IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT CO/7737/10, CO/7272/10

BETWEEN:

THE QUEEN
(ON THE APPLICATION OF GUARDIAN NEWS AND MEDIA LIMITED)
Claimant / Appellant

and

CITY OF WESTMINSTER MAGISTRATES' COURT
Defendant / Respondent

and

THE GOVERNMENT OF THE UNITED STATES OF AMERICA
Interested Party

SUBMISSIONS ON BEHALF OF ARTICLE 19
(Intervener on the appeal)

Introduction: ARTICLE 19 and its submissions

1. ARTICLE 19 was granted permission to intervene by way of written submissions by a direction of the Master of the Rolls (18 January 2012).

2. ARTICLE 19, the Global Campaign for Free Expression, is a non-governmental international human rights organisation based in London. Established in 1987, ARTICLE 19 works globally to protect and promote the right to freedom of expression, including the right to information. Its name is taken from Article 19 of the Universal Declaration of Human Rights which states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

ARTICLE 19 is a registered charity (Charity Commission Number 327421) and company limited by guarantee in England and Wales. From the outset, ARTICLE 19 has had an international focus. There are currently ARTICLE 19 offices in Bangladesh, Brazil, Kenya, Mexico and Senegal.

3. Since 1987, ARTICLE 19 has monitored, researched, published, advocated, campaigned, developed standards and litigated on behalf of freedom of expression and the right to information wherever these rights are threatened. It has expertise on international human rights standards and provides advice and assistance on the development of legislation protecting the right to speak and right to know. ARTICLE 19 champions freedom of expression and the right to information as fundamental human rights that are central to the realisation of other rights. Its work includes the promotion of the "right to know" of poorer communities and vulnerable individuals and groups and advocating for the implementation of right to information legislation to ensure transparency and strengthen citizens' participation.

4. ARTICLE 19 has filed amicus briefs in a number of cases seeking to assist international, regional and national courts on issues relating to freedom of expression and the right to information. These include *Claude Reyes v Chile* (judgment of 19 September 2006) ("*Reyes*"), the landmark case in which the Inter-American Court of Human Rights upheld "the right of the individual to receive ... information and the positive obligation of the State to provide it" (see further below). ARTICLE 19 has also been an intervener in numerous key cases at the European Court of Human Rights ("ECtHR") including *Goodwin v UK* (2002) 35 E.H.R.R. 18*, Incal v Turkey* (2000) 29 E.H.R.R. 449*, Observer & Guardian v UK* (1992) 14 E.H.R.R. 153*, Wingrove v UK* (1997) 24 E.H.R.R. 1 and *Sanoma Uitgevers BV v the Netherlands* [2011] E.M.L.R. 4. ARTICLE 19's most recent amicus brief has been to the Inter-American Court on Human Rights in *Uzcátegui v Venezuela* (filed 8 November 2011).

5. ARTICLE 19 has participated in interventions in a smaller number of cases in this jurisdiction, for example *HM Treasury v Mohammed Jabar Ahmed, HM Treasury v Mohammed al-Ghabra, R (Hani El Sayed Sabaei Youssef) v HM Treasury* [2010] UKSC 1 (the "alphabet soup" case) in the Supreme Court.

6. ARTICLE 19 is grateful for the opportunity to intervene in this appeal. It considers that the appeal raises issues of general importance in relation to a key area of its work and expertise (access to information) and that it engages Article 10 of the European Convention of Human Rights ("the European Convention"): see the Court of Appeal decision granting permission to appeal [2011] EWCA Civ 1188 at [45-46]. ARTICLE 19's submissions focus on the approach taken in other jurisdictions on access to information. This includes issues of important general principles, including "open justice" and the right to freedom of expression:

it is clear that access to information is a fundamental human right and there is now greater (and increasing) recognition of the fact that this includes both the right of the individual to obtain information *and* a positive obligation on the state to provide it. It also includes examples of case-law relating to access to information generated in relation to court proceedings (that is, going beyond being able to attend and observe what transpires in court). The submissions, identifying common themes, are set out in this document. An Appendix gives further information about relevant cases and other source material. References to the Appendix are in the form **A[paragraph number].**

General principles: open justice and freedom of expression

7. The imperative to open justice in the common law of England and Wales is fundamental and familiar: see, for example, *Scott v Scott* [1913] AC 417, 438 (Lord Haldane LC)[1]; *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966, 977 (Lord Woolf MR)[2]. That media reporting should play a central role in furthering the interests of open justice principles is also well-established: see, for example, *A-G v Leveller Magazine* [1979] AC 440, 450B (Lord Diplock) (emphasis added):

> "The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and **that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly**. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this."

See also *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582 at 591; *In Re S (A Child)* [2005] 1 AC 593 at [30] (Lord Steyn)[3]; *R v Chaytor* [2010] 2 Cr App R 34 at [95][4].

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1 "It is well established that court proceedings must be conducted in public and should be fully and freely reported. The right of public access to the court is 'one of principle … turning, not on convenience but on necessity'".

2 "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.… Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."

3 "Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law".

8. The importance of the principle of open justice has been acknowledged in many other jurisdictions, including Canada **A14** and New Zealand **A26.** Although the Divisional Court referred to the principles at [34-35], its conclusion at [36] as to what would "ordinarily" satisfy the requirements of open justice failed to have regard to what is required now, having regard to modern conditions of society, to ensure that evidence "communicated to the court" is communicated to the public[5]: for this to happen – for open justice to be a reality - the media must be given access to the evidence that the court itself has, particularly where (as here) written evidence has taken the place of oral evidence and, crucially, where that evidence (and other documentary material) has been taken into account by the court in making its decision. The media in court are the "eyes and ears of the public"[6]; but if they cannot see material relevant to the court's decision (or even hear it, since it has not been read out in full in open court), they cannot communicate that information to the public. The public, as well as the media, is deprived of information which it ought to have in relation to open court proceedings on a matter of public interest.

9. The right to freedom of expression has long been recognised in this jurisdiction by the common law and it is now guaranteed by Article 10 of the European Convention. It is included in many other international Conventions, including the Universal Declaration of Human Rights (Article 19) [2] above, the International Covenant on Civil and Political Rights (Article 19) **A37**, the American Convention on Human Rights (Article 13) **A36**, and the African Charter on Human and Peoples' Rights (Article 9) **A39.** In each case, the right includes not only the right to communicate information, but the right to seek and/or receive it. The right of the public to receive information, particularly on matters of public interest, is a vital aspect of the right to freedom of expression. The media have a key role in communicating information in a democracy[7].

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4 "There are equally well-established principles, both at common law and under the Convention, that criminal proceedings should normally take place in public, and that the media generally provides an essential element in the process by which open justice, and ultimately a fair trial, is secured".

5 See the reference to all evidence being "communicated publicly" in *Leveller* (set out in [7] above); this passage was cited by the Divisional Court (without added emphasis) at [35].

6 *Attorney-General v Guardian Newspapers Ltd (No 2)* (CA) [1990] 1 AC 109 at 183 (Sir John Donaldson MR): the media are the "eyes and ears of the general public".

7 This has been recognised in many Strasbourg and domestic decisions: see, for example, *McCartan Turkington Breen v Times Newspapers* [2001] 2 AC 277 at 290 (Lord Bingham): "The proper functioning of a modern participatory democracy requires that the media be free, active, professional and inquiring....."; Strasbourg decisions frequently refer to the obligation of the media to impart information and ideas on matters of public interest.

10. Recent judicial decisions have given greater emphasis to the fact that the right of freedom of expression includes the right of access *to* information: see *Tarsasag a Szabadsagjogokert v Hungary* (2011) 53 EHRR 3 ("*Tarsasag*") in the ECtHR **A1-A6** and *Reyes* in the Inter-American Court of Human Rights **A36**. In addition to these important decisions, the United Nations Human Rights Committee **A37-A38** and African Platform on Access to Information **A39** have also emphasised the importance of the right of the individual to obtain information and the obligation on the state to provide access to it.

The principle of public access

11. ARTICLE 19 submits that the principles of open justice and the right to freedom of expression support the contention that the court should recognise a principle of public access which requires that the court should generally grant access to court documents, on the request of any individual (in particular, a journalist). The court, as a public authority, has a positive obligation to provide access to information. Recognition of the existence of the principle is, now, required by Article 10 of the European Convention.

12. The scope of the public access principle would then need to be considered. ARTICLE 19 submits that the principle of public access should extend to all documents before the court (including witness statements, exhibits, correspondence or other documents). Where such material has been considered by the court in reaching its decision, access to it is particularly important. The fact that, in modern court proceedings, documents are not read out at length (for reasons of efficiency) should not deprive non-parties of the opportunity to follow what is going on. The circumstances in which derogations from that principle should be permitted should be limited to what is permitted by Article 10(2). How other jurisdictions have approached these issues is addressed below.

