileadmin/user_upload/Pdf/Publikacije_ostalih_pooblascencev/Right_to_Information_and_Privacy__banisar.pdf>

4 TSUKHISHVILI, N. *The Case Law of the European Court of Human Rights (ECHR): the Right of Access to Public Information*, 2013. [interactive]. [reviewed in 20 March 2020]. Available at: <https://idfi.ge/public/migrated/uploadedFiles/files/ECHR%20Case%20Laws%20Analysis(1).pdf>

5 MENDEL, T. *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights.* [interactive]. [reviewed in 20 March 2020]. Available at: <https://rm.coe.int/16806f5bb3>

6 KOKOTT, J.; SOBOTTA, C. *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR* International Data Privacy Law, Vol. 3, No. 4, 2013. [interactive]. [reviewed in 02 May 2020]. Available at: <https://academic.oup.com/idpl/article/3/4/222/727206>

7 SCHABAS, W. *The European Convention on Human Rights A Commentary* Oxford Commentaries on International Law. Oxford University Press, 2015.

8 The European Court of Human Rights. 14 July 2009. Court judgment *Társaság a Szabadságjogokért v. Hungary*, Case no. 37374/05.

Hungary[9] and *Szurovecz v. Hungary*[10] were a basis for examining Article10 scope. Respectively, the scope of Article 8 of the ECHR was described through the following cases: *Malone v. the United Kingdom*[11], *Amann v. Switzerland*[12], *and Copland v. the United Kingdom*[13].

Finally, the approach to balancing was examined with the help of cases *Magyar Helsinki Bizottság v. Hungary*[14], including the Dissenting opinion issued by Judge Spano and joined by Judge Kjølbro[15], and the Concurring opinion of judges Nussberger and Keller[16], and *Centre for Democracy and the Rule of Law v. Ukraine*[17].

[9] The European Court of Human Rights. 8 November 2016. Grand Chamber judgment *Magyar Helsinki Bizottság v. Hungary*, Case no. 18030/11.
[10] The European Court of Human Rights. 24 February 2020. Court judgment *Szurovecz v. Hungary*, Case no. 15428/16.
[11] The European Court of Human Rights. 2 August 1984. Court judgment *Malone v. the United Kingdom*, Case no. 8691/79.
[12] The European Court of Human Rights. 16 February 2000. Grand Chamber judgment *Amann v. Switzerland*, Case no. 27798/95.
[13] The European Court of Human Rights. 3 July 2007. Court judgment *Copland v. the United Kingdom*, Case no. 62617/00.
[14] *Magyar Helsinki Bizottság v. Hungary* (no. 9).
[15] The European Court of Human Rights. 8 November 2016. Grand Chamber judgment *Magyar Helsinki Bizottság v. Hungary*, Case no. 18030/11. Dissenting opinion of judge Spano joined by judge Kjølbro.
[16] The European Court of Human Rights. 8 November 2016. Grand Chamber judgment *Magyar Helsinki Bizottság v. Hungary*, Case no. 18030/11. Concurring opinion of judges Nussberger and Keller.
[17] *Centre for Democracy and the Rule of Law v. Ukraine* (no. 1).

PART I. THE RIGHT OF ACCESS TO PUBLIC INFORMATION AND THE RIGHT TO PERSONAL DATA PROTECTION: GENERAL OVERVIEW

In 2017, The Economist published an article named "The world's most valuable resource is no longer oil, but data[18]." Companies like Amazon, Google, Microsoft, and Apple make billions of dollars using the data we provide them with. Although not only tech giants have data about people, the most critical data are stored and managed by states. That is the reason for the information to be properly protected from loss, damage, transfer, and all kinds of wrongdoings. At the same time, people may have a need to access information that a state possesses.

Thus, there are two core rights needed to ensure the comfort of a person's life. The first one is the right to personal data protection, whereas the second is the right of access to information.

With the help of provisions of Article 10 and 8 of the ECHR it becomes possible to ensure the right of access to public information and the right to personal data protection. In the following Chapters, we will examine each of these rights.

Chapter I. The right of access to public information: Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms

Sub-Chapter I of Chapter I. Description of the right of access to public information

Article 10 of the ECHR guarantees the freedom of expression that consists of freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[19].

On the one hand, the article does not clearly state that everyone has the right of access to public information. On the other hand, it ensures freedom of expression for each person, meaning everyone has the right to receive and impart information without any interference from a state. Those peculiarities are crucial for the paper.

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[18] The Economist. *The world's most valuable resource is no longer oil, but data* [interactive]. [reviewed in 20 March 2020]. Available at: <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>

[19] Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14. Rome, 4 November 1950, p. 4. [interactive]. [reviewed in 20 March 2020]. Available at: <https://rm.coe.int/1680063765>

Due to the reasons mentioned, there is room for doubts whether the right of access to public information is guaranteed by Article 10. The scientific community has several points of view on the issue.

N. Tsukhishvili, in her work, stated that *"the right of access to public information is closely related to the right to receive information guaranteed by Article 10 of the ECHR*[20]*."*

Despite the close relationship between rights mentioned, N. Tsukhishvili did not consider them equal. Alas, she has not explained why the right of access to public information falls under the scope of Article 10.

There are other positions on the issue. For example, V. Milašiūtė has taken the position to treat the right of access to information *"as an element of the freedom of expression protected under Article 10 ECHR"*[21]. Her position completely stays in line with the definition given in the Report of the UN Special Rapporteur[22].

The ECtHR analyzed this Report in case *Magyar Helsinki Bizottság v. Hungary*. The Report defined that the right to access information consists of a set of narrower rights[23]:

1. the right of the public to access information of public interest,
2. the right of the media to access information, and
3. the right of individuals to seek information concerning themselves that may affect their rights.

Still, to receive a solid grasp of the ECtHR position, the deep dive into the case law should be conducted.

The first significant case on the right of access to information was *Leander v. Sweden*[24]. In this case, the state refused to provide the applicant with an opportunity to disprove information stored in a secret police-register, and on that ground, the applicant claimed to find a violation of Article 10[25].

The ECtHR found out that Article 10 *"does not, in circumstances such as those of the present case, 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"* (§ 74). Despite the fact that the case was

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[20] TSUKHISHVILI, N. (no. 4), p. 1.
[21] MILAŠIŪTĖ, V. (no.2), p. 8.
[22] *Magyar Helsinki Bizottság v. Hungary* (no. 9), § 42.
[23] Ibid.
[24] MAXWELL, L. *Access to information in order to speak freely: Is this a right under the European Convention?* 2017. [interactive]. [reviewed in 25 March 2020]. Available at: <https://ohrh.law.ox.ac.uk/access-to-information-in-order-to-speak-freely-is-this-a-right-under-the-european-convention/>
[25] The European Court of Human Rights. 26 March 1987. Court judgment *Leander v. Sweden*, Case no. 9248/81, § 69, § 48.

related to a secret police-register, such a conclusion strongly influenced the ECtHR's position that the right of access to information is not guaranteed by Article 10.

However, in further cases, the ECtHR reached different conclusions. The cases *Timpul Info-Magazin and Anghel v. Moldova,* and *Társaság a Szabadságjogokért v. Hungary* had a significant impact on the position shift.

In the case of *Timpul Info-Magazin and Anghel v. Moldova*, the applicants complained that domestic courts' decisions led to interference with their right protected by Article 10[26]. In case, domestic courts stated that the applicants ran a story that contained defamation, awarded to reimburse non-pecuniary damage and ordered the applicant newspaper to publish an apology (§ 19, § 14). It is worth mentioning, the published story was related to *"corruption at the highest State level, for which no one was going to be punished"* (§ 8).

Judging the case, the ECtHR stressed that *"... particularly strong reasons must be provided for any measure affecting ... role of the press and limiting access to information which the public has the right to receive"* (§ 31).

The ECtHR additionally admitted that the applicant acted in good faith by reporting on a public matter (§ 40). Taking into account the circumstances of the case, the ECtHR stated that the *"the interference with the applicant newspaper's right to freedom of expression was not "necessary in a democratic society"* (§ 40). Consequently, the ECtHR stated that the state has violated Article 10 of the ECHR (§ 41).

Two important points have been highlighted in the said judgment. The first one is that actions of the applicant involved matters of public interest, and that the applicant acted in good faith. To our mind, in this way the ECtHR not only set a precedent recognizing the right of access to information but more importantly defined elements which later would be used by the ECtHR as criteria for determining whether the access to information should be guaranteed or not.

In *Társaság a Szabadságjogokért v. Hungary*, the ECtHR also acknowledged that the right of access to information was clearly impaired by the state's actions.

The judgment said that the applicant had been collecting information on a matter of public importance and the authorities hindered that process[27]. Elaborating on the issue, the ECtHR said that *"The Constitutional Court's monopoly of information thus amounted to a form of censorship. Furthermore, given that the applicant's intention was to impart to the*

[26] The European Court of Human Rights. 2 June 2008. Court judgment *Timpul Info-Magazin and Anghel v. Moldova*, Case no. 42864/05, § 21.
[27] *Társaság a Szabadságjogokért v. Hungary* (no. 8), § 28.

public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired" (§ 28).

Moreover, the ECtHR also drew attention to the fact that the interpretation of the "freedom to receive information" tends to be broadened (§ 35).

Essentially, it means that in both cases, the ECtHR held that the right of access to information on other matters of public interest should fall under the scope of Article 10.

However, *Magyar Helsinki Bizottság v. Hungary* seems to be the most iconic case involving the right of access to public information.

The conflict revolved around the situation where the state denied granting the applicant NGO access to requested data[28]. During the proceedings in the ECtHR, the state refused to acknowledge that Article 10 ECHR guarantees the right of access to public information due to the following reasons:

1. the right of access to public documents is regulated by a separate Convention but not the ECHR, and it was done on purpose (§ 74).
2. the right of access to information was designed for other goals but not to be a supplement to freedom of expression (§ 76).
3. the right of access to public information in the scope of Article 10 could not be justified by any existing approach, neither "living instrument" nor a European consensus (§ 76).

The applicant, in turn, demanded to admit that Article 10 protects the right in question. Several facts backed the claims:

1. the ECtHR has already acknowledged that the right to seek information falls under Article 10 (§ 86).
2. the approach considering the right to seek information as freedom of expression's essential part is supported by case law and international documents (§ 87).
3. the ECHR is a "living instrument," thereby, its provisions *"should be interpreted in the light of present-day conditions, taking into account sociological, technological and scientific changes as well as evolving standards in the field of human rights"* (§ 90).

The ECtHR thoroughly analyzed all the reasoning from above and reached the following conclusions. First of all it is not *"prevented from interpreting Article 10 § 1 of the Convention as including a right of access to information"* (§ 149). Moreover, the

[28] *Magyar Helsinki Bizottság v. Hungary* (no. 9), §§ 11-20.

ECtHR could not take a stance where the right of access to information is not lying within the scope of Article 10 as its denial would have severe negative consequences for freedom of expression in general. Such a position can be found in the aforementioned case, where the ECtHR stated the following: *"As is clearly illustrated by the Court's recent case-law and the rulings of other human-rights bodies, to hold that the right of access to information may under no circumstances fall within the ambit of Article 10 of the Convention would lead to situations where the freedom to "receive and impart" information is impaired in such a manner and to such a degree that it would strike at the very substance of freedom of expression"* (§ 155).

Thereby, the ECtHR unambiguously admitted that the violation of Article 10 could take place if the limitation imposed impedes the exercising of the right to receive and impart information.

Going further, the ECtHR highlighted that the right of access to information held by a public authority may arise in cases where *"access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right"* (§ 156).

In order to simplify the process of determining this kind of situation, the ECtHR devised a threshold test, also referred to as threshold criteria[29].

