Memorial of the Government of Hungary
in the Case of Magyar Helsinki Bizottság v. Hungary
(application no. 18030/11)

1. The Government of Hungary submit the following Memorial in response to the request contained in the letter from the Deputy Registrar of the Grand Chamber dated 24 July 2015.

Part I deals with the relevant facts, Part II deals with relevant domestic law, Part III sets forth the Government's position as regards the alleged violations of the respective provisions of the Convention, Part IV deals with the issue of just satisfaction and Part V concludes this Memorial.

Part I
Circumstances of the case

2. *Legal aid defence counsels in Hungary*

At the outset, the Government note that in Hungary there is no office of public defenders parallel to the office of public prosecutors, no attorneys are employed by the state to provide defence in criminal proceedings. The right to defence is ensured by a system of legal aid lawyers registered by the regional Bar Associations and appointed by the authorities proceeding in the case (police, prosecution or courts, depending on the stage of the proceedings when the need for appointment of a counsel arises) if assistance by legal counsel is mandatory in accordance with the law in the interest of justice and the defendant cannot retain a counsel of his own choice. The legal aid defence counsel can exceptionally refuse to accept the case and the defendant can also request the appointment of another counsel. In the legal aid system lawyers' fees which are much lower than market fees are advanced or borne by the state. In all other respects the rights and duties of the legal aid defence counsel and the rules governing client-lawyer relations are the same as those of private counsels retained under a civil-law contract.

In light of the aforesaid the Government hereinafter will use the term of legal aid defence counsels instead of "public defenders" used by the Registry in the Statement of Facts. The Government consider that it is not a simple issue of linguistics but the aforesaid are pivotal to understanding the position of the Kúria (Supreme Court) on the nature of the data at issue in this case.

3. *Survey on the quality of defence provided by legal aid defence counsels published by the applicant organisation in 2009 and 2012*

The applicant requested from altogether 28 police departments the names of the legal aid defence counsels selected by them in 2008 and the number of appointments per each lawyer involved. Seventeen police departments complied with the request and another five did so after court proceedings had been initiated. In two cases which were submitted to the Supreme Court pursuant to a petition for review, the Supreme Court found that the data requested by the applicant, namely the names of the legal aid defence counsels appointed by the police were personal data not falling within the scope of section 19(4) of the Data Act 1992.

In 2009 and 2012 the applicant published two documents on the results of its survey concluding that the most frequently appointed legal aid defence counsels are those who are the least active in the course of the criminal proceedings. The frequency of appointments was analysed on the basis of the data obtained from the police departments while the quality of the defence (activity of the legal aid defence counsels as compared to a much smaller number of defence counsels retained under a civil law contract) was analysed on the basis of a set of court files not involving the same set of legal aid defence counsels.

The surveys published by the applicant did not contain any of the names of the legal aid defence counsels. The applicant published only a statistical analysis of the share of the two or three most frequently appointed legal aid defence counsels in all appointments at the respective police departments.

4. *Judicial proceedings*

The Hajdú-Bihar County Regional Court dismissing the applicant's action on 23 February 2010 did not argue that "public defenders did not carry out a task of public interest" but that legal aid defence counsels did not qualify as "*persons performing public duties*" *within the meaning of Section 19(4) of the Data Act* 1992. It argued that there was no statutory provision qualifying the tasks of a legal aid defence counsels as a public duty *for the purposes* of the Data Act 1992. The Regional Court added that according to Section 5(1) of the same Act, personal data may be processed only for specified and explicit purposes, where it is necessary for carrying out certain rights or obligations. This purpose must be satisfied in all stages of operations of data processing. In accordance with Section 8 of the Data Act 1992 read in conjunction with Act no. XXXIV of 1994 on the Police and judgment no. Pfv.IV.21.478/2007/4. of the Supreme Court, personal data can be grouped (in a specific system) only if authorised by law. Therefore even if it was technically possible for the police to collect the data requested by the applicant organisation from their databases, such grouping was not authorised by law and thus it was not legally possible.