To what material does the public access principle apply?

13. ARTICLE 19 refers in these submissions to the "public access principle", intending to include both the principles of open justice principles and the right to freedom of expression: the case-law referred to in the Appendix refers to one or other, or sometimes both, of these principles. The court is asked to read the Appendix, which summarises how the public access principle has been applied in jurisdictions including Canada **A13-A19**, New Zealand **A20-A29**, the USA **A30-A34** and South Africa **A35**.

14. In a number of jurisdictions, the courts have held that the public access principle is engaged by aspects of the court process beyond mere access to the court to hear oral evidence. A wide range of information generated in relation to court proceedings has been held to be subject to the public access principle and, consequently, liable to be disclosed to a third party - subject to any relevant countervailing interests, as to which, see below at [20-21]. The material subject to the principle has included:

(1) access to search warrants and informations filed in support of the application for a warrant, regardless of whether such evidence was later relied on in any trial: *Attorney-General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175 (Supreme Court of Canada) **A13**;

(2) "broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings": *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc.* [2001] 2 SCR 743 (Supreme Court of Canada) **A15**;

(3) an application to seal search warrant application materials, in advance of any trial: *Toronto Star Newspapers Ltd v Ontario* [2005] 2 SCR 188 (Supreme Court of Canada) **A14, A16**;

(4) access to video recordings (including one showing the death of a woman in custody), parts of which had been shown at a preliminary inquiry in relation to proceedings which had been discontinued prior to trial: *R v Canadian Broadcasting Corporation* 2010 ONCA 726 (Court of Appeal for Ontario) **A17-A19**;

(5) broadcast of video footage of a confession by a defendant who had later been acquitted at a trial at which the confession had been ruled inadmissible: *Rogers v TVNZ* [2007] NZSC 91 (the Supreme Court of New Zealand) **A23**;

(6) access to any written statements or documents admitted into evidence for the purposes of a committal hearing or trial (for a period of 20 days after the committal hearing or trial): the Criminal Proceedings (Access to Court Documents) Rules 2009 (New Zealand), rules 8 and 9 **A28**;

(7) access to papers filed under seal in connection with a pre-trial motion by defendants to exclude certain evidence at trial: *In re New York Times* 828 F.2d 110 (1987) (Court of Appeals for the 2nd Circuit, US) **A33**; and

(8) access to a sealed report filed with the district court in connection with an investigation into corruption allegations: *U.S. v Amodeo* 71 F.3d 1044 (1995) (the Court of Appeals, 2nd Circuit, US) **A34**.

15. Statements of principle have reflected the broad reach of the public access principle in relation to court proceedings:

(1) In Canada, the application of the right to freedom of expression has been held to govern "all discretionary judicial orders limiting the openness of judicial proceedings": *Re Vancouver Sun* [2004] 2 SCR 332 **A16**. Applying this test Sharpe JA in the Court of Appeal for Ontario noted in *R v Canadian Broadcasting Corporation* (above and **A17-A19**) that while a party who introduces an exhibit "may choose to read or play only portions of the exhibit in open court, the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case" [43]. The judge continued at [44] that

> "[a]s the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court… Absent some countervailing consideration sufficient to satisfy the Dagenais/Mentuck test[8], the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary".

(2) The Supreme Court of New Zealand, in *Mafart v TVNZ* [2006] NZSC 33 **A21** located the rationale for its broad approach to the scope of the public access principle in the context of modern values and social attitudes:

> "Public access to court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information, open justice, access to official information, protection of privacy interests, and the orderly and fair administration of justice."

(3) See also the statements of the South African Constitutional Court in *Independent News v Minister of Intelligence* [2008] ZACC 6:

> "From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial."

16. The Law Commission of New Zealand's Report of 30 June 2006, "Access to Court Records" **A26** set out different justifications for a similarly broad approach. That Report, which informed reforms to the rules governing third-party disclosure in criminal cases, stated:

> "… the transparency of the judicial process extends to public access to the records of court cases. To be effective, open justice requires presumptively open access to court records, at least from the start of a hearing. Access to records at the time of the hearing

[8] For further discussion of the "Dagenais / Mentuck test", see below **A14-A17**.

> should ensure accuracy of reporting by the media. At a later period, the possibility of a miscarriage of justice may come to light years after a case has been decided and records may need to be perused at that stage. At a later stage too, a person or organisation may need to research historic cases to investigate issues of public interest and concern."

17. Where specific tests have not been advanced by courts to explain the reach of the public access principle, underlying rationales have frequently been provided instead by way of justification. In this context a range of policy reasons, relating both to the importance of public awareness of judicial proceedings in a democracy and the central role played by the media in informing and stimulating this awareness, have been relied upon:

(1) Access to an exhibit or court document, even where not added to the oral proceedings, has been held to enable the public to: (i) better understand a court judgment: *R v CBC* **A17-A19***, Rogers* **A23***,US v Amodeo* **A34**; (ii) enter into an informed debate about the merits or consequences of a particular judicial decision, in the light of exposure to the evidence itself: *Rogers* **A23**; (iii) repose confidence in the courts as bodies which promote transparency and eschew a "defensive attitude" to their processes: *Rogers* **A23**; *Mafart* (Supreme Court and Court of Appeal) **A21-A22**; (iv) take a more vivid interest in court processes by gaining direct access to evidence rather than "second-hand" pleadings or judgments: *Independent News and Media Ltd v A* [2010] 1 WLR 2262 **A7**; *Rogers* **A23**.

(2) Conversely, a refusal of access to a particular item of evidence or document may hinder the media's ability to function as "social watchdog" or "surrogate for the public" by: (i) impairing its ability to provide accurate information: *Atkinson v UK* (1990) 67 DR 244 **A2**; *Tarsasag* **A4**; NZ Report on Access to Court Records **A26**; or (ii) deterring journalists from reporting on court-related matters: *Tarsasag* **A4**.

(3) The matters of public interest arising from court proceedings may not necessarily be co-extensive with the subjects addressed in any judgment. It would be wrong to rely on a judgment or the statements of case to communicate all such public interest matters, so as to preclude the need for access to exhibits or other documents since judges and lawyers are not arbiters of the public interest: *Independent News and Media* **A7***, In re Guardian Newspapers* [2010] 2 AC 697 (SC) ("*GNM*") at [63-66] *per* Lord Rodger[9].

[9] See for instance at [63]: Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: News Verlags GmbH & Co KG v Austria 31 EHRR 246 , 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in Campbell v MGN Ltd [2004] 2

(4) More generally, documents relating to the exercise of judicial power can be seen as falling within the category of information to which, absent good reason to the contrary, the public ought in any event to have access as a matter of entitlement, rather than for any instrumental reason. The reference to the undesirable potential for the court to exercise the "censorial power of an information monopoly" in *Tarsasag* **A4** can be seen in this light.

18. In its judgment in *Reyes* **A36,** the Inter-American Court of Human Rights provided the following broadly applicable analysis of Article 13 of the American Convention on Human Rights[10], the terms of which can be compared with Article 10 of the European Convention and Article 10 of the International Convention on Civil and Political Rights (see **A37-A38**):

> "…by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."

Importantly, therefore, and consonant with a human rights approach that prioritises substance over form[11], the courts assess the reach of the public access principle not by reference to a

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AC 457 , 474, para 59, "judges are not newspaper editors". See also Lord Hope of Craighead in In re British Broadcasting Corpn [2010] 1 AC 145 , para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.

[10] Article 13(1) (the relevant paragraph for present purposes) reads: "1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."

[11] See, eg *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440 at [19], where Lord Bingham referred to the ECtHR's "constant principles of preferring substance to form and seeking to ensure that Convention rights are effectively protected..."

fixed categorisation of types of evidence or information, but in the course of a fact-sensitive and contextual inquiry. This will take account all the circumstances, including the purpose for which access is sought and the wider rationales for media reporting of court proceedings.

19. The approach taken by the Divisional Court in this case did not give effect to a general public access principle and did not adequately consider the importance of access to the information requested. ARTICLE 19 notes, in particular:

(1) The Divisional Court held, by reference to the pre-Human Rights Act decision of *R v Waterfield* [1975] 1 WLR 711, that there was a distinction between oral evidence given in court and exhibits [47-50]. It concluded (in ARTICLE 19's view, erroneously) that the principle of open justice did not "extend to a right for the public, or after *Crook* for the press, to inspect documents or other exhibits placed before the court" [56]. This approach is wrong in principle (being too narrow) and on the facts.