The first criterion of the test is the purpose of the information request. The Court stated that *"it must be a prerequisite that the purpose of the person in requesting access to the information held by a public authority is to enable his or her exercise of the freedom to 'receive and impart information and ideas' to others"* (§ 158). If the refusal to provide information hinders the exercise of the right to freedom of expression that should be treated as a ground for Article 10 to come into play (§ 159).

The second one is dedicated to the nature of the information sought. The information requested should comply with the requirements of the "public-interest test" to prove the need for access to information (§ 161). The need for such an access exists where data if provided, could give more transparency on the way the state conducts public affairs or on matters that may interest the vast majority within the society (§ 161). In the meantime, the ECtHR highlighted that public interest cannot be reduced to the information about individuals' private life, or to "*an audience's wish for sensationalism or even voyeurism"* (§ 162).

[29] *Magyar Helsinki Bizottság v. Hungary* (no. 9), *(vi)* Threshold criteria for right of access to State-held information.

The third criterion to consider is the role of the applicant. The ECtHR pointed out that journalists and NGOs play a significant role in enforcing public debates or creating a platform for such debates acting as "watchdogs" (§§ 165-166). However, this does not mean the right warrantied by Article 10 should protect only media and NGOs, and other subjects remain without any legal protection. In the existing case law, the ECtHR also stated that academic researchers and authors of literature on matters of public concern would be covered with a higher level of protection (§§ 167-168).

The final criterion is aimed at defining if the information was ready and available. The ECtHR determined the need to consider the fact whether the collection of data was needed to provide requested information. In cases where the information in question was "ready and available", the denial of granting access to it should be seen as an "interference" with provisions of Article 10 (§ 169).

We can observe that the case *Magyar Helsinki Bizottság v. Hungary* has shed light on the situation with the right of access to public information. It summarized that the ECtHR would not recognize the right of access to public information in each case, but the decision regarding its presence would be taken basing on the criteria listed above on a case-by-case basis. Respectively, the states would have to ensure that right.

Speaking ahead in the most recent case law the ECtHR heavily relied on the approach first taken in *Magyar Helsinki Bizottság v. Hungary*[30] for defining whether the right of access to public information is protected by Article 10 or not.

It is noteworthy to mention that the ECtHR stays quite flexible when applying the threshold test. In the recent case of *Szurovecz v. Hungary*, the applicant claimed that the state violated his right to impart information by not granting access to the Reception Centre, which housed refugees[31].

The ECtHR omitted the criterion regarding the readiness and availability of information as it could not be derived because the applicant did not request information possessed by the state but wanted to get into the building of the Reception Centre.

The ECtHR underlined the following: *"Obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs,' and their ability to provide accurate and reliable information may be adversely affected"* (§ 52).

[30] *Centre for Democracy and the Rule of Law v. Ukraine* (no. 1).
[31] *Szurovecz v. Hungary* (no. 10), § 3.

The ECtHR opined that disallowing the applicant to get in the Reception Centre is essentially a denial to *"to conduct interviews and take photos inside the Reception Centre prevented him from gathering information first hand and from verifying the information about the conditions of detention provided by other sources and constituted an interference with the exercise of his right to freedom of expression in that it hindered a preparatory step prior to publication, that is to say journalistic research"* (§ 54).

Therefore, we can observe that the ECtHR approaches each particular situation with flexibility, deciding whether a criterion is applicable or not.

The approach of the ECtHR remains a subject for long and heated discussions, though that would be described in more detail in Part III.

Nevertheless, we can conclude that the right of access to information is recognized if the threshold test results were satisfactory, which could be quite adaptable to particular circumstances of the case. However, even in cases where the right is considered protected, it still could be limited. The restrictions would be explored in more detail in the following Sub-Chapter.

Sub-Chapter II of Chapter I. Limitations in relation to the right of access to public information

As outlined above, the right of access to public information may be treated as falling under provisions of Article 10. Still, the guarantees provided by the article are not absolute. It means state laws may impose restrictions in some instances.

Notably, Article 10(2) of the ECHR provides that legislation could set limitations[32].

In his paper, T. Mendel said that *"states therefore have a measure of discretion as to whether and to what extent they impose restrictions to protect the various interests listed in Article 10(2)[33]."* In other words, states possess a margin of appreciation regarding the extent of potential restrictions required for protecting interests enumerated in the mentioned Article.

Mostly, the states have the authority to limit the right of access to public information lawfully, yet the article does not require them to impose limitations[34].

The provisions of Article 10(2) provided a basis for establishing a three-part test that allows measuring the restrictions on freedom of expression, particularly[35]:

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32 MENDEL, T. (no. 5), p. 33.
33 Ibid.
34 Ibid.
35 Ibid; Convention for the Protection of Human Rights and Fundamental Freedoms (no. 19), p. 4.

1. the restriction is prescribed by law,
2. the restriction protects one of the interests listed in Article 10(2), and
3. the restriction is "necessary in a democratic society" to protect that interest.

In practice, it means a state has to prove that imposed restrictions met all criteria mentioned in the test. If any of the criteria are not satisfied, the restriction becomes invalid[36].

Nonetheless, as was noted by T. Mendel in his paper, *"on many occasions, the Court has skipped over certain parts of the test, and only focused on the part which a given restriction most clearly fails to meet. In other cases, the Court, having found a failure to meet one part of the test, declines to consider the following parts, on the grounds that this is unnecessary[37]."*

That is if the ECtHR could find that the restriction has failed to comply with just one of the parts, it may not take into account the remaining criteria.

In order to understand what exactly is considered under the test, we suggest investigating each element more thoroughly.

The first element states that legislation should provide the grounds for any restriction. Even though it is obvious, it is not as simple as it may seem. In no way, law should be considered as just papers and obligations prescribed by a state. Let us dive into details regarding the first restriction.

The definition of "prescribed by law" points to the concept of lawfulness[38]. Analyzing case law W. Schabas noted that the ECHR refers to mentioned concepts throughout its text, using quite similar expressions, e.g., "lawful," "in accordance with the law," and others[39]. He also admitted that, the taken measure should have a firm basis in domestic legislation, and also be foreseeable and accessible, meaning the explanation given by law should be precise enough for helping people to adjust their conduct to requirements prescribed by its clauses[40].

For illustrating the requirements from above, let us consider the example of *Sanoma Uitgevers B.V. v. the Netherlands.* The judgment mentioned above was also analyzed by T. Mendel in his paper. The ECtHR gave an interpretation of "prescribed by law" restriction. It strongly relied on the preceding case law and explained that it understands law not in

36 MENDEL, T. (no. 5), p. 34.
37 Ibid.
38 SCHABAS, W. (no. 7), p. 469.
39 Ibid.
40 Ibid, p. 469-470.

"formal" sense but rather in "substantive" one[41]. The ECtHR also reiterated the law includes "written law" being created by authorities and other regulatory bodies as well as unwritten law[42]. The "law" comprises both statutory law along with judicial practice, so-called judge-made "law[43]."

Thereby, law should not be considered legislative documents only. It may include both judicial practice developed by courts and statutory law. Still, they should stay in line with the requirements of being "foreseeable" and "accessible", otherwise the restriction could not be recognized as such prescribed by law.

According to the second element of the test, the restriction must protect one of the interests enumerated in Article 10(2), or to put it simply to have a legitimate aim. The key peculiarity is the exclusiveness of interests protected by the article[44].

Article 10(2) of the ECHR provides states with the ability to impose the restrictions in cases involving critical interests such as 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[45].

W. Schabas noted that *"In practice, this part of the analysis is rarely very important. It is not uncommon for the Court to simply pass over the issue entirely and move to the heart of the debate which takes place under the rubric of 'necessary in a democratic society', finding that it violates the final component of the test regardless of whether it fulfils a legitimate purpose[46]."*

The outlined interests are quite broad, and their interpretations may vary significantly. For the purpose of the current paper, let us demonstrate a brief example. We will analyze one of the interests, namely "preventing the disclosure of information received in confidence."

In case *Stoll v. Switzerland*, the applicant published information that was allegedly obtained from breaching official secrecy by an unidentified person, in a newspaper named

41 The European Court of Human Rights. 14 September 2010. Grand Chamber judgment *Sanoma Uitgevers B.V. v. the Netherlands*, Case no. 38224/03, § 83.
42 Ibid.
43 Ibid.
44 MENDEL, T. (no. 5), p. 38.
45 Convention for the Protection of Human Rights and Fundamental Freedoms (no. 19), p. 4.
46 SCHABAS, W. (no. 7), p. 471.

Sonntags-Zeitung[47]. As a result, the applicant was convinced in an offence under domestic laws (§§ 27-34).

The applicant insisted that his conviction for the publication had violated the right to freedom of expression guaranteed by Article 10 of the ECHR (§ 45). However, the ECtHR reached another conclusion analyzing the merits of the case. As the information used for the publication was sneaked from a diplomat's report, the ECtHR emphasized that the state had the respective interest to protect its diplomatic activities from outside interference (§ 125). So, if the state can claim that the confidential information was used, and then properly prove that fact, the legitimate aim element comes into play, in turn, satisfying this part of the threshold test.

The last but not least test element is the necessity in a democratic society. As judicial practice has shown, the overwhelming majority of cases were decided on the basis of this part of the test[48]. In its case law, the ECtHR explained the meaning of the word "necessary" mentioned in Article 10(2).

To determine the "necessity," the ECtHR considers if there was "a pressing social need.[49]" W. Schabas provides us with the following example: if the freedom of the press is somehow limited, the primary democratic society's interest would be to restore a free press. Thereby, in case the freedom of the press in question, the state must decide carefully if there is any pressing social need to take restrictive measures[50].

The following step is to assess the reasoning provided by the national authorities[51]. The reasons have to justify the interference conducted and show that the measures taken were proportionate to the purpose sought[52].

The case to illustrate the mentioned element is *Khurshid Mustafa and Tarzibachi v. Sweden.* The applicants claimed that their freedom to receive information was violated as they were deprived of the opportunity to receive TV programmes in Arabic and Farsi from their country of origin[53]. It was of particular importance for the applicants, as they were a family of immigrants with three children, who may desire to maintain close liaison with their culture and language (§ 44). The refusal to provide them with sufficient conditions for obtaining content in their native tongues even forced them to relocate to Västerås, which is

47 The European Court of Human Rights. 10 December 2007. Grand Chamber judgment *Stoll v. Switzerland,* Case no. 69698/01, §§ 17-18.
48 MENDEL, T. (no. 5), p. 39.
49 SCHABAS, W. (no. 7), p. 474.
50 Ibid.
51 Ibid.
52 Ibid.
53 The European Court of Human Rights. 16 March 2009. Court judgment *Khurshid Mustafa and Tarzibachi v. Sweden,* Case no. 23883/06, § 44.

about 110 kilometers west of Stockholm (§ 14). Consequently, the first applicant *"had much longer and costlier trips to and from work and the applicants' three children had had to change nursery and school and leave friends"* (§ 14).

The ECtHR assessed all the circumstances of the case, including the fact the applicants had lived in the apartment they left for more than 6 years (§ 49). Eventually, the ECtHR judged that the displacement of the applicants from the apartment what unproportionate to the pursued aim (§ 49). Considering all the aforesaid, the ECtHR concluded that such *"interference with the applicants' right to freedom of information was not 'necessary in a democratic society'"* (§ 50).

The case illustrates that if the measures taken are not proportionate to the purpose of the limitation, the necessity criterion would not be satisfied.

Therefore, interference with the right of access to information could be justified only if all three elements of the test are met. Still, the ECtHR does not blindly follow the test but resolves each situation on a case-by-case basis.

Chapter II. The right to personal data protection: Article 8 of the the Convention for the Protection of Human Rights and Fundamental Freedoms

Sub-Chapter I of Chapter II. Description of the right to personal data protection

Article 8 of the ECHR ensures every person's right to respect for private and family life, his/her home, and correspondence[54].

