



In the European Court of Human Rights

Application No. 47935/19

BETWEEN:

Jost Müller-Neuhof

Applicant

v.

Germany

Respondent Government

THIRD-PARTY INTERVENTION

**ARTICLE 19: Global Campaign for Free Expression
and
Access Info Europe**

Submitted on 17 January 2024

INTRODUCTION

1. Based on the leave of the President of the Court, granted on 20 December 2023, this third-party intervention is submitted by ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) and Access Info Europe, with the support of Freedom of Information Center (Armenia), Forum Informationsfreiheit Austria, Access to Information Programme (Bulgaria), Gong (Croatia), Transparency International Estonia, Regard Citoyens (France), Institute for Development of Freedom of Information - IDFI (Georgia), Open Knowledge DE (Germany), Vouliwatch (Greece), K-Monitor (Hungary), Right to Know (Ireland), The Good Lobby Italy, The Daphne Caruana Galizia Foundation (Malta), Lawyers for Human Rights (Moldova), Sieć Obywatelska Watchdog Polska (Poland), Transparency International Slovenia, Oštro (Adriatic region), and Campaign for Freedom of Information Scotland (UK) (further the Interveners). This submission does not address the facts or merits of the applicant's case.
2. The Interveners believe that the present case - concerning access to information about proceedings related to immunity of members of the German parliament (MPs) - provides the Court with the opportunity to further clarify the scope of the right to information as it pertains to legislative bodies/parliaments and the extent to which this right can be restricted to protect immunity of MPs. In these submissions, the Interveners:
 - (i) Illustrate the importance of accessing information related to all branches of the government, including the legislative branch, as means of ensuring openness, accountability, and transparency of legislative bodies;
 - (ii) Provide an overview of how access to information about legislative bodies is provided for in international standards and in laws and practices of the Council of Europe Member States and whether exceptions are provided on the basis of protection of parliamentary immunity; and
 - (iii) Based on the foregoing, analyse the proper approach to cases involving requests for access to information about legislative bodies, including how to properly assess the proportionality of refusals of such requests.

SUBMISSIONS

- i. **The importance of accessing information related to the legislative branch**
3. The right of access to information is a fundamental component of the right to freedom of expression, as enshrined in Article 10 of the European Convention

on Human Rights (the Convention)¹ and Article 19 of the International Covenant on Civil and Political Rights.

4. The Interveners recall that several international freedom of expression standards affirm that transparency is a key underpinning and essential element of democracy and good governance. Access to information laws reflect the fundamental premise that governments are supposed to serve the people while the public should be able to assess the performance of the government and elected representatives. Based on access to information laws, the public can scrutinise the actions of its leaders and engage in full and open debate about those actions. Access to information is also a key tool in combating corruption and wrongdoing.
5. Parliaments are pillars of democracy and good governance; they represent the public interest by adopting legislation, overseeing executive power and authorising the use of public resources through the state budget. They are in a position to create a framework for the transparency and accountability of all other state and public institutions.
6. Transparency of parliaments should be a necessity, because parliaments are de facto the “house of the people.” Parliamentary information belongs to the public and people should be able to know what is going on and what their representatives are doing there. They should be allowed to access and scrutinise this information, in whole or in part.
7. Transparency is also a key prerequisite to building trust in the institution of parliament and elected representatives. The Interveners believe that this trust would be greatly undermined by the lack of a right of access to information and the resulting inability to follow parliamentary decision making and monitor the integrity of individual MPs. As the three specialized mandates on freedom of expression have noted:

Implicit in the freedom of expression is the public’s right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people’s participation in government would remain fragmented.²

8. Further, as documented by numerous studies around the world, transparency of parliaments and local legislative bodies improves processes, functions and inclusivity of their decision making. Where Parliament works as a transparent and effective institution, it can help government work accountably, capably and

¹ European Court of Human Rights (ECtHR), *Magyar Helsinki Bizottság v. Hungary*, App No. 18030/11, 8 November 2016 (GC), para 42.