(2) It is important to note, given the inclusion of [60] as part of the Divisional Court's reasons why the application must fail, that the general principle of access to public or state-held information applies to court documents, notwithstanding the fact that the Freedom of Information Act 2000 ("FOIA") confers an "absolute exemption' on court records in s32. As Ward LJ explained in *Kennedy v Information Commissioner* [2011] EWCA Civ 367, [2011] EMLR 24 **A9,** the policy justification for that exemption was that "decisions over court documents should be taken by the court". The Ministry of Justice's guidance on FOIA makes the same point: it is not that the information is meant to be exempt from disclosure, but that it is to be dealt with by a different regime[12]. The general principle of access, and need to ensure that any limits upon it are consistent with Article 10(2) of the European Convention, apply equally in relation to court records.

(3) In premising its conclusion that there was no right of access to the documents, in part, on the fact that "[a]ll the issues relied upon were fully set out in the oral submissions in open court by senior and able Counsel" [1] & [57], the court misconstrued the rationale and effect of the *Tarsasag* line of jurisprudence **A1-A12**. As expounded in *Independent News and Media Ltd v A* at [22] **A7**, the legal issues at

[12] The website states: "some [absolute] exemptions designed to place the disclosure of information entirely within the ambit of separate access regimes (for example, the Data Protection Act 1998, or the procedures for disclosing court records) ...": http://www.justice.gov.uk/guidance/freedom-and-rights/freedom-of-information/foi-exemptions-about.htm"

stake in a case may not be coterminous with the matters of legitimate public interest; as Lord Judge CJ stated:

> "…the litigation is about A's interests, and the involvement of his devoted family, and the judge must concentrate on them and he will produce a judgment which reflects his decision about the matters in issue before him. He is not qualified to determine what is or may be of interest to the public: that is the function of the media, not the judiciary. In any event, it would be an inappropriate exercise of a judge's responsibility if he were to tailor the contents of his judgment to what he believed to be the needs or concerns of the media."

What are the justifiable limits on the public access principle?

20. Once the public access principle has been found to apply to a particular court-related piece of information, a balancing exercise arises almost uniformly across the various jurisdictions discussed in more detail in the Appendix **A13-A36** (and **A38**). In general this exercise involves a weighing-up of the principles of open justice and the right to seek and receive information against a variety of competing interests such as privacy, confidentiality, fair trial rights and the proper administration of justice.

21. ARTICLE 19 submits that the need for any limitation on the public access principle (i) needs to be demonstrated clearly, (ii) must be strictly necessary to advance another (specified) interest (prescribed by law) and (iii) must be no greater than necessary for that purpose (in duration or scope).

(1) Considering the public access principle as an aspect of the right to freedom of expression, then, like any other restriction or limitation on the Article 10(1) right, the need for any restriction or limitation on public access to court documents must be justified under Article 10(2): it must be "necessary" in a democratic society; the necessity must be convincingly established; and it must be for the purposes of (and no wider than required for) one or more of the legitimate aims prescribed.

(2) The same applies if the principle is considered by reference to open justice principles: in the recent Neuberger Committee Report on Superinjunctions (May 2011) the summary of conclusions at (2) (page iv of the Report) conveniently sets out the position in relation to any derogation from open justice: open justice is a fundamental constitutional principle; while derogations are permitted, they can properly be made only where, and to the extent that, they are "strictly necessary" in order to secure the administration of justice; there must be clear and cogent evidence

sufficient to support any derogation from open justice; the court must scrutinise the position carefully; and derogation must be the minimum necessary.

All of these considerations apply (in particular, those relating to open justice) in relation to access for information in extradition proceedings.

22. The case law from other jurisdictions shows that in some cases, the evaluation (or balancing) exercise takes place in the context of a presumption in favour of access: *Rogers* **A23***, Amodeo* **A34,** *Minister of Intelligence Services* **A35**. *Amodeo* propounds an interesting "continuum" in the weight to be accorded to the "presumption" of access, depending on the extent to which the information sought affects the adjudication. Time is a relevant consideration in the New Zealand rules: access to a wide range of court papers and evidence as of right is limited to 20 days after the committal hearing or trial **A28**.

23. Against this background, the present appeal is an unusual example of refusal to give access to court-related information, in that it was suggested that the fact that the relevant material was already substantially available (by reference to the oral submissions made in court) was an important justification for declining the request for access: Divisional Court at [1] and [57]. It is striking, by contrast, that the cases referred to in the Appendix are generally concerned with information which (for one reason or another) a party seeks to keep secret or undisclosed. It appears that, in this case – if it were to be accepted that the public access principle applies – there would be no proper countervailing reason that could warrant refusal of the request to access.

The right approach

24. The reason for the refusal to permit access to the requested documents in this case lay in the (supposed) non-applicability of the open justice principle and right to freedom of expression/Article 10 of the European Convention, rather than on the grounds of any countervailing interest sufficient to outweigh the general right of access (no such countervailing interest was put forward). ARTICLE 19 submits that the court should hold:

(1) that the public access principle exists as a matter of general principle – in the light of the recent case law in the ECtHR (*Tarsasag*) and other case law and sources referred to in the Appendix and above; and

(2) that the public access principle applies to the documents requested in this case by GNM.

If, as ARTICLE 19 submits, the public access principle extends to access to witness statements (including exhibits) given in evidence and relied upon by a judge (though not read in open court), then reasons one to four in the judgment of the Divisional Court [56-59] must fall away: the right to freedom of expression (Article 10) and section 6 of the Human Rights Act 1998 take precedence over the Criminal Procedure Rules (which should be consistent with Article 10); the pre-HRA authorities of *Waterfield* and *Crook* have been superseded.

25. On taking a fact-sensitive and contextual approach to the request for information made in this case, a number of considerations support the grant of access, including the following:

> (1) the information relates to matters which are plainly of public interest: see witness statements ("ws") of Rob Evans [7-11] and David Leigh [7];
> (2) the public interest elements may relate to but go beyond the contents of the judgment, notwithstanding that the judgment covered legal issues arising (such as the use by the US of extradition proceedings and the SFO's policy in relation to non-prosecution of certain individuals): Rob Evans ws [22-25];
> (3) the documents would enable the *Guardian* to act as "social watchdog" or "surrogate for the public" by testing the quality of the evidence assembled by the US Department of Justice and, by extension, the judge's own assessment of that evidence: Rob Evans ws [24];
> (4) the journalists and the *Guardian* have taken an active and long-running interest in these matters: Rob Evans ws [7-12];
> (5) copies of relevant documents have been requested by the journalists but to no avail: the court is therefore effectively in a "monopoly" position in relation to the information: Rob Evans ws [19-21]; David Leigh ws [8];
> (6) the denial of access to the documents has significantly impeded the ability of the journalist to understand the proceedings: Rob Evans ws [18-21]; David Leigh ws [4-6]. There was, therefore, a concomitant obstacle placed in way of the public's right to receive information on these matters of public interest;
> (7) the documents were relied upon by the district judge in reaching judgment and are therefore closely related to the adjudicative process; and
> (8) the CPS itself has a policy of generally releasing information of the type arising in the present case, which suggests that any policy arguments against the applicability of the public access principle are limited: David Leigh ws [9].

26. It is submitted that taken singly or together these factors are of compelling force. Access to the information sought is amply justified. By contrast, there is no countervailing factor against which could justify refusal of access. The extradition proceedings, and the context within which they operate, were a matter of public interest about which the public was entitled to be informed. Without access to the documents requested, there is an unwarranted restriction on the flow of information. As set out in Rob Evans ws at [22-25], the matters of legitimate public interest transcend the issues in the extradition proceedings. It would be a mistake to expect (or suggest) that the statements of the judge, or counsel (who

are concerned with the interests of their client), would address all the matters of public interest in relation to these proceedings in the way that the media would.

Conclusion

27. ARTICLE 19 submits, for the reasons above, that the court should recognise and give effect to a general public access principle, giving effect to the right to freedom of expression. The information requested in this case falls within the scope of that principle. While the principle is not absolute, being subject to such limitations as are established to be strictly necessary for proper countervailing interests - it applies to the request for access to documents in this case. ARTICLE 19 submits that the appeal should be allowed.

28. If the court were to request further information or submissions from ARTICLE 19, it would be happy to seek to assist the court.