The ECtHR has paid close attention that Article 8 includes a wide range of interests[55]. It encompasses the right to a person's image, i.e., photo or video; personal development and identity like the right to develop relations with other people[56]. Business and professional activities are also a part of private life[57].

Referring to cases like *Amann v. Switzerland*[58] and *Rotaru v. Romania*[59], J. Kokott and C. Sobotta outlined that *"the Court has applied Article 8 of the European Convention*

[54] Convention for the Protection of Human Rights and Fundamental Freedoms (no. 19), p. 4.
[55] *Privacy and data protection Explanatory Memorandum*, § 2. [interactive]. [reviewed in 10 April 2020]. Available at: <https://www.coe.int/en/web/freedom-expression/privacy-and-data-protection-explanatory-memo>
[56] Ibid.
[57] Ibid.
[58] *Amann v. Switzerland* (no. 12).
[59] The European Court of Human Rights. 4 May 2000. Grand Chamber judgment *Rotaru v. Romania*, Case no. 28341/95.

on Human Rights (covering the right to privacy) to give rise to a right of data protection as well[60]*."*

As was noted by M. Bem, the ECtHR has thoroughly analyzed numerous situations closely related to data protection. Various issues were addressed in judgments, among them there are cases on[61]:

1. Transfer of medical data by the hospital to authority controlling the quality of healthcare services[62];
2. Collection of genetic and biometric data by the police[63];
3. Collection of banking data by the Prosecutor's Office[64];
4. Publishing by a journal of information about individuals' taxable incomes and assets[65] and many more.

To form an overall picture of the ECtHR practice on the right to personal data protection, let us delve deeper into the way how the judicial practice was formed.

One of the first notable cases was *Malone v. the United Kingdom*, where the applicant's telephone conversations was intercepted upon instructions of the public authority[66]. The ECtHR emphasized that *"conversations are covered by the notions of 'private life' and 'correspondence' the admitted measure of interception involved an 'interference by a public authority'"* (§ 64).

Therefore, the state violated the applicant's right under Article 8 by intercepting and release of his communications (§ 89). Despite the importance of the judgment itself, the position of Judge Pettiti is also worth noting. Judge Pettiti has given a concurring opinion, which was aimed at drawing attention to the growing use of personal data by states. More precisely, the Judge warned that the significant threat for democratic societies in 1980-1990 comes from the public authorities' interest in citizen's day-to-day life[67]. From our perspective, that had a significant influence on the following ECtHR cases.

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60 KOKOTT, J.; SOBOTTA (no. 6), p. 223.

61 BEM, M. *Overview of the recent ECHR case-law related to data protection*, 2019, p. 12-13. [interactive]. [reviewed in 16 April 2020]. Available at: <http://www.ejtn.eu/PageFiles/17861/Overview_of_the_ECHR%20case_law_related_to_data_protection.pdf>

62 The European Court of Human Rights. 29 July 2014. Court judgment *L.H. v. Latvia*, Case no. 52019/07.

63 The European Court of Human Rights. 4 December 2008. Grand Chamber judgment *S. and Marper v. the United Kingdom*, Case nos. 30562/04 and 30566/04.

64 The European Court of Human Rights. 7 October 2015. Court judgment *M.N. and Others v. San Marino*, Case no. 28005/12.

65 The European Court of Human Rights. 27 June 2017. Grand Chamber judgment *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, Case no. 931/13.

66 *Malone v. the United Kingdom* (no. 11), § 64.

67 The European Court of Human Rights. 2 August 1984. Court judgment *Malone v. the United Kingdom*, Case no. 8691/79. Concurring opinion of Judge Pettiti.

In a bunch of other cases like *Leander v. Sweden, Amann v. Switzerland, and Copland v. the United Kingdom*, the ECtHR went even further.

For instance, in case *Leander v. Sweden* that was already mentioned in the section regarding access to information, in connection to rights guaranteed by Article 8, the ECtHR concluded the following. As the secret police-register has undoubtedly contained data closely related to the applicant's private life, and later released that information without providing the applicant with an opportunity to disprove it, the ECtHR determined the interference with rights protected under Article 8 of the ECHR[68].

The said judgment has strongly influenced the further judicial practice. Thus, in case *Amann v. Switzerland*, the ECtHR reiterated that any storage of the information related to an individual's private life *"falls within the application of Article 8[69]."*

The ECtHR also clarified that the concept of "private life" should not be interpreted narrowly. Therefore, respect for private life includes the right to establish and develop relationships with other human beings, professional and business activities etc. (§ 65). Additionally, the ECtHR underlined that it uses the broad interpretation defined in the CoE's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which identifies personal data as *"any information relating to an identified or identifiable individual"* (§ 65).

The judgment defined that data stored by the state was closely tied to the private life of the applicant; thus, it points out to the applicability of Article 8 of the ECHR (§ 67).

Finally, in case *Copland v. the United Kingdom*, the ECtHR stated that collection and storage of personal data *"amounted to an interference with ... right to respect for ... private life and correspondence within the meaning of Article 8"* as the applicant has no knowledge about how the information about her use of the internet, telephone, and emails was used[70].

Those cases above lead us to the following conclusion: the ECtHR uses the widest interpretation of personal information for resolving cases related to personal data protection. It also admitted that the right to personal data protection is guaranteed by the ECHR provisions, yet the ECtHR did not devise any specific threshold test as was with the right of access to information.

Nevertheless, as with the right of access to public information, the right to personal data protection should not be perceived as an absolute. The restrictions may be imposed on

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[68] *Leander v. Sweden* (no. 25) § 48.
[69] *Amann v. Switzerland* (no. 12), § 65.
[70] *Copland v. the United Kingdom* (no. 13), § 44.

certain conditions, and those restrictions would be described in more detail in the following Sub-Chapter.

Sub-Chapter II of Chapter II. Limitations in relation to the right to personal data protection

As described in the preceding Sub-Chapter, the ECtHR judicial practice stands on the point that personal data protection lies within the scope of Article 8 ECHR.

Still, to limit personal data protection, certain conditions or criteria have to be met. Those criteria are similar to the ones described in Sub-Chapter II of Chapter I.

The first criterion stipulates the limitation imposed should be a restriction prescribed by law[71]. This particular requirement as it was already discussed is met if the limitation has some basis in domestic law and is accessible, foreseeable, and supported by the respective procedural warranties for preventing the arbitrariness[72].

The illustration for this criterion would be the case of *Rotaru v. Romania*. The RIS was collecting and storing information about the applicant, including data about his private life[73]. The applicant pledged a violation of his right protected by Article 8 (§ 41)

The ECtHR determined that the interference with the right to respect for private life took place (§ 46), and after that, started applying the aforementioned criteria for defining whether the imposed limitation was justified. Analyzing whether the restriction was prescribed by law, the ECtHR reached a conclusion that *"the storing of information about the applicant's private life had a basis in Romanian law* (§ 53)*"* and stated that the law regulating the issue satisfied the accessibility requirement (§ 54).

However, the ECtHR emphasized that the Romanian legislation did not provide sufficient safeguards (§ 60), and *"does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities* (§ 61)*."* On that basis, the ECtHR judged that the storage and usage of the applicant's personal information were not in accordance with the law; thus, such actions constitute a violation of Article 8 (§ 62-63).

All in all, the said above demonstrates that despite the restriction was accessible and defined by law, it is not enough to conform with the criterion. Considering the ECtHR's position, we believe that the criterion would be considered met if domestic legislation is

71 BEM, M. (no. 61), p. 15.
72 Ibid.
73 *Rotaru v. Romania* (no. 59), § 41

clear enough regarding the scope and manner of how the authorities could exercise a margin of appreciation given to them.

By analogy with Article 10, the second criterion stipulates that the restriction should pursue a legitimate aim. Such an aim has to be intended to protect the interests listed in Article 8(2) of the ECHR, namely the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others[74].

In order to consider this criterion we will examine the case of *P. and S. v. Poland*.

This case concerned a minor, who was raped (that resulted in pregnancy) and wanted to perform an abortion[75]. The background shows that the hospital where the applicant planned to perform an abortion issued a press release to the effect that it would not perform a procedure and provided to the journalists information on circumstances (§§ 23-24). Eventually, the information about the abortion reached national news, newspapers and *"was subject of various publications and discussions on the internet"* (§ 24).

Though the Government assured that *"the press release did not contain the applicants' names or other details making it possible to establish their identity"* the applicant was contacted numerous times by many people (§ 130).

Assessing the legitimate aim, the ECtHR did not regard media interest as a justification for the disclosure regarding the applicant's undesired pregnancy and the refusal to conduct an abortion (§ 133). The Court elaborated further: *"... it cannot be regarded as compatible either with the Convention standards as to the State's obligation to secure respect for one's private or family life, or with the obligations of the medical staff to respect patients' rights laid down by Polish law. It did not therefore pursue a legitimate aim* (§ 133)*."*

The last but not least criterion is that the restriction has to be "necessary in a democratic society[76]." This criterion would be illustrated by aforementioned case *Leander v. Sweden*. Analyzing the criterion of necessity, the ECtHR stated that *"the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued[77]."*

Nevertheless, the ECtHR acknowledged that national authorities have a margin of appreciation to define the restriction, yet the scope of it strongly depends on the pursued

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74 Convention for the Protection of Human Rights and Fundamental Freedoms (no. 19), p. 4.
75 The European Court of Human Rights. 30 January 2013. Court judgment *P. and S. v. Poland*, Case no. 57375/08, § 6-8.
76 BEM, M. (no. 61), p. 20.
77 *Leander v. Sweden* (no. 25), § 58.

legitimate aim as well as on the nature of the interference (§ 59). Elaborating on the issue, the judgment goes as follows: *"... the interest of the respondent State in protecting its national security must be balanced against the seriousness of the interference with the applicant's right to respect for his private life* (§ 59)*."*

At the same time, the ECtHR admitted that the fact the applicant was not notified about the release of information could not back the claim that the interference was not *"necessary in a democratic society in the interests of national security* (§ 66)*."* Thereby, the ECtHR took into account the margin of appreciation national authorities possessed and concluded that the state had all grounds to consider that national security interests prevailed over interests of the applicant (§ 67). As a result, the imposed limitation was proportionate to the legitimate aim pursued (§ 67). Therefore, the third criterion was satisfied.

As was previously said, the restriction was imposed lawfully if and only if all three test criteria were satisfied. However, circumstances of cases may drastically differ, and because of this fact, the ECtHR considers each on a case-by-case basis.

To sum up, the ECtHR guarantees the right to personal data protection and the right of access to public information, although the Court underlines that those rights are not absolute and could be limited according to the provisions of the ECHR.

PART II. ANALYSIS OF THE EUROPEAN COURT OF HUMAN RIGHTS APPROACH ON BALANCING THE RIGHT OF ACCESS TO PUBLIC INFORMATION AND THE RIGHT TO PERSONAL DATA PROTECTION

Today's world is loaded with data. Two fundamental rights that ensure a person's ability to seek information and to be confident that his/her data are thoroughly protected were described in detail in the preceding Part.

Nevertheless, in various situations, the right of access to information and the right to personal data protection may conflict with each other. The question of finding the balance between the two is a far more complicated task than it may seem at first glance.

Balancing should be mainly done by domestic laws. However, in certain situations, the general approach should be prescribed by some higher-order entities. For this reason, the ECtHR developed its approach for dealing with balance-related issues.

In the following chapters, we will examine the situations when a conflict may arise. In order to define how such conflicts should be resolved and how a right should be balanced, we will take a closer look at the ECtHR approach. For this purpose, most worth-noting cases would be analyzed in detail.

Chapter I. The necessity of balancing the right of access to public information and the right to personal data protection: pre-requisites and examples

States hold loads of information about people and companies. While using data to ensure the proper work of public bodies, states do not actually store information for themselves. They rather keep data on behalf of the public[78]. In general, it means authorities should give individuals and entities access to data if requested[79].