² See Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, 26 November 1999.

responsively.³ Therefore, parliaments should make their own operations subject to the principle of maximum transparency.

ii. Overview of international, regional and comparative standards on access to information from legislative bodies

International and regional standards

9. International and regional human rights bodies have explicitly confirmed that the right of access to information applies also to the legislative branch of the government. In particular:

- The **UN Human Rights Committee**, in General Comment No 34, confirmed that all information held by all bodies performing public functions and operating with public funds includes the legislative branch.⁴ To give effect to this right, States should both “proactively put information in the public domain” and ensure that information is provided on request in a timely manner under access to information laws.⁵
- The report by the Office of the **United Nations High Commissioner for Human Rights** emphasised that access to information held by public bodies applies also to legislative branch of government.⁶
- The **UN Convention against Corruption**, which covers measures related to corruption in public and private sector, specifies that “public officials” include persons holding a legislative office.⁷ With regards to immunity protections for public officials, it stipulates that States should establish and maintain a proper balance between the protection afforded by immunity and the necessity to fight against corruption.⁸
- The **Council of Europe Convention on Access to Official Documents** (Tromsø Convention) defines “official documents” as “all information recorded in any form, drawn up or received and held by public authorities;” and that “public authorities” include “legislative ... authorities as they perform administrative functions according to national law.”⁹

³ See e.g. Congress of Local and Regional Authorities of the Council of Europe, Transparency and open government, December 2018; OGP, Open Parliament e-Network, Parliaments and open government Early lessons from country experiences, 2020; or L. Mills, Parliamentary transparency and accountability, UK Institute of Development Studies, 2017.

⁴ UN Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 18.

⁵ *Ibid.*, para 19.

⁶ OHCHR, Report of the Office of the UN High Commissioner for Human Rights, A/HRC/49/38, 10 January 2022, para 23.

⁷ UN General Assembly, UN Convention Against Corruption, 31 October 2003, A/58/422, Article 2 a).

⁸ *Ibid.*, Article 30.

⁹ Council of Europe Convention on Access to Official Documents, CETS No. 205, 18 June 2019, Article 1.

- The **Council of Europe’s Congress of Local and Regional Authorities** has issued several resolutions addressed to the Committee of Ministers to promote open government standards.¹⁰ They affirm that an open government strategy should apply to a wide range of government activities, including law making and policy making.¹¹
- The Council of Europe Committee of Ministers in **20 Guiding Principles for the Fight against Corruption** agreed to “limit immunity from investigation, prosecution or adjudication of corruption offences to the degree necessary in a democratic society.”¹²
- In **the European Union (EU)**, the right to access to documents of all EU institutions, bodies and agencies is established in the Treaty on the Functioning of the European Union¹³ and with the mechanisms for requesting information developed in Regulation 1049/2001.¹⁴ This right to access includes documents held by the European Parliament – the legislative branch.¹⁵
- Finally, the **Open Government Partnership (OGP)**, a multilateral initiative, has included “open parliament” as an essential part of open government.¹⁶ OGP recommends that States should ensure, facilitate and promote the right of access to information by, *inter alia*, ensuring individuals can access information held by parliaments and should set up officers responsible for replying to information requests.¹⁷

Comparative standards

10. Several Council of Europe member states also recognise in their national legislation that transparency of parliamentary bodies is fundamental to increase accountability, prevent corruption, and build trust in democratic institutions with the ultimate aim of strengthening the rule of law. Further, national courts

¹⁰ See e.g. Resolution 435(2018) Debated and adopted by the Congress of Local and Regional Authorities on 7 November 2018.

¹¹ *Ibid.*

¹² Council of Europe, Resolution (97)24 on the Twenty Guiding Principles for the Fight Against Corruption adopted by the Committee of Ministers on 6 November 1997, Principle 6.

¹³ Consolidated version of the Treaty on the Functioning of the European Union, Part One – Principles Title II - Provisions Having General Application, Article 15 (Ex Article 255 Tec). Article 15 enshrines “the right of access to documents of the Union’s institutions, bodies, offices and agencies, whatever their medium, subject to the principles and conditions to be defined in accordance with this paragraph.”

¹⁴ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

¹⁵ *Ibid.*, Article 2.

¹⁶ See OGP, Open Parliaments Fact Sheet which defines “open parliament” as one that encourages transparency, participation and accountability throughout the legislative process.

¹⁷ See Parliaments in OGP – Recommendations.

have issued important decisions as well as developed good practices in relation to access information held by the legislative branch.

11. The Interveners' research shows that 31 out of 46 Council of Europe member states' access to information laws apply to the legislative branch. Subsequently, information related to immunity of MPs is either published proactively or accessible through access to information requests (although specific tests for exemptions might apply).¹⁸ For instance:

- The Access to Public Information Act (APIA) in **Bulgaria** covers all branches of the government, including parliamentary bodies.¹⁹ Moreover, in its 2010 decision, the Administrative Court clarified that all information held by the National Assembly falls under the scope of APIA.²⁰
- The Act on Access to Information of Public Character (FOIA) of **Slovenia** covers the legislative branch, the National Assembly. The FOIA includes a specific exemption on "information compiled in connection with internal operations or activities of bodies, of which disclosure could cause disturbances in the body's operations or activities." While some information related to immunity of MPs might fall under this exception, the harm and public interest test under FOIA must be applied so as to decide whether the public interest in withholding the information outweighs the public interest in it being disclosed.²¹
- The Fundamental Law of **Hungary** enshrines the right to access information held by all branches of the government.²² The access to information law (Act CXII) qualifies information held by parliamentary bodies as "data of public interest" that should be "disclosed, made accessible or available to the general public."²³ Information related to immunity of MPs could fall under one of the exceptions for withholding information (e.g. the protection of privacy and prosecution interest).²⁴ However, proposals to lift immunity of MPs and final decisions by the Immunity Committee are proactively published on the website of the National Assembly and the Immunity Committee as a summary. Complete information is accessible through requests subjected to the exceptions (as per above).²⁵ In 2011 decision, the Metropolitan Court of Appeal ordered to release meeting minutes related to lifting immunity of candidates running for the National Assembly while

¹⁸ Data from the RTI Rating, available at www.rti-rating.org.

¹⁹ Bulgaria, Access to Public Information Act, Art. 3(1) amended SG No. 104/2008

²⁰ Bulgaria. Administrative Court, Rosen Bosev vs. the National Assembly, case No. 584/2009, ACSC, Second Division, 36 panel, 8 January 2010

²¹ Slovenia, Act on Access to Information of Public Character (FOIA), Article 6.

²² Hungary, Fundamental Law, Article VI (3).

²³ Hungary, Act CXII of 2011, Section 3.

²⁴ Hungary, Act CXII of 2011, Section 27.

²⁵ Proposal for resolution to the National Assembly is published on the Assembly's website - <https://shorturl.at/bflg5>; and on a dedicated website of the Immunity Committee - <https://shorturl.at/yFPQY>.

making sure personal data were deleted from the documents to protect the privacy of candidates.²⁶

- In **Estonia**, the Access to Information Law covers legislative bodies. It provides for an exception to access information related to immunity via requests while also setting up proactive publication obligations.²⁷
 - The Freedom of Information Act 2000 (FOI Act) in the **United Kingdom** stipulates that the Parliament (which includes both the House of Commons and the House of Lords) is a public authority under the FOI Act. The right of access to information applies to any information held by the House of Lords Administration, with the exceptions set out in the FOI Act. The Clerk of the Parliaments, as authorised officers, may refuse to disclose information on the grounds of either parliamentary privilege or prejudice to the effective conduct of public affairs. The Clerk must examine the requested information under the harm and public interest tests.²⁸
 - The Freedom of Information Act 2014 in **Ireland** covers the Houses of the Oireachtas (both houses of parliament). Information related to arrest and criminal prosecutions of MPs falls under the scope of the FOI Act but can be exempted: refusals should then be subjected to harm and public interest test.²⁹
12. The research conducted by Interveners therefore shows that only in a minority of the Council of Europe member states are parliaments and MPs explicitly excluded from the scope of access to information laws³⁰ or are excluded through the specific case law interpreting access to information laws.³¹ In some member states, access to information about parliaments is limited only to administrative function of parliaments.³²
13. As for the restrictions on access to information about the immunity of MPs, the Interveners highlight that even in countries where the decision on immunity of the MPs is excluded from the scope of access to information laws, some transparency obligations still apply. For example, in Poland, decisions regarding immunity of MPs are subject to proactive transparency. This means that documents produced by the Committee on Rules, Deputies' Affairs and Immunities, including recordings and positions are accessible on the website of the Parliament and sessions are open to public attendance.³³

²⁶ Hungary, Metropolitan Court of Appeal No. Pf.20.898/2011/4, 16 June 2011.

²⁷ Estonia, Public Information Act, Article 31.

²⁸ UK, Freedom of Information Act (2000), Sections 34 and 36

²⁹ Ireland, Freedom of Information Act 2014, Sections 31 and 32.

³⁰ See e.g. France, Code des relations entre le public et l'administration, Article L300-2. Article 2.

³¹ See e.g. Poland, Supreme Administrative Court, ref. no. I OSK 2287/11, Decision of 14 December 2011.

³² See e.g. Austria, Meinungsäußerungsfreiheit: Recht eines Journalisten auf Zugang zu Informationen über Bezugsfortzahlungen an ehemalige Abgeordnete. VfGH 4.3.2021, E 4037/2020 (12 April 2021).