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APPENDIX: note on cases and other sources

Contents

1. *TARSASAG* IN CONTEXT

1.1 Strasbourg

A1. The recent line of ECtHR case-law concerned with the right of individuals, particularly journalists, to obtain information in the hands of the state authorities, which culminated in the judgment in *Tarsasag a Szabadsagjogokert v Hungary* (2011) 53 EHRR 3 (*"Tarsasag"*), can be seen as a limitation on, and response to, the principle in *Leander v Sweden* (1987) 9 EHRR 433 (*"Leander"*). In *Leander,* which concerned the refusal of the applicant's request for a secret police file compiled on him, the court observed at [74] that Article 10 did not "in circumstances such as those of the present case, confer on an individual a right of access to a register containing information on his personal position".

A2. There was an early indication that the *Leander* principle may not apply uniformly to all information requests in the admissibility decision of the European Commission of Human Rights ("ECmHR") in *Atkinson, Crook and The Independent v UK* (1990) 67 DR 244 ("*Atkinson"*). In the context of an Article 10 challenge to a sentencing hearing being held in private, the ECmHR stated that the *Leander* principle "does not apply with the same force in the context of judicial proceedings" (p 259). It referred to the Article 6 right to a public hearing, recalled the "important role played by the press in the field of the administration of justice" and quoted from *Sunday Times v United Kingdom* (1979-80) 2 EHRR 245 at [65] that

> "it is incumbent on them *[the media]* to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them ...".

The ECmHR then observed (p260):

> "In order that the media may perform their function of imparting information there is a need that they should be accurately informed."

The ECmHR was willing to assume that the decision to proceed in private by the court was an interference with the Article 10 right, but held that, in the circumstances, this was justified by a pressing social need.

A3. A clearer precursor to *Tarsasag* is found in the admissibility decision in *Sdruzeni Jihonceske Matky v Czech Republic* (App no 19101/03), 10 July 2006 (*"Matky"*). The denial of a request by an environmental NGO for documents and plans in the possession of the state relating to a nuclear power plant was held to interfere with the applicant's Article 10 rights. Although it noted that the *Leander* judgment was founded on the proposition that Article 10 "basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him", the court held that there had been an interference with the Article 10(1) right in this case: the request had been to inspect government documents which were available to the authorities and where domestic law provided for access to such documents, subject to the fulfilment of certain specified conditions. The interference was held to be justified under Article 10(2).

A4. The judgment in *Tarsasag* was the first finding of a breach of Article 10 by reason of a withholding of information in the possession of the state. The applicant NGOs had asked the Constitutional Court for access to a complaint made to it by an MP, seeking a review of certain parts of the Criminal Code. In finding that the refusal breached Article 10, the court enumerated the following propositions:

> (a) "the most careful scrutiny" is required of state conduct which is "capable of discouraging the participation of the press, one of society's "watchdogs", in the public debate on matters of legitimate public concern, even measures which merely make access to information "more cumbersome" [26];
>
> (b) Article 10 does not permit "arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information", which is "an essential preparatory step in journalism and an inherent, protected part of press freedom" [27];
>
> (c) the Constitutional Court had a "monopoly of information" in relation to the applicant's request, which concerned a matter of public interest, and whose refusal had thereby impaired the applicant's "right to impart information" [28];

(d) the ECtHR had "recently advanced towards a broader interpretation of the notion of 'freedom to receive information'" (in the *Matky* decision) "and thereby towards the recognition of a right of access to information" [35];

(e) the present case concerned "an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a social watchdog, like the press" (not a denial of a general right of access to official documents). It compared the case with previous concerns that "preliminary obstacles created by the authorities in the way of press functions" called for "most careful scrutiny". Further, the State's obligations in matters of freedom of the press" included "the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities". In this case, the information was "ready and available and did not require the collection of any data by the Government" and the State had an obligation "not to impede" the flow of information [36];

(f) the hindering of access to information of public interest may discourage or deter journalists from pursuing such matters, with the result that they may no longer be able to play their "vital role as 'public watchdogs'", and may impair their ability to provide "accurate and reliable information" [38];

(g) in the absence of any competing interests, such as privacy, which might argue against disclosure, there was a breach of Article 10 was [37], [39].

A5. So far, *Tarsasag* has been cited in two ECtHR judgments. The first, *Kenedi v Hungary* [2009] ECHR 786 (*"Kenedi"*), concerned a request by the applicant historian to the Ministry of the Interior for access to certain documents relevant to his historical study of the Hungarian State Security Service. Despite several court judgments in his favour, the applicant had been denied access by the Ministry. The Government conceded that there had been an interference with the applicant's Article 10 right and the court agreed, holding at [43] that

> "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression".

Since the Government's conduct had been in defiance of court orders it had not been prescribed by law and could not be justified under Article 10(2) [45].

A6. The second, *Wizerkaniuk v Poland* (App no 18990/05) (5 July 2011), concerned a challenge by the applicant journalist to the compatibility with Article 10 of his conviction and financial penalty for having published an interview with an MP without the latter's consent, contrary to a requirement in domestic law. *Tarsasag* was cited in [65], as part of the assessment of the proportionality of the criminal sanction imposed: the court noted the need

for the most careful scrutiny of measures of prior restraint on publication (see also [81-82]). This case did not arise out of a request for access to information.

1.2 Domestic cases (England and Wales)

A7. *Tarsasag* was considered in *Independent News and Media Ltd v A* [2010] EWCA Civ 343, [2010] 1 WLR 2262 CA, on the application by a number of media organisations for access to the hearing of a Court of Protection case, the details of which had to some extent already entered the public domain, in part because of the extraordinary musical talents of "A". In upholding the judgment that access should be granted, the Court of Appeal's reasoning was:

(a) in answer to the contention (against allowing access) that much of the material of public interest relating to the case was publicly known, and the remainder could be addressed by publication of (parts of) the Court of Protection judgment at [22]:

> "it is just because A's remarkable situation including… details of his private life, is already in the public domain that the interests of the public and the media are legitimately engaged… the litigation is about A's interests, and the involvement of his devoted family, and the judge must concentrate on them and he will produce a judgment which reflects his decision about the matters in issue before him. He is not qualified to determine what is or may be of interest to the public: that is the function of the media, not the judiciary. In any event, it would be an inappropriate exercise of a judge's responsibility if he were to tailor the contents of his judgment to what he believed to be the needs or concerns of the media."

(b) the "general rule" in *Leander "*may well not apply" when "the information concerned is sought by the media and arises in court proceedings… [w]here article 6 is also engaged, and the information sought consists of evidence given in a court of law, article 10 may be engaged when the media are seeking the information for the purpose of disseminating it more widely because it is in the public interest" [39];

(c) applying the principles derived from *Atkinson* and *Tarsasag*, the fact that the journalists in the instant case sought information (i) relating to court proceedings, (ii) in order to report them in the public interest and (iii) in circumstances where "the basis of the media interest is what is lawfully and appropriately already in the public domain" reinforced the relevance of Article 10 and meant it had been engaged at the point at which the media organisations applied to the first-instance judge to attend the hearing [40-44].

A8. The Court of Appeal at [42] referred to the European Commission for Democracy through Law's description of the *Tarsasag* judgment as a "landmark decision on the relation between freedom of information and the .. Convention". In *BBC v Sugar (No 2)* [2010] 1 WLR 2278[1] at [76], Moses LJ referred to it as a "landmark decision on freedom *to* information" (emphasis in original) that "establishes that article 10 may be invoked not only by those who seek to give information but also by those who seek to receive it".

A9. *Tarsasag* was referred to by the Court of Appeal in *Kennedy v The Information Commissioner* [2011] EWCA Civ 367, [2011] EMLR 24. The applicant (a journalist) challenged a decision by the Information Tribunal, upheld on appeal before Calvert-Smith J, that information he sought in relation to a Charity Commission inquiry into George Galloway's Mariam Appeal was exempt from disclosure under s32 of the Freedom of Information Act 2000 ("FOIA"). Having concluded provisionally (in a draft judgment) that the decisions below were correct, the Court of Appeal decided – in the light of *Tarsasag* and *Kenedi* – to refer the issue back to the Tribunal and to stay the appeal pending its further decision. Ward LJ at [45(1)] referred to the two decisions as "very recent and potentially important new developments of Strasbourg jurisprudence"; Jacob LJ said that, in the absence of an Article 10 argument, he would have dismissed the appeal, but indicated at [47] that this would have been "with reluctance" in part because

> "the construction favoured by the Judge means that all information deployed in a statutory inquiry (other than one under the Inquiries Act 2005) allows all information deployed in the inquiry to be kept secret for 30 years after the end of inquiry, regardless of the contents of the information, the harmlessness of disclosure or even the positive public interest in disclosure. The blanket ban would apply to each and every document deployed in the inquiry, even if those who deployed it were entirely content that it should be published. It means that the operation of the inquiry will not be open or fully open to public scrutiny for no apparent reason."