Currently, approximately one hundred states have enforced laws related to public information access[80]. The laws grant individuals a right of access to public information controlled by authorities, and prescribe authorities to disclose the "key type of information[81]."

[78] *International Standards: Right to Information, 2012.* [interactive]. [reviewed in 27 April 2020]. Available at: < https://www.article19.org/resources/international-standards-right-information/>.
[79] Ibid.
[80] Ibid.
[81] Ibid.

Notably, 132 countries also drafted and adopted laws on privacy and the protection of data[82]. It shows the tendency where states are eager to solidify the level of data protection and prevent the use of personal data without owners' explicit consent.

Those facts indicate the following: both the right to personal data protection and the right to information are crucial for the modern information society.

Indeed, the rights mentioned are going hand in hand and could barely work separately. They complement each other in many ways because it is essential to protect data from unjustified access as well as to give some needed information without overprotection. Plus, they help to ensure the accountability of authorities to citizens and entities in the age of information[83].

In its 1986 recommendation, the Council of Europe emphasized that the roles of the rights are "*not mutually distinct but form part of the overall information policy in society[84].*"

Mentioned above, though, does not exclude the potential conflicts between the rights. For example, a conflict may arise when domestic legislation does not reflect when the rights overlap.

David Banisar, in his paper, listed the situations that are on the edge of conflict. Let us mention some of them[85]:

1. the situations involving personal data of public officials. For example, how to make a clear distinction between personal and public information of a public official? What data could be published and given access to? Should a state protect biographical data, photographs, salary records, employment records, home addresses, records of financial assets, and medical histories of public officials and to what extent?
2. the situations involving private individuals data held by governments in court, social program, professional records, or public registers. For instance, should identities of private individuals like names, birth dates etc. be removed before information made public in such registers?

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82 *Data Protection and Privacy Legislation Worldwide* [interactive]. [reviewed in 11 May 2020]. Available at: <https://unctad.org/en/Pages/DTL/STI_and_ICTs/ICT4D-Legislation/eCom-Data-Protection-Laws.aspx>

83 BANISAR D. (no. 3), p. 9.

84 Ibid.; Recommendations and resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of media and information society, Strasbourg, 2016, p. 34. [interactive]. [reviewed in 27 April 2020]. Available at: <https://rm.coe.int/16806461f9>

85 BANISAR D. (no. 3), p. 12-15.

The list goes way further. For example, how should a state deal with data about a candidate for the official position that withdrew his/her candidacy? To delete or not to delete the information about him from public sources and government records?

Other examples are a bit more tricky: what if an individual, media, or a NGO requests information about a well-known person that is not a public official? What decision should be taken if they request information about a person performing duties for authorities, but the person is not falling into a definition of "a public official?"

In each case, public bodies have to determine whether the information could be granted and handed over to the requestor or not. The answer to the question is often ambiguous.

Things become even more complicated as situations vary drastically. Thus, we will try to categorize all of them and describe several cases to illustrate each category.

To find the "right" approach for categorization is a complicated task. For the interest of this chapter, we will split all the cases into two categories depending on the person the requested information is about.

The first category concerns the disclosure of information regarding public figures. Let us emphasize in advance that this category encompasses various individuals.

The Parliamentary Assembly of the Council of Europe defined in paragraph 7 of Resolution 1165 (1998) who is the public figure. It states that *"public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."*[86]

According to the Resolution above, "public figures" is a broad category that includes persons who can influence or play a significant role in public life.

The ECtHR position on the issue also should be taken into account. Referring to the judgments made by the ECtHR, K. Hughes noted in her paper as follows: "*Although initially the Court limited the public figure concept to those exercising official functions, the Court has subsequently vastly expanded public figures contradicting its stance on the need for clarity and rendering the concept increasingly laden with moralistic determinations. The doctrine now extends far beyond elected officials and even celebrities to include businessmen, journalists and lawyers, well-known academics, as well as other*

[86] Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe [interactive]. [reviewed in 27 April 2020]. Available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en>

persons who have a "position in society" or have "entered the public scene" rendering the scope of its application difficult to predict.[87]"

It is worth noting that in case *Caragea v. Romania* even company managers were seen as public figures[88].

In case *Von Hannover v. Germany (No. 2)*, the ECtHR drew a distinct line between the private individuals and public figures' right to protection of private life. It stated that individuals that have no impact on public life and remain unknown to a broad audience *"may claim particular protection of his or her right to private life, the same is not true of public figures.*[89]*"*

As we see it, the ECtHR did not conclude public figures' right to personal data protection should not be protected. Such a position rather shows that the ECtHR has different approaches to rights protected by Article 8, depending on whether public figures or private individuals are involved.

We will give examples of the situations that could arise in this category to illustrate the occasions where the balancing is needed.

The first example where the balancing might be required is a situation that occurred in Ukraine in January 2020[90]. The C-level executives of Naftogaz, national oil and gas company of Ukraine, were going to receive a 1 percent bonus from around 2.9 billion dollars received. Thereby, the sum devoted to top management was about 29 million dollars or 700 million hryvnias in equivalent.

Such enormous bonuses for the state-owned company executives caused considerable attention and public interest. Society's attitude showed a need for disclosure of information regarding the persons intended to receive bonuses and the amount of a bonus for each manager. In essence, the society wanted to disclose data of great public interest.

Though Ukrainian society has not taken any actions for obliging Naftogaz to disclose the aforementioned information, the situation encompasses a potential conflict between a right of access to public information and a right to personal data protection.

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87 HUGHES, K. The public figure doctrine and the right to privacy. Cambridge Law Journal, 78(1), March 2019, p. 73. [interactive]. [reviewed in 27 April 2020]. Available at: <https://www.cambridge.org/core/journals/cambridge-law-journal/article/public-figure-doctrine-and-the-right-to-privacy/FE9076D59920F8F95CC35AA2586180A0>

88 The European Court of Human Rights. 8 March 2016. Court judgment *Caragea v. Romania*, Case no. 51/06, §§ 5-10, § 33.

89 The European Court of Human Rights. 7 February 2012. Grand Chamber judgment *Von Hannover v. Germany (no. 2)*, Case nos. 40660/08 and 60641/08, § 110.

90 *Топ–менеджери "Нафтогазу" отримають премію в 700 мільйонів* [interactive]. [reviewed in 27 April 2020]. Available at: <https://www.epravda.com.ua/news/2020/01/13/655746/>

As managers of a state company could be considered “public figures,” they could be subject to public scrutiny. However, the information about the managers’ salary is personal data.

In case individuals, media or NGOs request the information about Naftogaz managers' salaries and the amount of their bonuses, the situation may end up in a conflict between a right of access to public information and a right to personal data protection. It is a splendid example of a situation where balancing between personal data protection and public interest is needed.

The other notable case also took place in Ukraine. The key difference from the case above is that domestic courts eventually resolved the situation. Let us describe the circumstances.

The Public register of politically exposed persons of Ukraine maintained by an NGO, has kept records about the ex-People’s Deputy of Ukraine, which was a suspect in the high profile, 700 million hryvnias corruption case[91]. The National Anti-Corruption Bureau of Ukraine published information about the same person on its website, and the article had a heading containing the person’s surname[92].

In turn, the public person did not agree with such a situation and brought a lawsuit saying his name was being used unlawfully. He demanded the Bureau and NGO in charge of the aforementioned register to admit that published information infringes on his non-property rights on the name usage and impairs the goodwill[93].

Both the Bureau and the register’s administrators have released the information with the name to public access on the web. Even though the case has drawn the attention of a broad audience, the name is considered personal data. That is where the balancing between the right to information and data protection should take place.

At the time of writing, the Ukrainian courts have taken the position that personal data protection of the person is prevailing over the public interest in this particular case[94].

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91 *Суд знехтував правом на свободу слова і зобов’язав ЦПК видалити інформацію про екснардепа Мартиненка* [interactive]. [reviewed in 27 April 2020]. Available at: <https://antac.org.ua/news/sud-znekhtuvav-pravom-na-svobodu-slova-i-zobov-iazav-tspk-vydalyty-informatsiiu-pro-eksnardepa-martynenka/>

92 *Безіменні Мартиненки та Труханови: Верховний суд проти поширення імен фігурантів резонансних справ* [interactive]. [reviewed in 27 April 2020]. Available at: <https://antac.org.ua/news/bezimenni-martynenky-ta-trukhanovy-verkhovnyy-sud-proty-poshyrennia-imen-fihurantiv-rezonansnykh-sprav/>

93 Ibid.

94 Ibid; Kyiv Court of Appeal. 2 September 2019. Case no. 757/30830/18-ц. [interactive]. [reviewed in 27 April 2020]. Available at: <http://reyestr.court.gov.ua/Review/84403624>

We will go no further into details of Ukrainian legislation and the judicial system. Still, that was another example where the balancing between two rights is crucial and should be performed.

We described the first category when third parties try to obtain information about public figures. The other category is related to cases individuals or entities seek information about persons other than public figures.

The majority of individuals, as a rule, have not involved themselves in public life; therefore, they want to exercise their right to personal data protection fully.

We can encounter problems in plenty of situations. For example, students take an exam, and the state later publishes their name, surname, exam grades on a publicly accessible register.

Could this situation be treated as a breach of the student's rights? It is hard to find a straight and unambiguous answer. However, the potential situation should be adequately balanced. It means the public importance of data has to be assessed, and the appropriate data protection measures should be chosen if necessary. In other words, the balancing may and should be performed not only in cases concerning public figures but also when individuals are involved.

So, the categories the majority of situations fall into are cases where:

1. personal data of public figures (persons who entered the public domain) are requested;
2. personal data of all other individuals that are not public figures are requested.

The categories above were used to illustrate the two main groups of cases depending on the person whose data is requested. We do not state that other factors except a person's publicity should not be considered during splitting into categories. Each case is unique, and numerous factors like the role of the person, types of personal data could come into play. We will discuss those factors in the following chapters.

David Banisar in his paper used an akin approach for categorizing situations where balancing is needed. However, he defined categories where data about public authorities and data that do not belong to public authorities are involved[95]. From our point of view, a concept of "public figures" better characterizes persons involved in public life than the concept of "officials". Thereby, the division would be more precise and clear. The cases may vary drastically; thus, there is a severe need for an approach that could be used in the

[95] BANISAR D. (no. 3), p. 12-15.

majority of situations. The ECtHR addressed that need in its case law. We will elaborate on this in the following chapter.

Chapter II. Case law of the European Court of Human Rights on balancing the right of access to public information and the right to personal data protection

It is almost impossible to foresee all the diversity of situations where the balancing of the right of access to public information and personal data protection may be needed. That fact makes the work of legislators and the judicial system quite complicated.

A necessity to develop a unified approach that would work in the majority of cases is a complex although vital task. The ECtHR continues to work in that direction.

It is worth pointing out that the ECtHR approaches every case differently, carefully considering the factual background of the case and the context in which the alleged rights' conflict took place. However, some kind of guidelines that would help resolve most conflicts of rights are already available in the existing case law.

Unfortunately, there are not so many ECtHR cases concerning the balance between the right to personal data protection and the right of access to public information. Some of them have already been mentioned in previous chapters like cases *Társaság a Szabadságjogokért v. Hungary* and *Magyar Helsinki Bizottság v. Hungary.* We will get back to the latter for the further analysis below.

The crucial goal of the following Sub-Chapters is to extensively analyze the approach the ECtHR applies when balancing the aforementioned rights.

So, the first subchapter will describe the case of *Magyar Helsinki Bizottság v. Hungary*, which, in our opinion, played a fundamental role and influenced the following judicial practice of the ECtHR.

The second and one of the most recent ECtHR cases is the case of *Centre for Democracy and The Rule of Law v. Ukraine.*

Let us move straight to the reasoning written in the aforementioned cases and describe the attitude of the ECtHR to balancing-related issues.