³³ See the website of the Polish Parliament, available at <https://shorturl.at/cgoNP>.

iii. Proper approach to cases involving requests for access to information about legislative bodies

14. Based on the foregoing, the Interveners submit that this Court should affirm that the right of access to information under Article 10 of the European Convention on Human Rights applies to legislative bodies. This means that the national parliaments should be guided by transparency principles and proactively publish information pertaining to their operations. They should also be subject to access to information/freedom of information laws.
15. The Interveners also recall that for restrictions on the right to information to comply with the requirements of Article 10 para 2 of the Convention, they must meet a strict three-part test of restrictions. Namely, any restriction must be (a) provided by law, (b) for the purpose of safeguarding a clearly defined legitimate interest in Article 10 para 2 of the Convention, and (c) necessary to secure the specific legitimate interest. The burden of proving that any restrictions meet these conditions rests on the State. The Interveners submit that this test must be applied when assessing whether the restrictions on the access to information about immunity of MPs are compatible with Article 10 para 2 of the Convention.
16. As for the **legitimate aim** leg of the three-part test, although the Interveners acknowledge that this Court accepted parliamentary immunity as a legitimate and ubiquitous constitutional norm that protects the representative democracy,³⁴ it is not clear whether it is *per se* a reason to limit access to information. Under Article 10 para 2 of the Convention, the legitimate aims are explicitly enumerated as national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary. Therefore, maintaining confidentiality of information about parliamentary immunity and relevant proceedings must be clearly linked to one of these protected aims.
17. Here, the Interveners wish to highlight that the Council of Europe European Commission for Democracy (Venice Commission) stated that rules that afford maximum protection and complete inviolability of MPs “are not a necessary part of modern democracy” and therefore, state authorities should leave the necessary margin for public scrutiny and accountability.³⁵ Also, the Council of Europe Group of States against Corruption (GRECO) has increasingly recommended States, when evaluating their legal frameworks and their implementation, to limit the scope of immunity in order to support anti-corruption efforts.³⁶ Therefore, the Interveners believe that reason for

³⁴ *C.f.* jurisprudence concerning parliamentary immunity under Article 6 and Article 10 of the Court.

³⁵ Council of Europe, European Commission for Democracy, Study No. 714 / 2013, p. 30.

³⁶ Council of Europe, Group of States against Corruption (GRECO), Evaluations.

restricting access to information about parliamentary immunity should not only be clearly linked to protection of a specific legitimate aim under Article 10 para 2 of the Convention but also must be very narrowly construed.

18. As for the **necessity** leg of the three-part test, the Interveners urge the Court to reaffirm that any restriction on access to information under Article 10 para 2 of the Convention should be considered “necessary” for securing a legitimate interest only if, at a minimum:
 - Disclosure of the information sought would cause substantial harm to the interest, and
 - The harm to the interest caused by disclosure is greater than the public interest in having access to the information.³⁷
19. It is not for the Interveners to comment on whether the denial of the information requested by the applicant in the present case was necessary to protect a legitimate interest. However, they note that it is under this third leg of the test where the nondisclosure of requested information must face the toughest challenge. States must demonstrate that keeping the requested information confidential serves a state interest in a way more compelling than disclosing it. Additionally, even if the release of information – including about immunity of MPs and relevant proceedings as in this case – could cause a substantial harm, authorities should still have to assess whether the public would benefit from the disclosure of the information. For instance, in cases where the request relates to information about corruption, bribery, or criminality by a member of the parliament, rejecting such request would appear disproportionate and inconsistent with the principle of minimal encroachment upon the right to freedom of expression and information. Here, the Interveners also note that this Court previously rejected a claim that courts might refuse to disclose information of clear and significant public interest on the basis of the privacy rights of public officials.³⁸

CONCLUSIONS

20. The Interveners submit that the international and comparative standards on access to information show that the right to access information about parliaments and elected representatives is well established under human rights framework and practice. Transparency of parliaments is a prerequisite for public scrutiny of democratic institutions and for public trust in them.

³⁷ *C.f.* ARTICLE 19, The Public’s Right to Know: Principles on Freedom of Information Legislation. The ARTICLE 19 Principles have been endorsed by, among others, the UN Special Rapporteur on Freedom of Opinion and Expression. See Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para 43.

³⁸ See *Társaság a Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*, App. No. 37374/05, 14 April 2009.

21. The Interveners' research shows that majority of the Council of Europe member states provides for proactive transparency and access to information about legislative bodies explicitly in their national legislations. Under the jurisprudence of this Court and under national laws outlined above, any restrictions on access to information about parliaments must pursue the explicitly enumerated legitimate aim and be necessary and proportionate. Even in cases where protection of parliamentary immunity could be justifiable under a specific legitimate aim, it must still be subject to the harm and public interest test.
22. The Interveners urge this Court to recognise and reaffirm these principles and stipulate that even in cases of parliamentary immunity, assuming public office and shouldering public trust require some level of transparency and public accountability.

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