A10. The First Tier Tribunal ("FTT") produced its new decision on 18 November 2011: *Kennedy v The Charity Commission* (EA/2008/0083). It noted the "developing jurisprudence" in Strasbourg which, though it did not grant a "general right to receive information under Article 10", advanced towards a "broader interpretation of the notion of freedom of information" recognising an "individual right of access" (subject to conditions under Article 10(2)), for example, where a "social watchdog is involved and there is a genuine public interest" (as in *Tarsasag*); it was "clear" that the ECtHR had now recognised "an individual

[1] The Supreme Court heard an appeal (November 2011); the decision has not yet been handed down.

right of access to information in certain circumstances" [42]. In [43], the FTT tried to explain *Tarsasag*, which seemed to establish, in particular "in relation to social and media watchdogs" the following:

> "(i) Where a State makes no provision for a right of access to official information (at least so far as the right is needed to help inform public debate), that absence will itself constitute an interference with the right to freedom of expression which is protected by Article 10(1);
>
> (ii) Where a state does confer such a right of access but the right is shaped (i.e. so that there is no right of access outside its bounds), then for information falling outside the bounds of the right:
> (a) there is an interference with the right to freedom of expression which is protected by Article 10(1); and
> (b) that interference falls to be addressed by Article 10(2)."

The FTT noted the remarks of Jacob LJ (see **A9** above) and concluded that an interference with Article 10 had been established on the grounds that the journalist's efforts to gather information on matters of public concern had been refused by the Charity Commission in what amounted to a "form of censorship" that "impaired" his "right to impart information" [44] in a context where the Commission constituted an "information monopoly" [53]. No justification for that interference existed [65]. Section 32 of FOIA was therefore to be read as exempting the information from disclosure only for the duration of the Charity Commission inquiry [72]. A Court of Appeal hearing is listed for 21 or 22 February 2012.

A11. It is worth noting that, in the context of the *Kennedy* application, the Court of Appeal acknowledged that the policy justification for granting an "absolute exemption" from FOIA for court records in s32 was "that decisions over court documents should be taken by the court": Ward LJ at [29]; see also at [30], quoting Coppel's Information Rights (3rd ed) at 20-035:

> "The thinking behind the exemption is that the disclosure of information contained in court documents (which may include confidential information and which may have special restrictions upon its re-use) should be regulated by the procedure applying in the court or tribunal in question, rather than by the general freedom of information regime."[2].

[2] See also Institute of Chartered Accountants of England and Wales v Information Commissioner/ Ministry of Justice (EA/2011/0148) (8 December 2011) (FTT) at [45-49]. The Council of Europe Convention on Access to Official Documents (adopted by the Committee of Ministers on 27 November 2008), which guarantees "the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities", subject to specified limitations, and requires state parties to "take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this convention", excludes information held by "judicial authorities" save "in so far as they exercise administrative authority" from the scope of the Convention. However, the Convention states that each member may declare that the rights and obligations provided for by the Convention do apply to all other information held by judicial authorities.

It is submitted, therefore, that the fact that court records fall outside the ambit of FOIA means that it is incumbent on the court, as a public authority, to put in place a proper system for access to information (including in relation to extradition proceedings) that is compatible with the requirements of Article 10.

1.3 Scotland

A12. The High Court of Justiciary considered *Tarsasag* very recently in *British Broadcasting Corporation (Petitioners)* 2012 WL 14755 (12 January 2012). The BBC asked for access to certain photographs of the victim in a murder case, which had been produced in evidence at a sentencing hearing. In Scotland, there was no equivalent to the CPS Protocol in place in England and Wales[3], governing access to material. The court carried out a balancing process (copyright and privacy rights were involved): [34-36]; it was "fortified" in its conclusion by *Tarsasag*. The court referred to the present appeal [38-40]. On the circumstances of that case, the photographs were "significant adminicles of evidence[4] at the trial" and "were effectively published in open court" [40].

2 OTHER JURISDICTIONS[5]

2.1 Canada

A13. The Canadian courts' approach to public access to court records is now governed primarily by the application of the fundamental right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" in section 2(b) of the Charter of Rights and Freedoms. However, before that Charter came into force, the question was addressed in *Attorney-General (Nova Scotia) v MacIntyre* [1982] 1 SCR 175. A journalist sought access to search warrants and informations filed in court. Dickson J, for the majority, upheld the grant of access to these materials, citing the "strong public policy

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[3] The Protocol, agreed by the CPS, Association of Chief Police Officers and media representatives, is referred to in GNM's skeleton argument of 12 April 2011 at [16] and in David Leigh's witness statement at [9]. The intervener has not seen exhibit DL1, but the Protocol is publicly available.

[4] According to the online glossary of the Scottish Land Court: "Strictly speaking, any piece of evidence supporting a particular argument may be said to be an adminicle of evidence but lawyers often tend to use the term when speaking of small pieces of evidence which are not of great weight in themselves but which they hope the court will accept as giving at least some support to their case."

[5] ARTICLE 19 has not in its submissions addressed the approach taken by the Court of Justice of the European Union to access to court information .

in favour of "openness" in respect of judicial acts" (p183) and holding that "[a]t every stage the rule should be one of public accessibility and concomitant judicial accountability" (p186). The principle of openness was not applicable only to materials which had been relied on a full criminal trial; rather, the "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance" (p186-7). The court held that following the execution of a search warrant and the bringing to court of any relevant objects found as a result, the public was entitled to inspect the warrant and the underlying information (page 190).

A14. After the entry into force of the Charter, the courts' approach to public access to judicial proceedings came to be founded on a set of principles known as the *Dagenais / Mentuck* test: the name being derived from the Supreme Court judgments in *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835 and *R v Mentuck* [2001] 3 SCR 442. As subsequently developed in *Toronto Star Newspapers Ltd v Ontario* [2005] 2 SCR 188 (*"Toronto Star"*), these principles enshrine a rebuttable presumption in favour of open and public judicial proceedings, based on section 2(b) of the Charter. According to *Mentuck* at [32], a "publication ban" could be ordered only when (a) its necessity has been established and (b) the proportionality of the ban's salutary and deleterious effects had been found by the court. A publication ban should be ordered only when:

> "(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice."

A15. The Supreme Court has taken a broad view of the scope of application of section 2(b) of the Charter in relation to court proceedings. In *Lac d'Amiante du Québec Ltée v 2858-0702 Québec Inc.* [2001] 2 SCR 743, Lebel J at [72] referred to the "fundamental importance of the media's right of access to information in a modern democracy" and said:-

> "It will also be recalled that once the trial begins, and except for the limited number of cases held in camera or subject to a publication ban, the media will have broad access to the court records, exhibits and documents filed by the parties, as well as to the court sittings. They have a firm guarantee of access, to protect the public's right to information about the civil or criminal justice systems and freedom of the press and freedom of expression."

The court referred to the "imperative of transparency in the judicial system". However, this did not apply to an examination on discovery, which was carried out in private and under an express rule of confidentiality.

A16. The *Dagenais* / *Mentuck* test has more recently been held to govern not only the right to attend court proceedings but "all discretionary judicial orders limiting the openness of judicial proceedings": *Re Vancouver Sun* [2004] 2 SCR 332 at [30-31]; *Toronto Star* at [30]. It has been applied to an application to seal search warrant application materials in advance of trial (*Toronto Star*) and a media request for access to, and the right to copy, an exhibit after the conclusion of a trial: *R v Fry* (2010) 254 CCC (3d) 394 (British Columbia Court of Appeal).

A17. In *R v Canadian Broadcasting Corporation* 2010 ONCA 726 ("*CBC*"), the Court of Appeal for Ontario considered a request by CBC to have access to and copy video recordings, one of which showed the death of a woman in custody, which had been exhibits in a preliminary inquiry into alleged offences of criminal negligence. Four correctional officers had been charged with causing death by negligence. Only parts of the footage were shown at the inquiry and the prosecution was discontinued before trial. At first instance, the judge limited CBC's access to the parts of the video evidence played at the preliminary inquiry; it was not permitted to copy the part of the video showing the woman's death. On appeal, Sharpe JA, speaking for the court, held at [24] that:

> "The open court principle and the rights conferred by s. 2(b) of the Charter embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press.": *CBC v. New Brunswick* at paras. 23-26. In *Vancouver Sun (Re)* at para. 25, the Supreme Court of Canada described the openness of the courts and judicial processes as being "necessary to maintain the independence and impartiality of courts", "integral to public confidence in the justice system" and "a principal component of the legitimacy of the judicial process".