Sub-Chapter I of Chapter II. The general approach to balancing the right of access to public information and personal data protection taken in case *Magyar Helsinki Bizottság v. Hungary*

This case has already been analyzed in the previous chapters, giving us a solid grasp about applicability criteria and the issues related to the right of access to public information. The ECtHR also, in great detail, explained that the ECHR protects the right mentioned above under certain circumstances.

The other value of the judgement is that it depicts the approach to balancing the right of access to public information and the right to personal data protection.

The goal of the Sub-Chapter is to identify and highlight the key point from the ECtHR's reasoning and define the universal guidelines for resolving cases related to balancing.

We will start describing only those facts of the case that are dedicated to balancing both rights. In this case, the applicant was a NGO whose main goals were to monitor how human rights standards were implemented in Hungary as well as to represent victims of alleged human rights abuses[96]. The applicant's primary focus within the latter was on *"access to justice, conditions of detention, and the effective enforcement of the right to defence"* (§ 10).

During one of its researches regarding the appointment of defense counsels, the applicant reached a conclusion that the system of ex officio appointed defenders worked improperly (§§ 11-14). It turned out the police chose the defendants from the pre-defined list of law firms and attorneys which led to the situation where the same police department appointed the same attorneys for most cases (§ 14).

Under the research, the applicant requested access to the names of public defenders and all the assignments given to them from twenty-eight police departments. The requested data was intended to show how police made decisions when appointing public defenders (§ 16). The applicant justified its request by saying that such information constituted public interest, thereby, should have been disclosed (§ 16).

Two police departments refused to provide the applicant with any information reasoning their decision with the facts that the names of attorneys are personal data (§§ 18-20). The departments also stated they have to deal with the unproportionate burden imposed by the collection of data for answering the request (§ 19).

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[96] *Magyar Helsinki Bizottság v. Hungary* (no. 9), § 10.

The position of both sides clearly illustrates the conflict between the rights outlined in Article 8 and 10 of the ECHR.

We will skip the fact the ECtHR admitted Article 10 applicable in the current case, and will jump right into the balancing issue.

In order to find the right balance between those positions, the ECtHR uses criteria described in the previous Chapters:

1. the restriction should be prescribed by law;
2. the restrictions protects interests listed in Article 10(2);
3. the restriction is "necessary in a democratic society."

As we previously noted, if at least one criterion is not met, there is no balance between data protection and access to information. In the current case, the ECtHR paid close attention to the last criterion of the test.

To resolve the conflict, the ECtHR has taken into account a number of facts.

First thing, it considered the person about whom that data was requested. We have already emphasized the importance of the difference between public figures and individuals that are not involved in public life.

However, the circumstances of the case go even further. Hungarian law defines personal data as any information that may help to identify an individual. The information that encompasses personal data should not be revealed *"unless this possibility was expressly provided for by law, or the information was related to the performance of municipal or governmental (State) functions or was related to other persons performing public duties"* (§ 188).

The ECtHR also emphasized that the Hungarian Supreme Court excluded public defenders from "other persons performing public duties", the NGO had no chance to prove that the revelation of information was needed for exercising its watchdog role (§ 188) .

The NGO has claimed that the state had no valid reasons not to grant the requested information regarding the public defenders (§ 189) .

After considering the arguments of both sides, the ECtHR found that *"the disclosure of public defenders' names and the number of their respective appointments would not have subjected them to exposure to a degree surpassing that which they could possibly have foreseen when registering as public defenders"* (§ 195) .

We reckon that the ECtHR pointed out the importance of data owners' role within society. Public defenders should have foreseen their job plays a significant public role. That, in turn, may expose them to a higher level of public attention compared to ordinary

individuals. That shows that the importance of the role played should be considered for the purpose of balancing.

The second factor that was reviewed is the data requested. The applicant wanted to access the information about the name and the number of appointments the public defender had in a particular region of the state (§ 194). Therefore, the request asked to grant access to information about professional activities that lies within the public domain.

The ECtHR took into account several facts during the assessment of the information. First of all, the name of a person is personal data, but in the circumstances of the case, the purpose was to obtain more information about public proceedings the person was involved in. Another significant point is that the requested information in no way requires information regarding their legal advice or tasks done for their clients (§ 194).

In our opinion, that shows that the type of data requested is essential for the goals of balancing.

The ECtHR considers requested data in close connection with the third element: the purpose of obtaining data. The NGO tried to research the public defenders' system efficiency and the ways how the police made appointments of those defenders to cases (§ 197).

We may note that from NGO's perspective, it was needed to raise public discussion regarding the public defenders' appointment schema and its efficiency. It means that the ECtHR acknowledges the importance of the request's goal for balancing.

And that brings us to the fourth element, namely the importance of data for the public interest. The applicant was intended to enforce a debate about the public defenders' system, a public matter that could have been interesting to the society as a whole. Consequently, the refusal of the police to transmit the requested data to the applicant hindered the ability of the latter to contribute to public debates (§ 197).

The ECtHR reached the following conclusion:

"*The potential repercussions of police-appointed lawyers on defence rights have already been acknowledged by the Court in the Martin case. The issue under scrutiny thus going to the very essence of a Convention right, the Court is satisfied that the applicant NGO intended to contribute to a debate on a matter of public interest. The refusal to grant the request effectively impaired the applicant NGO's contribution to a public debate on a matter of general interest*" (§ 197).

The final point is whether the disclosure of data may affect the person about whom request is made. As was said above, the applicant only wanted to receive statistical data regarding the number of appointments that each public defender had within the publicly

funded national legal-aid program. Eventually, the ECtHR did not find any negative consequences for the public defenders' privacy if the information requested was granted (§ 198) .

Magyar Helsinki Bizottság v. Hungary is a crucial case to locate all the guidelines that could be used for creating a more unified approach to balancing the right of access to public information and the right to personal data protection.

Taken into account all the points described above, the issues that may help to balance both rights more efficiently are as follows:

1. the person, whose data are involved in the case. If a person performs the "functions" that expose them to a public domain, they tacitly agree to the more considerable attention to their data.
2. the person who requests data. In a case where persons like NGOs, media, or academics request data for achieving some results that may be important to the public, such data more likely should be provided.
3. the purpose of the request. The purpose of the request should be the exercise of freedom of expression in good faith. For example, it should be a necessary preparatory step in journalistic investigation.
4. the public interest in the data requested. The information is more likely to be provided if the end goal of receiving it is to bring some discussions or value to society.
5. the effect on the data owner's privacy. If there are no significant threats to the privacy of the person whose data are requested, data access should be granted to the requestor.

In our opinion, the points listed above are quite universal and well-suited for many cases but we cannot say that they cover all occasions. In some situations, completely different facts could be considered, and they may have a profound effect on the case.

Sub-Chapter II of Chapter II. The general approach to balancing the right of access to public information and personal data protection taken in case *Centre for Democracy and The Rule of Law v. Ukraine*

The ECtHR continued to use the approach taken in the case of *Magyar Helsinki Bizottság v. Hungary* in situations that required balancing the right to personal data protection and the right of access to public information.

One of the most recent judgments on the issue is *Centre for Democracy and The Rule of Law v. Ukraine*. The case illustrates the fact the ECtHR has already designed a reusable approach, and the latter case is just a reaffirmation of it. Though the judgment is not finalized yet, it shows the newest tendencies in the ECtHR judicial practice.

The factual circumstances of the case were as follows. The applicant, a Ukrainian NGO, requested the CEC for CVs of individuals that crossed the electoral barrier and would become deputies in the Ukrainian Parliament[97]. Relying on domestic legislation, the applicant claimed that CVs contain important public information though it has given no details about the way information would be used if provided (§ 11).

The candidates handed their CVs to the CEC in order to run for parliament. A concise summary of each CV was published on the CEC's website (§ 7). The applicant requested the full information contained in CVs, yet the CEC refused to grant an access to data, reasoning it as follows (§ 12):

1. the CEC followed the "broad definition" of confidential information described in the decision of the Ukrainian Constitutional Court in 2012, namely:
   "Information about private and family life covered all information about relations of a monetary and non-monetary nature, events, relations associated with a person and his or her family except for information about performance by public officials of their functions. In particular, it covered information about ethnicity, education, civil status, religious convictions, health, property, address, date and place of birth, information about events in day-to-day, intimate, professional, business and other aspects of life[98]".

[97] *Centre for Democracy and the Rule of Law v. Ukraine*, (no. 1), § 5, §§ 8-11.
[98] Ibid, § 47; Summary to the Decision of the Constitutional Court of Ukraine dated January 20, 2012 No. 2-rp/2012 in the case upon the constitutional petition of Zhashkiv regional council of Cherkassy oblast concerning official interpretation of the provisions of Articles 32.1, 32.2, 34.2, 34.4 of the Constitution of Ukraine [interactive]. [reviewed in 10 May 2020]. Available at: <http://www.ccu.gov.ua/en/docs/285>

2. Ukrainian legislation defined what kinds of information about candidates should be treated as public information. Only such information could have been published on the CEC's website.
3. the CEC had no legal grounds to grant access to the information requested as the personal data could not be used for purposes it was not provided for.
4. the CEC did not have candidates' consent in order to disclose the data requested, which among other things included their work history, including elected positions, family address and telephone numbers.
5. the applicant's request did not ground the need for disclosing the information without the respective consents because of *"national security, economic welfare and human rights."*

The applicant filed a lawsuit against the CEC. Domestic courts stated that the information in question is confidential, and the applicant went to the ECtHR claiming the breach of Article 10. The main goal here is to analyze the ECtHR's approach to balancing both rights, therefore, we will skip the details on the case's admissibility and will focus on the balancing.

During the analysis of the case, the ECtHR found out that a restriction pursued the legitimate aim of protecting candidates' data (§§ 78, 113) though it had doubts about whether the restriction was necessary in a democratic society. In essence, the ECtHR performed the same set of steps for evaluation, as in case *Magyar Helsinki Bizottság v. Hungary*.

The first fact taken into account is the owner of the data requested. In the current case, those were *"public figures of particular prominence* (§ 117)*."* As the ECtHR emphasized, the candidates could have foreseen the public interest in their data at the moment of the registration for the election (§ 117), especially, considering that many candidates were at the top of their parties lists (§ 115). Again we can observe the significance of the person's role in society. We can conclude from the ECtHR's case law that if a person enters a public domain, they should be ready for particular attention from society.

The next point took into account the information that was requested. Candidates submitted CVs to continue their participation in parliamentary elections. The data included in CVs with high probability was intended to gain a review from the public. The ECtHR pointed out that data given within the CV is considered "open" by the Ukrainian legislation (§ 117). So, the information was required for public scrutiny and was not "confidential" as the domestic courts stated.

The third element for consideration was the intended use of data and its purpose. In the initial request to CEC the applicant did not explain the goal data would be used for. The ECtHR acknowledged that the absence of the purpose hindered the authorities' ability to correctly balance the right of access to public information and the right to personal data protection (§ 119). The ECtHR, however, highlighted that Ukrainian legislation did not require the presence of the goal in the request (§ 119). Additionally, the applicant revealed the reasons for receiving the information right after the refusal (§ 119). Therefore, the information was needed for drawing public attention to the election process.

Lastly, the ECtHR considered whether the reveal of data could have an adverse effect in other words *"harmful impact"*on the person (§ 118). It found no evidence that the privacy of politicians could be harmed if the CEC provided data to the applicant.

Namely, the Court stated: *"... there was no attempt to assess the former aspect of the balancing exercise: the degree of potential harmful impact on the politicians' privacy. It was not even explained how the privacy of those two politicians who of their own will had published their CVs could have been harmed under the circumstances*" (§ 118).

We can notice the absence of two elements that were in the case of *Magyar Helsinki Bizottság v. Hungary*. Namely a significance of data to the public interest and requestor's role in society. Though it does not mean the ECtHR has ignored those elements.