The *Dagenais/Mentuck* test (A14 above) applied to media requests for access to exhibits [25-26].

A18. The court in CBC went on to consider whether the media's rights were limited to attending court and reporting on what they observed there. At [28], the court rejected the

submission that the open court principle and Charter rights were "limited to attending court and reporting on what actually transpires in the courtroom". It said (emphasis added):

> "[28] .....Even before the *Charter*, **access to exhibits that were used to make a judicial determination**, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle: *MacIntyre.* That approach was endorsed in *Vancouver Sun* at [[27]]...
>
> [29] Likewise, in *Toronto Star*, the Supreme Court applied the *Dangenais/Mentuck* test to a Crown application to seal search warrant materials, thereby underlining that *Dagenais/Mentuck* applies **to ensure the "openness of the judicial process"**, not only what actually transpires in open court. ...."

The court at [30] referred to *Lac d'Amiante*, in which the Supreme Court "defined the media's right to access to court records and exhibits very broadly and in terms that are inconsistent with notion of a bare right to report on what actually transpires in open court" (citing the passage set out at A15 above). Further, absent any countervailing interest to satisfy the *Dagenais / Mentuck* test, the right of access included the right to make copies [31ff].

A19. The court's explanation in *CBC* of why the judge had been wrong to limit the right of access to only those parts of the exhibits played in open court is important (emphasis added):

> "[43] When an exhibit is introduced as evidence to be used without restriction in a judicial proceeding, the entire exhibit becomes a part of the record in the case. While a party may choose to read or play only portions of the exhibit in open court, **the trier of fact, whether judge or jury, is not limited to considering only those portions when deciding the case**. A party who introduces an exhibit without restriction cannot limit the attention of the trier of fact to only portions of the exhibit that favour that party and that the party chooses to read out or play in open court.
>
> [44] **As the entire exhibit is evidence to be used in deciding the case, I can see no principled reason to restrict access to only those portions played or read out in open court.** When Dickson J. articulated and applied the open court principle to accord a journalist access to an affidavit filed in support of a search warrant application in *MacIntyre*, he was plainly confronted with material that had not been read out in open court. Yet he did not hesitate to order access. **Absent some countervailing consideration sufficient to satisfy the *Dagenais/Mentuck* test, the open court principle and the media's right of access to judicial proceedings must extend to anything that has been made part of the record, subject to any specific order to the contrary.**"

The court considered and rejected the arguments against access: the relevant test was not satisfied.

2.2 New Zealand

A20. Recent authority law on public access to judicial proceedings and documents has applied the balancing test enunciated by the Court of Appeal of New Zealand in *R v Mahanga* [2001] 1 NZLR 641: the court set out the following test in relation to the power to

permit access to court documents under rule 2(5) of the Criminal Proceedings (Search of Court Records) Rules 1974 (now revoked: see below **A28-29**):

> "We conclude that the broad judicial discretion under R 2(5) is intended to be exercised by weighing the competing interests presented by any particular application. Any legitimate privacy concern raised by an accused person is one. The purpose for which access is sought, if known, may be relevant. The principle of open justice will often be important, especially when applications are made for access to Court records by the media. So will be the interests of administration of justice where there is a risk that they will be harmed by disclosure."

A21. In *Mafart v TVNZ* [2006] NZCA 183, the media organisation, TVNZ, sought access to taped footage of the guilty pleas of two defendants in committal proceedings. The proceedings related to the manslaughter of a French Greenpeace photographer on the ship "Rainbow Warrior" in 1985 and the pleas had been broadcast by way of closed circuit television within the court building. The Supreme Court of New Zealand (*Mafart v TVNZ* [2006] NZSC 33) had upheld an appeal against an earlier decision (*Mafart v TVNZ* [2005] NZCA 197) that there could be no appeal against the decision of the first-instance judge (Simon France J) granting access. The Supreme Court's judgment, which concluded that the Court of Appeal had jurisdiction to hear an appeal, included this important statement of principle at [7] (footnotes omitted; emphasis added):

> "**Public access to court files, both in respect of current and completed cases, must be considered in the context of contemporary values and expectations in relation to freedom to seek, receive and impart information, open justice, access to official information, protection of privacy interests, and the orderly and fair administration of justice.** The basis upon which access is permitted can raise important points of principle, the application of which may be deserving of appellate scrutiny, as is indicated by a number of recent court decisions."

A22. When it looked at the merits of the decision in *Mafart*, the Court of Appeal balanced the competing privacy and freedom of information interests [51-52]. A further interest - "the integrity of the administration of justice" – was held to be "of little moment in this present case" [52]. Having considered the privacy issues, and noted at [63] that the only potential privacy interests which arose on the facts of the case was whether "scorn, harm and disgust" might impact upon the (convicted) defendants as a result of media exposure, the balancing exercise was summarised at [70] as follows:-

> "In the absence of any distinctive harm to the appellants of the kind we have noted in [63] from which they ought to be protected, there is no justification for our courts to exercise something akin to a censorship role, or to encourage the use of the courts as, in effect, a public information filter. Indeed the Courts must be careful not to sanction unjustifiable limitations on the right of freedom of expression conferred by s 14 of the New Zealand Bill of Rights Act 1990. The particular acts complained of were in a public place; the nature and intrusiveness of the acts were minimal; and the goals of the surveillance were lawful, and

> indeed judicially sanctioned. This is particularly so where, as here, the act sought to be "filtered out" is of very great historical significance."

The appeal against the release of the footage was dismissed[6].

A23. More recently in *Rogers v TVNZ* [2007] NZSC 91 the Supreme Court considered the application of the open justice principle in relation to video footage acquired by the police in the course of their investigation into an alleged murder by the appellant, who had (later) been acquitted at trial. The footage showed the appellant confessing to the killing, but had been ruled inadmissible at trial because its acquisition had been in breach of the New Zealand Bill of Rights Act 1990. TVNZ had gained possession of the video from the police and wished to use it in a documentary about the appellant's acquittal and the inadmissibility ruling. The judge granted an injunction; the Court of Appeal allowed an appeal against it; and the Supreme Court upheld the discharge of the injunction. Tipping J at [67] gave the court's starting-point as follows (emphasis added):

> "The rules relating to the search of court records envisage the balancing of competing interests. It is difficult to posit a case in which the principle of open justice will not, to a greater or lesser extent, be a factor in favour of release. It is therefore generally appropriate to administer the rules on the basis that **unless there is some good reason for withholding the material concerned, members of the public, or at least those with a bona fide purpose in obtaining the information, should be entitled to it.** The freedom of information culture which exists in New Zealand, and its counterpart, the right to freedom of expression, both justify this general approach. In practical terms the effect of this approach is that if the balance of competing factors is even, the material in question should be released."

Addressing the points in favour of broadcast, Tipping J observed that "[t]he public have a legitimate interest in being informed about the whole course of the investigation and the trials in relation to the death of Ms Sheffield" [71]. It was the broadcast itself (rather than discussions of it in previous court judgments) which was "important" for the medium of television and access to the footage was required to enable the public to be fully informed about the case [72]. Tipping J made the more general statement at [74] (emphasis added):

> "The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. **Any public perception that the courts are adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system.** There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. **But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness**."

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[6] The Supreme Court refused to hear an appeal against the discretionary decision, which had been reviewed by the Court of Appeal: [2006] NZSC 78 (26 September 2006).

A24. In his judgment in *Rogers* at [136], McGrath J highlighted the considerations of transparency which militated in favour of direct media access to sources of information rather than access mediated through court judgments (emphasis added):

> "In the end, in the circumstances of this difficult case, I have reached the conclusion, when balancing the conflicting interests, that the side of open justice carries the greatest weight. Preservation of public confidence in the legal system is directly relevant, because of the circumstances and outcome of the trials of the two accused persons. There is a real risk of damage to public faith in the criminal justice system if the circumstances that led the Court of Appeal to refuse to admit the evidence are not fully transparent. It is a less than satisfactory response to reason that the end is achieved because the Courts' own descriptions of the events that are depicted in the videotape are full and complete. **Open justice strongly supports allowing the media access to primary sources of relevant information rather than having to receive it filtered according to what courts see as relevant.** On the other side of the scales, Mr Rogers' rights have been breached but also vindicated during the criminal justice process. At this stage they have much less weight."