Analyzing the factual background of the case, we see that the applicant was convinced the information was of great public interest as it concerned candidates for parliament, including the leaders of various political forces (§ 16). Moreover, the requestor was an NGO fighting for transparent and fair elections, involving itself in the supervision of the election process (§ 16). From our perspective, that fact shows a significant public role of the applicant.

Furthermore, when assessing the existence of interference the ECtHR emphasized the importance of public interest (§§ 84 - 88). Considering the current wording and conclusions, we may notice the following: the ECtHR found that the request asked to disclose information about the candidates, and that information was already revealed in their CVs. The decision to limit access to such data, especially in the context of upcoming elections could not be justified as a necessity in a democratic society (§ 120). Respectively, it means the breach of Article 10 ECHR took place (§ 121).

To sum up, the ECtHR followed almost identical reasoning as in the case of *Magyar Helsinki Bizottság v. Hungary*. The approach developed in the aforementioned case is becoming sort of a framework for all the cases regarding the balancing for Articles 10 and

8 of the ECHR. It helps to tackle the key points of the case during the proceedings, which eases the load on the ECtHR in similar cases.

Another major point here is that the approach is easily extendable. If the future cases will have some obstacles that were not dealt with in the existing case law, the ECtHR would be able to adapt its approach to new circumstances without significant hardships. That shows that the approach could be treated and unified and suitable for the majority of cases.

PART III. THE DISCUSSIONS RELATED TO THE SCOPE OF ARTICLES 10 AND 8 OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND CHALLENGES CONCERNING BALANCING

In the preceding Parts, we have described how the ECHR protects the rights related to data. Also, we took a close look at the judicial practice of the ECtHR and the way it approaches the question of balance, determining crucial aspects that should be considered.

Even though the ECtHR's case law clarified how to deal with various situations and defined a several step test to ease the balancing, a number of theorists and practitioners do not fully agree with the outlined approaches.

It is always useful to analyse different views on the situation for further development and improvement. Therefore, what is now considered merely scientific debates could later be taken into consideration by the ECtHR and might have a great impact on the existing judicial practice.

Chapter I. Ongoing debates on the scope of the relevant rights and issues related to balancing

Sub-Chapter I of Chapter I. Discussions concerning the scope of Article 10

The changes in the ECtHR's case law on Article 10 of the ECHR entailed discussions among theorists and practitioners. Some of them criticize the most recent case law involving Article 10 for going beyond the ECHR scope as the right of access to information is not directly mentioned in the said article. They hold an opinion that such an approach contradicts the established judicial practice and the role of the ECtHR.

In turn, other theoreticians support the approach developed by the ECtHR. Moreover, they believe that further judgments could be more progressive in relation to the right of access to information.

One of the most prominent opinions stating that the right of access to information should not be included in the scope of Article 10 was outlined in the dissenting opinion given by Judge Spano and joined by Judge Kjølbro in case *Magyar Helsinki Bizottság v. Hungary.*

Analyzing this dissenting opinion in his paper, A. Mowbray called it powerful[99]. R. Clayton noted: "*Judge Spano's judgment is particularly interesting because he is a leading exponent of the view that the ECtHR's current role is to defer to the reasoned and thoughtful assessment of Convention rights by national authorities…*[100]"

We will take a closer look at the most fundamental arguments used by the judge and supporting arguments of researchers that stay in line with the position that the right of access to information lies out of Article 10 scope.

The first argument to be discussed is that Article 10 of the ECHR does not mention the right of access to information. Thus, the right of access to or the right to seek information cannot be derived from the wording given in Article 10.

As was noted by G. S. Alfreðsson and A. Eide Article 10 of the ECHR does not expressly speak of the right to seek information unlike the Article 19 of the ICCPR[101].

Judge Spano adduced similar arguments in his dissenting opinion: the ECHR does not encompass the freedom to seek information in contrast to other international treaties such as the ICCPR, the UDHR, and the ACHR that clearly include the said right[102].

He also noted that the right to receive information was considered *"a passive right, triggered by the positive action of a willing provider of information and ideas"* (§ 7). Moreover, Article 10 "*does not, and was not meant to, encompass a right to access information held by public authorities that they are not willing to impart or obliged to disclose under domestic law"* (§ 12). That means that exercising the right to receive information while interacting with state authorities is only possible if such bodies either want to grant access to information or have an obligation to do so.

The opinion issued by Judge Spano illustrates that the ECHR ensures only the right to receive information, which is directly specified in Article 10. So, we can conclude it protects the data transmission from interference but imposes no obligations to provide information.

The second argument concerns the fact that the ECtHR imposes additional duties on states.

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99 MOWBRAY, A. *European Court of Human Rights: May 2016-April 2017,* 2017. p, 16. [interactive]. [reviewed in 02 May 2020]. Available at: <https://nottingham-repository.worktribe.com/output/902640>

100 CLAYTON, R. *New Directions for Article 10: Strasbourg Reverses the Supreme Court in Kennedy,* 2016. [interactive]. [reviewed in 02 May 2020]. Available at:<https://ukconstitutionallaw.org/2016/12/13/richard-clayton-qc-new-directions-for-article-10-strasbourg-reverses-the-supreme-court-in-kennedy/>

101 ALFREDSSON, G.; EIDE, A. *The Universal Declaration of Human Rights: A Common Standard of Achievement.* The Hague; Boston: Martinus Nijhoff Publishers, 1999. p, 409.

102 Dissenting opinion of judge Spano joined by judge Kjølbro (no. 15), § 6.

Judge Spano underpins this position with scientific resources, namely with "Freedom of Speech," written by E. Barendt: "... *Recognition of the right of access would impose a constitutional duty on government or other authority to provide information it did not want to disclose 'as unwilling speakers'*" (§ 17).

G. Ulfstein outlined the states' position that the ECtHR went too far in its judgments. He has noted that: "*Some member States think that the Court has gone too far: that it has become an activist court. They reproach the Court for excessive encroachment on their national sovereignty, at the expense of national democratic decision-making and judicial practice*[103]."

Therefore, we can observe from the position shown above that while broad interpretation helps to keep the ECHR on par with the pace of time, such a treatment limits democratic and sovereign rights of states.

The third argument is closely tied to the legal certainty and foreseeability of the ECtHR judicial practice.

The dissenting opinion encompassed an analysis of the cases that existed at the time of writing. It highlighted that judgments of Plenary and Grand Chambers were excluding a right of access to public information under Article 10[104]. The changes to case law could not be made without respective reasons, otherwise, they would lead to an inconsistency. The inconsistency impairs the ability of states to ensure the rights provided by the ECHR and deprives the case law of legal certainty (§ 29).

It's worth mentioning the position of I. E. Koch and J. V. Hansen quoted by Kanstantsin Dzehtsiarou: "*Some legal observers see this dynamic method of interpretation as producing legal uncertainty, because it makes it difficult if not impossible to foresee the state of the law within the near future. It cannot be ignored that interpreting such provisions as those laid down in international human rights treaties may imply a certain risk of lacking foreseeability.*[105]"

So the main point of the preceding argument is since the ECtHR's case law strongly influences the lawmaking and the practice of domestic courts, it should not be uncertain or unforeseeable as it may hinder an implementation of the decision.

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103 ULFSTEIN, G. *Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties*, The International Journal of Human Rights, 2019. p, 1. [interactive]. [reviewed in 02 May 2020]. Available at: <https://doi.org/10.1080/13642987.2019.1598055>

104 Dissenting opinion of judge Spano joined by judge Kjølbro (no. 15), § 29.

105 DZEHTSIAROU, K. *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, German Law Journal, Vol. 12 No. 10, 2011. p. 1742. [interactive]. [reviewed in 02 May 2020]. Available at: <http://www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/Human%20Rights%20BCN%2028-29%20April%202014/Dzehtsiarou_Interpretation_ECHR_GLJ_2011.pdf>

The fourth argument is a perception of the ECHR as a living instrument and the notion that all member states reached a consensus. Aforementioned things could not be treated as acceptable proofs for including the right of access to public information within the scope of Article 10.

Judge Spano admitted that a vast majority of states of the CoE had enacted laws related to the freedom of information at the highest legislative level[106]. However, that fact in no way demonstrated the reached consensus. Quite the opposite, considering the unwillingness of the states in ratifying the CoE Convention on Access to Information, they want to have their margin of democratic discretion in this area (§ 33).

Indeed, there were other arguments related to the issue, yet in our opinion, the mentioned above are the most crucial. Those arguments have reflected and grounded the position why the right of access to public information should not be included in the scope of Article 10.

Nevertheless, not all theorists have the same view on the issue. Some researchers claim that the right of access to information should be recognized as present in the ECHR even though it is not specified in the text.

The first argument to support this position is that the ECtHR's case law has been changing gradually; thereby, all the changes were a result of the judicial practice development.

Analyzing the ECtHR's case law, W. Hins and D. Voorhoof took into account the decision in *Sdružení Jihočeské Matky v. Czech Republic* that was given as far as in July 2006 and noted as follows: *"In the Sdružení Jihočeské Matky decision, the Court firmly puts forward that under such circumstances a refusal to provide a citizen or a legal person with the requested administrative documents must be in accordance with Article 10 of the Convention[107]."*

M. McDonagh analyzing the aforementioned decision indicated that "*This decision was significant in terms of establishing that a refusal of a request for access to information can amount to an interference with Article 10*[108]."

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106 Dissenting opinion of judge Spano joined by judge Kjølbro (no. 15), § 33.

107 HINS, W.; VOORHOOF, D. *Access to State-Held Information as a Fundamental Right under the European Convention on Human,* Rights EuConst 3, 2007. p, 125. [interactive]. [reviewed in 02 May 2020]. Available at: <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/894C90BF329F4E2E2A6DCDB4CAA44290/S1574019607001149a.pdf/access_to_state held_information_as_a_fundamental_right_under_the_european_convention_on_human_rights.pdf>

108 MCDONAGH, M. *The Right to Information in International Human Rights Law,* Human Rights Law Review 13 (1), 2013. p, 10. [interactive]. [reviewed in 02 May 2020]. Available at: <https://www.researchgate.net/publication/271510416_The_Right_to_Information_in_International_Human_Rights_Law_Maeve_McDonagh>

Judge Spano also addressed the mentioned decision, however he stays on the position that it is *"a very weak source*[109]" and *"one that can hardly be determinative*[110]*".*

We believe that the decision in the case *Sdružení Jihočeské Matky v. Czech Republic* laid the foundations for the future acknowledgment of the right of access to information. Additionally, we think the importance of cases that were overseen in Chapter I of Part I should not be underrated. The cases such as *Timpul Info-Magazin and Anghel v. Moldova,* and *Társaság a Szabadságjogokért v. Hungary* also should be taken into account even though they were not examined by the Grand Chamber. All of the cases have been reactions to the changing modern world environment and showed the need to recognize the existence of certain rights under the ECHR. Thereby, we do not stick to the position given in the dissenting opinion that the ECtHR settled case law was overruled. Quite the opposite, we favor the ECtHR's argumentation and think that the introduced case law is slowly but surely approaching the recognition of the right of access to information.

The second argument is treating the ECHR as a living instrument. We believe that the ECHR should change over time in order to be appropriate to current circumstances.

It is worth pointing out that the ECtHR in case *Christine Goodwin v. the United Kingdom* opined that "*the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved*[111]."

Additionally, the ECtHR underlined that provisions of the ECHR should be applied in a way that makes rights listed there being effective and practical but not theoretical and illusory (§ 74).

That means that both the ECHR and case law should adjust to the current day realities and should not be seen as static and never changing instruments.

To our mind, the rapid digitalization and informatization of day-to-day life is a starting point for the ECHR to change and evolve. The modern internet contains tons of information on plenty of topics, yet it is quite hard to understand whether we could trust the source. So, the individuals and entities may need to contact public authorities in order to verify information related to public matters. Also, with the internet's ability to connect people, citizens on opposite sides of the country can discuss the same issue that they could not know about without the net. Due to this fact, the social responsibility of people is

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109 Dissenting opinion of judge Spano joined by judge Kjølbro (no. 15), § 27.
110 Ibid.
111 The European Court of Human Rights. 11 July 2002. Grand Chamber judgment *Christine Goodwin v. the United Kingdom,* Case no. 28957/95, § 74.

continuously growing, which means that they will seek verification of the obtained information from the authorities more frequently.

Therefore, we cannot refuse the importance of the right of access to information. The ECtHR should recognize that right under Article 10 and protect it accordingly; otherwise, the freedom of expression may be put at risk.

It is important to say that, D. Voorhoof and R. Fathaigh analyzing the most recent case law of the ECtHR, namely *Szurovecz v. Hungary* noted: *"the Court roundly rejected the Hungarian government's argument that Article 10 does not include a 'right of access to information', and that Article 10 only guaranteed a right to 'receive information willingly imparted by others', with only a 'negative obligation on the part of the State not to unjustifiably hinder access to publicly available information'*[112]*."* This position demonstrates that the ECtHR changed its approach to the right of access to information. Hence, some of the reasoning that the right of access to information does not fall within Article 10 has no solid ground anymore.

J. McCully and N. J. Reventlow think that the ECtHR case law is on the right track, and may recognize the right of access to information in the future[113]. In their paper they also pointed out: "*The only obstacle appears to be, in fact, the Court's own caselaw. One can only hope that, in time, the Court will find itself prepared to surmount that one remaining obstacle and align itself with existing international standards*[114]."

That is, the authors hope that despite the existing judicial practice of the ECtHR, the right of access to information would be fully acknowledged in the future.

We tend to think that the way of recognition of this right started back in 2006, and the ECtHR has been continuously changing its approach to the issue since then. The said changes were an appropriate reaction to social changes; thus, there was an objective need for them.

The ECtHR has taken a balanced position by providing sets of criteria for determining when the right of access to information should be ensured. These actions allow the ECtHR to gradually integrate the right of access to information into case law despite its omission in the ECHR.

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[112] VOORHOOF, D.; FATHAIGH, R. *Denying journalist access to asylum-seeker 'reception centre' in Hungary violated Article 10 ECHR*, 2019. [interactive]. [reviewed in 02 May 2020]. Available at: <https://strasbourgobservers.com/2019/11/04/denying-journalist-access-to-asylum-seeker-reception-centre-in-hungary-violated-article-10-echr/#more-4444>

[113] MCCULLY, J.; REVENTLOW, N.J. *The European Court of Human Rights and Access to Information: Clarifying the Status, with Room for Improvement*, 2016. [interactive]. [reviewed in 02 May 2020]. Available at: <https://www.mediadefence.org/news/european-court-human-rights-and-access-information-clarifying-status-room-improvement>

[114] Ibid.

We cannot support the statement that the right of access to information is not under the scope of Article 10. At the same time, we support both the ECtHR's approach taken in *Magyar Helsinki Bizottság v. Hungary* and the position given by J. McCully and N. J. Reventlow, and believe that the right above may be fully acknowledged in the further judicial practice.

Sub-Chapter II of Chapter I. Discussions concerning the scope of Article 8

Article 8 of the ECHR does not directly mention the right to personal data protection. Therefore, as in the situation with Article 10 described in the previous Sub-Chapter, there is room for doubts whether the ECHR guarantees that right.

Nevertheless, the ECtHR's case law treats the right to personal data protection in a slightly different way compared to the right of access to information.

Analyzing the respective judicial practice, the former President of the European Court of Human Rights, L. Wildhaber noted: "*In a dynamic instrument, Article 8 has proved to be the most elastic provision. … The breadth of the potential scope of the interests protected by Article 8 has thus been an advantage in allowing the development of the Court's case-law in this area to keep pace with the modern world*[115]."

It shows that the ECtHR is inclined to broaden the scope of article 8 in order to meet challenges posed by technologies and the rapid spread of information.

At the same, L. Wildhaber expressed concerns regarding the following: "*It is, however, something of a disadvantage when Governments are seeking to establish exactly what is expected of them under the Convention*[116]."

In contrast to the case law on Article 10, the ECtHR has already formed its approach regarding the right to personal data protection long ago. As we mentioned in Chapter I of Part I, the ECtHR underlined the importance of data protection back in 1984.

Analyzing the judicial practice of the ECtHR, B. van der Sloot stressed out that "*following the living instrument doctrine, the Court has been willing to accept a number of the notions essential to the right to data protection under the scope of the right to privacy*[117]."

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115 WILDHABER, L. *The European Court of Human Rights in action.* Ritsumeikan Law Review No. 21, 2004. p. 84. [interactive]. [reviewed in 02 May 2020]. Available at: <http://www.ritsumei.ac.jp/acd/cg/law/lex/rlr21/wildhaber.pdf>

116 Ibid.

117 VAN DER SLOOT, B. *Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"* [interactive]. [reviewed in 02 May 2020]. Available at: <https://utrechtjournal.org/articles/10.5334/ujiel.cp/>

J. Kokott and C. Sobotta in their paper highlighted that the ECtHR's case law uses a wide definition of personal data explaining it through the definition of private life[118]. Nonetheless, the researchers also paid their attention to the several points they could not agree with in the case law. Analyzing the case of *Rotaru v. Romania* described in Part I, authors reached the conclusion that in the ECtHR's view, personal data could be lying in the scope of private life, if an additional element of privacy is in place[119]. More precisely, they noted the following argument of the ECtHR: "*... the RIS's letter of 19 December 1990 contained various pieces of information about the applicant's life, in particular his studies, his political activities and his criminal record, some of which had been gathered more than fifty years earlier. In the Court's opinion, such information, when systematically collected and stored in a file held by agents of the State, falls within the scope of "private life" for the purposes of Article 8 § 1 of the Convention.*[120]."

J. Kokott and C. Sobotta raised the question of whether a less systematic collection and storage of personal information would constitute a violation of Article 8[121]. As we can observe from all the aforesaid, researchers express concerns that the ECtHR paid close attention to such wording as *"systematically"* and the fact that data were stored for a long time period when describing the scope of the private life. We also entirely share these concerns.

As was described in preceding Sub-Chapter, from the one hand the ECtHR should assess circumstances of a particular case rather than provide generalizations and take an activist stance. We do not doubt that the ECtHR should have analyzed all the facts and taken into account the systematic and long-lasting collection of data.

However, we are concerned that one can have a perception that the ECtHR stated that only a systematic collection of data would be included in the scope of "private life," while less systematic collection would not be sufficient enough. As a result, one can conclude that the cases where the collection of data was not systematic and long-standing would not fall within the scope of "private life." Hence, it would come in handy if the ECtHR used more precise wording.

Thus, we see that on the one hand, the ECtHR has been doing an excellent job of developing the scope of Article 8. On the other hand, its position is not always precise enough which can lead to misinterpretation as in case *Rotaru v. Romania*. Such a vagueness, in turn, may lead to debates and doubts on the further case law development.

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118 KOKOTT, J.; SOBOTTA (no. 6). p, 223-224.
119 Ibid, p. 224.
120 *Rotaru v. Romania* (no. 59), § 44.
121 KOKOTT, J.; SOBOTTA (no. 6). p, 224.

Sub-Chapter III of Chapter I. Issues concerning the balancing between the right of access to public information and the right to personal data protection

The ECtHR grounds its approach to balancing on the three-part test determined in Articles 8 and 10 of the ECHR. The test itself, as we described in the preceding Parts, defines whether there were sufficient legal basis, the legitimate aim, and necessity in the democratic society.

At the same time, for determining whether there was a necessity, the ECtHR uses a set of factors (or criteria) that are crucial for performing balancing between the right of access to information and the right to personal data protection. Our understanding of those criteria was given in Chapter II of Part II.

It is noteworthy that during the analysis of the ECtHR and the CJEU approaches to the balancing, V. Milašiūtė in her paper identified very similar sets of criteria that are crucial for balancing between two rights. Those criteria are listed below[122]:

1. Status of the person asking for public information.
2. Status of the person whose personal data is potentially affected.
3. The importance of the public interest served by disclosing personal data.
4. The extent of harm potentially suffered by the data subject.

V. Milašiūtė also pointed out as follows: "*In the doctrine, the balancing test is criticised for opening an often too broad pool of possibilities for any balancing and deciding body due to a lack of more specific determining criteria which are necessary to assess all the relevant factors, impacts and possible harms of any balancing result*[123]."

We realize such concerns as it is difficult to generalize all issues related to balancing in a set of formal pre-defined criteria. Things get even more complicated when one criterion speaks in favor of Article 10 like the publicity of the person whose data was requested, and another criterion states that there was no public interest in the requested information. V. Milašiūtė also supports this position by saying that *"where balancing criteria point in different directions, the outcome of balancing is less predictable"*[124].

Hence, each case is unique in many ways; therefore, only the complex analysis of as many factors as possible will help to find the most appropriate solution.

The author also illustrates an example of the situation where criteria conflict with each other by citing the case of *Standard Verlags GmbH v. Austria (No. 3)*. In the said case,

[122] MILAŠIŪTĖ, V. (no.2), p. 11.
[123] Ibid, p. 22.
[124] Ibid, p. 24.

a newspaper published an article incriminating embezzlement of funds to a senior employee of the bank whose father was a politician disclosing the employee's personal information[125]. V. Milašiūtė underlined that many factors such as a caused harm and a context should be assessed in the current case as, on the one hand, the banker was not a public person; on the other hand, his father was[126].

Thus, even though the criteria are quite static, their usage and approach to balancing may vary from case to case.

An interesting point was expressed in the case of *Magyar Helsinki Bizottság v. Hungary* that was already referred to above. Judges Nussberger and Keller issued a concurring opinion in which expressed concerns regarding the ECtHR attitude to potential harm assessment as one of the assessing components. They pointed out the following: "*The argument that data which are already in the public domain therefore need less protection may create tensions with the jurisprudence of the CJEU*[127]."

Specifically, the judges elaborated that the fact if data has already entered a public domain does not deprive a person of the right to personal data protection. In fact, all the circumstances should be assessed to define the level of data protection in each case. The judges also reasoned their position referring to the case of *Google Spain*, where the CJEU stated that operations should be classed as the processing of data even if those data exclusively concerns the facts and materials that has already been published in the media (§ 8).

Additionally, the concurring opinion stated that even if a person could have potentially known that his or her data would be collected and stored, it does not mean that Article 8 would not be applied. The reasoning goes even further giving an example in the context of the *Magyar Helsinki Bizottság v. Hungary* case: *"... it was foreseeable for public defenders that the authorities would store their data. But that is no reason to reject the applicability of Article 8 of the Convention, thereby denying them any protection against the use or misuse of their personal data, both by the authorities themselves and also by third parties"*(§ 7).

Thus, even though the collection and storing of data were foreseeable and the data owners have entered a public domain, their rights should be properly protected under Article 8 of the ECHR.

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125 Ibid, p. 22; The European Court of Human Rights. 10 April 2012. Court judgment *Standard Verlags GmbH v. Austria (no. 3),* Case no. 34702/07, § 6-8.
126 MILAŠIŪTĖ, V. (no.2), p. 22-23.
127 Concurring opinion of judges Nussberger and Keller (no. 16), § 8.

In their concurring opinion Judge Nussberger and Judge Keller emphasized that the ECtHR "*should not dilute the level of data protection recognized in its case-law and should as a rule continue to apply the notion of "private life" in Article 8 § 1 of the Convention to personal data collected by State authorities*" (§ 9).

As we could have seen, the ECtHR's position and the one expressed in the concurring opinion is a compelling example of different approaches to the same issue. Following all the said above, it could be concluded that all the details are essential, and they should be thoroughly considered while balancing between the rights.