A25. Similarly, in *Rogers* at [55], Blanchard J endorsed the following statement of William Young P in the Court of Appeal with regard to the imperative that lay behind direct, rather than mediated, public access to the primary facts:

> "I agree that the underlying issues can be debated without the videotape being shown on national television. But experience shows that arguments are usually more easily understood where they are contextualised. An esoteric argument about the way the New Zealand Bill of Rights Act is applied by the Courts becomes far more accessible to the public if the implications can be assessed by reference to the concrete facts of a particular case. In that context, to prohibit the proposed broadcast of the videotaped confession and reconstruction would necessarily have the tendency to limit legitimate public discussion on questions of genuine public interest."

A26. The developing case law in this area resulted in a New Zealand Law Commission investigation and Report: "*Access to Court Records*" (Report 93), 30 June 2006. The Report includes the following findings of potential relevance to this appeal (emphasis added; footnotes omitted):

> "2.2 Open justice is a fundamental tenet of New Zealand's justice system. It requires, as a general rule, that the courts must conduct their business publicly unless this would result in injustice. Open justice is an important safeguard against judicial bias, unfairness and incompetence... It maintains public confidence in the impartial administration of justice by ensuring that judicial hearings are open to public scrutiny...
>
> 2.3 There is an argument, espoused by both the Chief Justice and the District Court judges in submissions on the consultation draft of this report, that the open justice principle is satisfied by open court hearings and judgments being accessible as of right. This argument contends that open justice (and consequently the accountability of the judicial process) is largely not engaged when it is a question of access to court records.

> 2.4 However, in our view, **the transparency of the judicial process extends to public access to the records of court cases. To be effective, open justice requires presumptively open access to court records, at least from the start of a hearing. Access to records at the time of the hearing should ensure accuracy of reporting by the media**. At a later period, the possibility of a miscarriage of justice may come to light years after a case has been decided and records may need to be perused at that stage. At a later stage too, a person or organisation may need to research historic cases to investigate issues of public interest and concern."

The Report referred to well-established principles from this jurisdiction (including *Scott v Scott* and the *Leveller* cases) in relation to the principle of open justice, as well as cases from New Zealand. It included (emphasis added):

> "2.10 In recent decisions, the UK courts have considered that the principle of open justice applied to access to court records. For example, in *Dian AO v Davis Frankel & Mead*, in allowing access to records in proceedings that concluded some years ago to a person with a legitimate interest, the High Court said:
>
> > . . . I think that **in the case of documents that were read by the court as part of the decision-making process, the court ought generally to lean in favour of allowing access in accordance with the principle of open justice** . . .""

The Report referred to *Mafart*, citing the passage set out in bold from the Supreme Court decision (see **A21** above) at [2.13]. It continued:

> "2.14 In R v Mahanga, the Court of Appeal accepted that when a court is exercising its supervisory powers over court files and deciding whether access should be permitted, "the principle of open justice will often be important, especially when applications are made for access to Court records by the media". *In R v Wharewaka*, the High Court held that a presumption of openness of court records will apply where there is no countervailing public interest."

The next section, headed "*Open justice in criminal cases"*, included:

> "2.18 We endorse the principle of open justice as a guiding principle and recommend a presumption of openness of access to court records."

Chapter 7 of the Report considered "media access", noting at [7.1] that the media have a "crucial role to play in translating the principle of open justice into reality". It considered a number of practical recommendations for reform. These included, in relation to written material handed to court, a recognition of the "serious practical problems" for the media if material taken into account by the court in making its decision was not read out; it recommended that written material that "features in proceedings in open court", including affidavits or witness statements that had been confirmed and stood as evidence, should be regarded as documents read in open court and (subject to any statutory restriction or confidentiality order) the media should be given access to them [7.18-7.19].

A27. The general approach of the Law Commission to the question "[u]nder what circumstances should members of the public be able to access information held by the courts?" was expressed in the Executive Summary at [5] as follows:

> "in accordance with the principle of open justice, information should generally be available unless there are good reasons for not permitting access".

Although the courts had not been included in the "generous" access to public information afforded by the Official Information Act 1982 (courts had been outside the terms of reference of the Committee whose recommendations led to its enactment), the approach in that Act should be used as the legislative framework for access to court records: see [5-6]. The Report noted at [2.60] that the Court of Appeal in *Mahanga* had considered that its terms of the 1982 Act were relevant when the court considered public access to court records:

> "The Court of Appeal has held that the exclusion of courts does not mean that the principles of the Official Information Act 1982 are irrelevant to access to information held by courts, or that the whole of the Act's framework is inapplicable. The Court said the purposes of the Act and the principle of availability should influence the exercise of judicial discretion under the rules governing access to court records in marginal cases."[7]

A28. Informed by the recommendations of the Law Commission Report, the Criminal Proceedings (Access to Court Documents) Rules 2009 came into force on 12 June 2009. They confer on any person a right of access (on informal application to the Registrar) to (amongst other things) the following documents, subject to the power of a judge or judicial officer to order that any document not be accessed without a judge's permission:

> "(a) for a 20 day period starting with the day of committal *[see Rule 8]*:
>
> i. any documents filed in court for the purposes of the committal proceedings;
> ii. any written statements admitted into evidence for the purposes of the committal hearing;
> iii. any documents admitted into evidence for the purposes of the committal hearing; and
> iv. any transcript of oral evidence given at a committal hearing; and
>
> (b) for a 20 day period following any verdict at trial *[see Rule 9]*:
>
> i. any written statements admitted into evidence for the purposes of the trial;
> ii. any documents admitted into evidence for the purposes of the trial; and
> iii. any transcript of oral evidence given at trial."

In addition, in accordance with Rule 11, a person not entitled to access a document, court file or any part of the formal court record under any other rule may apply to the court for such

[7] The Report also referred to Mahanga, in this context, at [1-18-1.22].

access. Rule 12 provides for certain exemptions to access as of right in respect of certain specified types of evidence.

A29. Rule 16 specified the following matters as relevant considerations where the rules confer a discretion as to whether access should be granted:

> "(a) the right of the defendant to a fair hearing:
> (b) the orderly and fair administration of justice:
> (c) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
> (d) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, trials and decisions:
> (e) the freedom to seek, receive, and impart information:
> (f) whether a document to which the application or request relates is subject to any restriction under rule 12:
> (g) any other matter that the Judge, other judicial officer, or Registrar thinks just."

2.3 United States

A30. While the US Bill of Rights does not expressly safeguard the right of public access to criminal trials, the Supreme Court in *Richmond Newspapers v Virginia* 448 U.S. 555, 100 S.Ct. 2814 (1980) held that the existence of such a right was implicit in the freedoms of speech, press and assembly protected by the First Amendment. In the course of his reasoning, Burger CJ expressed the following principled approach on behalf of the plurality, with a particular stress on the function performed by the press in reporting court proceedings:

> "Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner."… It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," Offutt v. United States, 348 U.S. 11, 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.
>
> Looking back, we see that when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was in fact being done.
>
> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."….
>
> In earlier times, both in England and America, attendance at court was a common mode of "passing the time." …. With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet "[i]t is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice." *State v. Schmit*, 273 Minn. 78, 87-88, 139 N. W. 2d 800, 807 (1966). Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ." *Nebraska Press Assn. v. Stuart*, 427 U.S., at 587 (BRENNAN, J., concurring in judgment)."

A31. In the earlier case of *Nixon v Warner Communications* 435 U.S. 589, 98 S.Ct. 1306 (1978) (which concerned media organisations' request to make copies of certain Watergate tapes used in criminal trials) the Supreme Court recognised at p597 "the existence of a common-law right of access to judicial records". The court noted that previous authorities had founded this right on "the citizen's desire to keep a watchful eye on the workings of public agencies" and "a newspaper's intention to publish information concerning the operation of government". The right to inspect and copy judicial records was, though, a qualified one, with earlier judgments having prevented inspection (amongst other things) to "insure that its records are not 'used to gratify private spite or promote public scandal'". The court held that decisions on access were best left to the discretion of the trial court, but was prepared to assume that a right of access did apply to the tapes at issue (albeit finding that the right did not require release of the tapes because an alternative mechanism for processing and releasing the tapes had been provided for under the Presidential Recordings Act).

A32. There is a great deal of case law in the United States relating to access to court documents, including many appellate decisions. This Appendix does not seek to review or summarise those cases. Two appellate decisions are highlighted below, as being of potential assistance to the court.

A33. Firstly, in *In re New York Times* 828 F.2d 110 (1987), the common law right identified in *Nixon* was identified as inhering also in the First Amendment. The Court of Appeals for the Second Circuit addressed a request for access to disclosure of papers filed under seal in connection with the defendants' pre-trial motion to exclude certain evidence. The court held at pp114-116 that the First Amendment right of access extended to such documents and that, while the right to access may be limited, any limitation would need to be founded on "specific, on the record findings… demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest'". Despite the importance of the defendants' countervailing fair trial and privacy rights in that case, the court held that the first-instance judge had erred in making a wide-ranging ban on disclosure of the relevant documents.

A34. In *US v Amodeo* 71 F.3d 1044 (1995) the Court of Appeals, 2nd Circuit, considered a request for disclosure of a sealed report filed with the district court in connection with a corruption investigation into a union. The court noted the "presumption of access" to court records generated in relation to litigation but stated that (emphasis added):

> "the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from **matters that directly affect an adjudication** to matters that come within a court's purview solely to insure their irrelevance.

Further factors may come into play where a record falls "in the middle of the continuum" such that:

> "Where such documents are usually filed with the court and are generally available, the weight of the presumption is stronger than where filing with the court is unusual or is generally under seal."

The court held that, once the weight of the presumption is determined, its importance should be balanced against competing considerations such as the danger of impairing law enforcement or judicial efficiency (for instance, by deterring the cooperation of persons with police) and the privacy interests of those resisting disclosure. In *Amodeo,* the report had been only "on the periphery of the adjudicative process" and there were some strong countervailing interests in relation to law enforcement and privacy. The first-instance decision to unseal most of the report was therefore reversed and the question remanded to the district court.

2.4 South Africa.

A35. In *Independent Newspapers v Minister for Intelligence Services* [2008] ZACC 6, the Constitutional Court considered an application for access to court documents, which was resisted on grounds of national security. The court referred to the "constitutional right"[8] of access to court proceedings ("open justice") at [39]. The systematic requirement of openness in society flowed from the founding values of the Constitution; "transparency, accountability and responsiveness" were required in relation to the courts and all organs of the state [40]. The court observed that the default position was one of openness and stated at [41]:

> "From the right to open justice flows the media's right to gain access to, observe and report on, the administration of justice and the right to have access to papers and written arguments which are an integral part of court proceedings subject to such limitations as may be warranted on a case-by-case basis in order to ensure a fair trial."

The court had to have regard to all factual matters and factors before it to decide whether a limitation on open justice passed "constitutional muster" [46]. On the facts of the case, Moseneke DCJ (for the majority) considered the documents requested separately, ruling that some should be made available, but refusing access to others. Yacoob J and Sachs J dissented (in separate judgments): both would have required all the documents to be made available in the public interest. Van der Westhuizen gave a separate dissenting judgment.

3. THE INTER-AMERICAN COURT OF HUMAN RIGHTS

A36. In *Claude Reyes v Chile* (judgment of 19 September 2006), the Inter-American Court of Human Rights considered an application for access to information (not in the context of access to court proceedings). The Court considered the extent of the right to freedom of expression under Article 13 of the American Convention on Human Rights [75ff]. Like other human rights instruments, it established a "positive right to seek and receive information" [76]. It emphasised the importance of the right of access to information held by the state [77], stating (emphasis added):-

> "77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention **protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention.** Consequently, this article protects **the right of the individual to receive such information and the positive**

[8] Article 32 of the Constitution of South Africa (1996) contains the right to "access to information". 32(1) provides that everyone has the right of access to "any information held by the state" and "any information that is held by another person and that is required for the exercise or protection of any rights." 32(2) requires that national legislation must be enacted to give effect to this right: see the Promotion of Access to Information Act 2000; and see Sachs J on the integral role of the principle of openness in the "constitutional vision of an open and democratic society" and the "sea-change in philosophy and practice" in South Africa [153-159].

> **obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case.** The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State."

It referred to regional consensus on the issue in the Organization of American States [78] and a range of international and national instruments [79-81] and the importance of the right in a democracy [82-84]. This section of its judgment concluded with the following (footnotes omitted):

> "85. The Inter-American Court referred to the close relationship between democracy and freedom of expression, when it established that:
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> > "Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free."
>
> 86. In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.
>
> 87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society."

The Court reminded Chile that, under the Convention, it was obliged to adopt legislative and other measures to make the Convention rights and freedoms effective, including the "necessary measures to guarantee the protection of the right of access to State-held information" [161]-[163].

4. UNITED NATIONS HUMAN RIGHTS COMMITTEE ("UNHRC")

4.1 General Comment No 34: Article 19: Freedoms of opinion and expression

A37. The UNHRC issued its General Comment No 34 on Article 19 of the International Covenant on Civil and Political Rights ("ICCPR")[9] on 29 July 2011. It noted that freedom of opinion and expression are "essential for any society", constituting the "foundation stone for every free and democratic society" [2]. It contained a section headed "Right of access to information" which includes the following (footnotes omitted; emphasis added):

> "18. Article 19, paragraph 2 **embraces a right of access to information held by public bodies.** Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production. Public bodies are as indicated in paragraph 7 of this general comment[10]. The designation of such bodies may also include other entities when such entities are carrying out public functions. As has already been noted, taken together with article 25 of the Covenant, the right of access to information includes a right whereby the media has access to information on public affairs and the right of the general public to receive media output[11]. Elements of the right of access to information are also addressed elsewhere in the Covenant. As the Committee observed in its general comment No. 16, regarding article 17 of the Covenant, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. ....
>
> 19. To give effect to the right of access to information, **States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.** States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation. The procedures should provide for the timely processing of requests for information according to clear rules that are compatible with the Covenant.... Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests....."

4.2 UNHRC Communication No. 1470/2006: *Toktakunov v Kyrgyzstan*

A38. The Comment (A37 above) had been preceded by a "communication" on a specific case arising in Kyrgyrzstan: the applicant (Toktakunov) complained that he had been

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[9] Article 19 ICCP states (emphasis added): "(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; **this right shall include freedom to seek, receive** and impart information and ideas of all kinds...."

[10] Paragraph 7 of the Comment begins (emphasis added): "The obligation to respect freedoms of opinion and expression is binding on every State party as a whole. **All branches of the State** (executive, legislative and **judicial**) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State party. Such responsibility may also be incurred by a State party under some circumstances in respect of acts of semi-State entities....."

[11] The Article 25 right includes that every citizen shall have the right and opportunity to "take part in the conduct of public affairs, directly or through freely chosen representatives".

denied access to information about number of people sentenced to death in the country and the number of people held in prison who had received such a sentence. The UNHRC noted:

> "7.3 ..... The first issue before the Committee is, therefore, whether the right of the individual to receive State-held information, protected by article 19, paragraph 2, of the Covenant, brings about a corollary obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Covenant, the State is allowed to restrict access to the information in a specific case.
>
> 7.4 In this regard, the Committee recalls its position in relation to press and media freedom that the right of access to information includes a right of the media to have access to information on public affairs and the right of the general public to receive media output. The Committee considers that the realisation of these functions is not limited to the media or professional journalists, and that they can also be exercised by public associations or private individuals (see paragraph 6.3). When, in the exercise of such 'watchdog' functions on matters of legitimate public concern, associations or private individuals need to access State-held information, as in the present case, such requests for information warrant similar protection by the Covenant to that afforded to the press. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State. In these circumstances, the Committee is of the opinion that the State party had an obligation either to provide the author with the requested information or to justify any restrictions of the right to receive State-held information under article 19, paragraph 3, of the Covenant."

The UNHRC concluded, on the facts, that there was no sufficient justification for a restriction on the right to receive the information requested: none of the justifications contained in Article 19.3 applied (where necessary, restrictions are permitted "(a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.").

5. AFRICAN CHARTER & AFRICAN PLATFORM ON ACCESS TO INFORMATION

A39. The African Charter on Human and Peoples' Rights includes a right to freedom of expression which expressly includes that "every individual shall have the right to receive information": Article 9(1). In terms of regional standards, the "African Platform on Access to Information" (19 September 2011) has been developed by a number of regional groups and approved by the UN Special Rapporteur on Freedom of Opinion and Expression and the Special Rapporteur on Freedom of Expression and Access to

Information of the African Commission on Human and Peoples' Rights. The Platform - accessible at http://www.pacaia.org/images/pdf/apai%20final.pdf – sets out "key principles" on access to information that include the following: that "access to information is a fundamental human right"; that the right to access to information should be established by law in each African country; that the law should be binding and enforceable and "based on the principle of maximum disclosure"; and that the obligations of access to information should apply to "all public bodies". The right to access to information should be subject only to limitations set out in law, which should be "strictly defined" and applicable only if was shown that there would be "significant harm" if the information were released and the public interest in withholding the information was "clearly" shown to be greater than the public interest in disclosure.