Chapter II. Own perspective on the issues related to the balancing between the right of access to public information and personal data protection

The current Chapter will be devoted to an analysis and peculiarities of applying the criteria we have identified in cases *Magyar Helsinki Bizottság v. Hungary* and *Centre for Democracy and the Rule of Law v. Ukraine*. We will also share our view on their application and make suggestions on how to lower the potential mistakes interpreting.

Thus, the main emphasis would be paid not to a three-part test but to the elements the ECtHR considers during balancing.

The first element to be analyzed and given suggestions to would be a person whose data are involved in the case. We reckon that this criterion is fundamental for balancing purposes. The ECtHR splits persons into two major groups: those who entered a public domain and play a significant role in public life, and those who did not. We support this division and the ECtHR's attitude in this regard that persons who entered a public domain should be prepared to greater attention from the general public (*See Sub-Chapter I Chapter II Part II of this Thesis)*.

Although the current element is quite helpful and objective in the majority of cases, there could be edge cases when determining whether a person entered a public domain is a complicated task.

For instance, complications arise when employees of both state and private corporations are concerned. Typically, they do not occupy management positions, do not give any public speeches, but the general public may think that they are deeply involved in the company's business. That could heighten attention to their lives.

In our opinion, in order to correctly handle such type of situations the following questions should be answered:

1. Could a person have foreseen that he or she would be in an area of public interest?

2. Why does the public interest about a non-public person may arise?

We believe that the answers to the questions above may help to deal with the edge cases more effectively.

The second element that would be overseen further is the person who requests data. From the ECtHR's judicial practice, we can observe that "watchdogs" or academics are more likely to be provided with the requested information, as was described in Sub-Chapter I Chapter I Part I.

At the same time, it is worth noting that the ECtHR defines the concept of social watchdogs quite broadly. From the ECtHR's point of view, the mentioned concept is not limited only to journalists and NGOs, but "*the function of bloggers and popular users of the social media may be also assimilated to that of "public watchdogs" in so far as the protection afforded by Article 10 is concerned*[128]."

That means the ECtHR tried to broaden the concept of "watchdog" as much as possible, at the same time emphasizing that a person has to have a certain level of popularity in order to be considered a public watchdog.

To our mind, the measure of "popularity" is quite vague. In the present-day world, every person could become famous overnight. By posting articles on Medium or Facebook or by recording stories on Instagram, people can gather a big audience around themselves thanks to being mentioned by another popular person. Does it mean that up to such a "moment of glory" the not-so-well-known person should not have the same level of access to information that popular persons may have? We reckon that the answer in "no." The main attention should be paid to the requested information and not to the personality of the requestor.

Notably, Judge Spano and Judge Kjølbro also held the view that it would be hard to draw a line on who should be considered a public watchdog in the dissenting opinion in case *Magyar Helsinki Bizottság v. Hungary*: "*It goes without saying that the potential reach of these categories, which now enjoy an independent Convention right of access to official documents, will prove exceedingly difficult to circumscribe in any sensible manner*[129]."

Therefore, we suppose that the future practice of the ECtHR will pay less attention to the person of a requestor but will put more considerations into the types of the requested information and the purpose of the request.

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[128] *Magyar Helsinki Bizottság v. Hungary*, (no. 9), § 168.
[129] Dissenting opinion of judge Spano joined by judge Kjølbro (no. 15), § 46.

That brings us to the third element that needs to be discussed, which is the purpose of the request. As has been already stated in the preceding passage, this criterion will become of more importance in the ECtHR's future case law.

We believe that the information requested for the scientific research, the analysis of public authorities activities and other data that has a significant value for the general public, therefore, should have greater chances to be provided no matter who requested it.

The fourth element considers the public interest in the data requested. This element is closely connected with the previous one, i.e. the purpose pursued by the requestor. The ECtHR noted that "*the public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism*[130]."

From our perspective, there could be situations where it would be hard to delineate "wish for sensationalism" from the real public interest. Therefore, the interpreters of the ECtHR's position should play it safe and consider the case circumstances more thoroughly.

The ECtHR is more likely to be assessing the actual content of the information that used the requested data and to pay less attention to the sensational titles and wording when balancing the right of access to public data and the right to personal data protection.

For example, at times the journalists' investigations could be positioned as sensations, and information in them in some ways looks like a pursuit of sensationalism. However, despite the given positioning, the published investigation may reveal the facts on important public matters. So, we support the position that the actual "usefulness" and contribution to public interest should be assessed in the first place.

Last but not least, an element to be elaborated on is the effect on the data owner's privacy. While considering this element, the ECtHR, among other things, pays a close eye on the fact whether the information has already been in the public domain and is easily accessible.

However, the considerations also should be careful as the information could have entered the public domain, i.e., posted on the internet, without the person's consent, or he/she did not even know that some information about him may be found while surfing web pages.

So, let us summarize all the aforesaid. The concept of "watchdogs" should not be decisive for the purpose of balancing in cases for access to information. Our opinion is that the ECtHR would pay less and less attention to this element in future cases.

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130 *Magyar Helsinki Bizottság v. Hungary*, (no. 9), § 162.

The purpose of receiving information should gain more influence on the balancing between the right of access to public information and the right to personal data protection.

While considering the other three elements, namely a person whose data are involved, the presence of public interest, and the effect on the data owner's privacy, a high level of caution should be undertaken.

CONCLUSIONS

Conclusion 1. The position of the ECtHR regarding the scope of Article 10 has been changing over time. Initially, in cases such as *Leander v. Sweden*, the ECtHR did not recognize that the said Article protects the right of access to information. Nonetheless, in later cases, the ECtHR changed its approach and devised a threshold test to define whether the provisions of Article 10 are applicable to the right of access to public information.

The test mentioned above was developed in case *Magyar Helsinki Bizottság v. Hungary*, and consists of four criteria:

1. the purpose of the information request;
2. the nature of the requested information;
3. the role of the applicant;
4. the availability and readiness of the information.

The purpose of the information request stipulates that the requested information must be necessary for exercising the freedom of expression. For example, the information may be needed for investigative journalism or academic research. The nature of information criteria provides that the requested information should be related to the public interest, noting that public interest could not be narrowed to a desire for sensation or voyeurism. The role of the applicant criterion defines that the requestor should be a "watchdog." Examples include journalists, NGOs covering public matters, as well as bloggers and famous individuals that form public opinion. The availability and readiness criterion suggests that the information has to be already collected and/or could be easily accessed, meaning that the collection of the requested data does not impose any unproportionate burden on public bodies.

However, we want to note that the ECtHR stays flexible regarding the application of those criteria and examines each situation on a case-by-case basis. It was shown in case *Szurovecz v. Hungary*, where the criterion related to the availability and readiness of the data was omitted due to the inability to assess it.

It is noteworthy to mention that the right of access to information is not absolute and could be limited according to the Article 10(2).

Conclusion 2. The ECtHR maintains the position that the right to personal data protection is guaranteed by Article 8 and imposes no additional threshold test for it. The Court demonstrated its position as early as 1984 in case *Malone v. the United Kingdom*, pointing out the importance of personal data protection. It should be noted that the ECtHR

uses the broad definition of personal data, meaning it is "any information relating to an identified or identifiable individual."

Nevertheless, the right to personal data protection should not be considered absolute as it could be limited on the grounds defined in Article 8(2) of the ECHR.

Conclusion 3. The aforementioned rights may conflict with each other. Such situations may occur due to the lack or imprecision of domestic legislation and could be explained by public interest to data in question. Generally, a wide variety of potential conflicts could be split into two groups. The first group includes cases when the requested information relates to public figures, and the other concerns the access to private persons' data. It is noteworthy to mention that the concept of "public figures" encompasses a wide variety of individuals. Celebrities, politicians, public officials, renowned academics and researchers, journalists, and lawyers etc., all of them could be considered public figures.

Assessing the level of intrusion in a person's private life, the ECtHR underlined that public figures should be ready for the respective level of attention from society. Additionally, the ECtHR stated that entering a public domain such figures should have anticipated the scrutiny from the general public.

Conclusion 4. Performing balancing between the right of access to public information and the right to personal data protection the ECtHR tries to establish whether there were sufficient legal basis, the legitimate aim, and necessity in the democratic society for denying or granting access to requested personal data. At the same time, analyzing the necessity criterion, the ECtHR considers the following:

1. a person whose data are involved in the case;
2. a person who requests data;
3. the purpose of the request;
4. public interest in the data requested;
5. effect on the data owner's privacy.

Said criteria partly intersects with the mentioned threshold test established for the right of access to public information, but they are also being extended with salient data protection elements.

Considering the case, the ECtHR pays close attention to various details depending on the criterion being assessed. For example, when assessing the person whose data are involved, it is essential to define whether he/she is a public figure or not. The criterion of the person who requests data depends on the "watchdog" role of the requestor. The assessment of the request purpose and public interest in the requested information is closely tied to the contribution to the public interest. Finally, while considering the effect on the

data owner's privacy, the ECtHR takes into account potential harm that may be caused to a data owner.

Conclusion 5. The theoreticians and practitioners have various views on the ECtHR's judgments and reasoning. Some positions attempt to convince that the right of access to information is not covered by the scope of Article 10. In contrast, other theoreticians hope for the full acknowledgment of the right of access to information. We support an important and serious step forward that ECtHR took by recognizing the right under certain conditions. We are also optimistic regarding the full recognition of the said right.

The majority of theorists and practitioners do not question the scope of Article 8, and the respective guarantee of the right to personal data protection. Thus, considering the said in the passage, the ECtHR has to show a reasonable level of flexibility and precautions taken while resolving cases involving balancing between rights, especially in edge cases, where no unambiguous conclusion can be reached.

We are strong supporters of the position that the ECtHR should pay less attention to the requestor's personality as it is hard to define who is performing the "watchdog" role. In a modern world, the popularity and "media influence" could be achieved in a short span. Those are the matter of one interview with another famous person or a celebrity's repost. A researcher who published a paper on some important topic could become an opinion maker in a matter of days if not hours, and the list goes further. As we can observe, a line when a person becomes a watchdog is becoming more blurred. Therefore, this criterion should gradually lose its initial significance. At the same time, we think that the purpose of the request and respective public interest in the information should gain a leading role in assessment.

Moreover, we believe the ECtHR should act with great caution judging edge cases. The edge cases arise when there is no way to make an unequivocal conclusion, for example, when it could not be defined whether a person entered a public domain or not.

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SUMMARY

In the Master's thesis *"Balancing the Right of Access to Public Information and the Right to Personal Data Protection,"* the author analyzes the case law of the ECtHR and legal discussions on the balancing between mentioned rights.

In the first part of the work, the author explores the applicability criteria of both the right of access to information and the right to personal data protection to Articles 10 and 8 of the European Convention on Human Rights. The author further identifies potential limitations that could be imposed on those rights.

In the second part, the author analyzes situations where the potential conflicts of the rights may occur and outlines the approaches for resolving the conflicts used by the ECtHR, based on the cases of *Magyar Helsinki Bizottság v. Hungary*, and *Centre for Democracy and the Rule of Law v. Ukraine.*

In the third part of the work, the author analyzes the existing discussions related to the scope of Articles 10 and 8 and the balance between them.

The thesis contains the following conclusions:

- judging cases on balancing the right of access to information and the right to personal data protection, the ECtHR relies on the three-part test, defining whether there were sufficient legal basis, the legitimate aim, and necessity in the democratic society for denying or giving access to requested personal data.
- when defining whether the restriction was necessary in the democratic society, the ECtHR also took into account several criteria. Those are the person whose data are involved in the case, the person who requests data, the purpose of the request, public interest in the data requested, and the effect on the data owner's privacy.
- the author hopes that in further case law, the ECtHR would pay less attention to the identity of the requestor, and would more thoroughly examine the other criteria. At the same time, the author points out that the criteria mentioned should be used with a high level of caution.