Upon the applicant's petition for review, in its judgment of 15 September 2010, the Supreme Court added that in accordance with Recommendation no. 1234/H/2006 of the parliamentary commissioner for data protection "persons performing public duties" within the meaning of Article 19 of the Data Act 1992 are those who exercise public powers prescribed by law (who are vested with independent powers and competences). Defence counsels, although their activity serves a public interest, do not exercise public powers.

Recommendation no. 1234/H/2006 of the parliamentary commissioner for data protection endorsed by the Supreme Court in the present case as well as in other similar cases clarified that the term of *persons performing public duties* had an autonomous meaning in the context of the Data Act 1992 irrespective of the

provisions of the Criminal Code. In this context, *persons performing public duties* included public officials who operated as one-person institution vested with independent powers and competences (*"önálló feladat- és hatáskör címzettjei"*) and who are personally responsible for surrendering the data relevant to them (*személyükben kötelesek helytállni a rájuk vonatkozó adatok kiszolgáltatásáért*).

Part II

Relevant domestic law and practice

5. ***Act LXIII of 1992 on the Protection of Personal Data and the Disclosure of Information of Public Interest*** (Data Act 1992, or "Avtv." as in force at the relevant time)

Section 2

1) 'personal data' shall mean any information relating to an identified or identifiable natural person (hereinafter referred to as 'data subject') and any reference drawn, whether directly or indirectly, from such information. In the course of data processing, such information shall be treated as personal data as long as the data subject remains identifiable through it. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity;

4) 'public information' shall mean any known fact, data and information, other than personal data, that are managed by the State or a local public authority or agency or by any other body attending to the public duties specified by law (including those data pertaining to the activities of the given authority, agency or body), irrespective of the method or format in which it is recorded, and whether autonomous or part of a compilation;

5) 'public information subject to disclosure' shall mean any data, other than public information, that are prescribed by law to be published or disclosed for the benefit of the general public;

Section 5

(1) Personal data may be processed only for specified and explicit purposes, where it is necessary for carrying out certain rights or obligations. This purpose must be satisfied in all stages of operations of data processing.

Section 8

(1) Personal data may be transferred, whether in a single or in a set of operations, if the data subject has given his consent or if the transfer is legally permitted, and if the safeguards for data processing are satisfied with regard to each and every personal data.

(2) Subsection (1) shall also apply where data is structured between various filing systems of the same processor, or between those of government and local authorities.

ACCESS TO INFORMATION OF PUBLIC INTEREST

Section 19

(1) State or local public authorities and agencies and other bodies attending to the public duties specified by law (hereinafter jointly referred to as 'agency') shall provide the general public with accurate and speedy information concerning the matters under their competence, such as the budgets of the central government and local governments and the implementation thereof, the management of assets controlled by the central government and by local governments, the appropriation of public funds, and special and exclusive rights conferred upon market actors, private organizations or individuals.

(2) The agencies specified in Subsection (1) shall regularly publish by electronic means or otherwise make available - including the means specified in Section 20 upon request - all information of import concerning their competence, jurisdiction, organizational structure, professional activities, the evaluation of such activities (including their effectiveness), the categories of data they process, the legal regulations that pertain to their operations, and their financial management. The manner of disclosure and the data to be disclosed may be prescribed by legal regulation.

(3) The agencies defined in Subsection (1) shall allow free access to the public information they have on files to any person, excluding those classified by an agency vested with proper authorization, or if classified by virtue of commitment under treaty or convention, or if access to specific information of public interest is restricted by law in connection with

a) defense;

b) national security;

c) prevention, investigation, detection and prosecution of criminal offences;

d) central financial or foreign exchange policy;

e) external relations, relations with international organizations;

f) a court proceeding or administrative proceeding.

(4) Unless otherwise prescribed by law, the personal data of any person acting in the name and on behalf of the agencies specified in Subsection (1), to the extent that it relates to his duties, and the personal data of other persons performing public duties shall be deemed public information subject to disclosure. Access to such data shall be governed by the provisions of this Act pertaining to information of public interest.

(5) Unless otherwise prescribed by law, any data, other than personal data, that is processed by bodies or persons providing services prescribed mandatory by law or under contract with any governmental agency, central or local, if such services are not available in any other way or form, to the extent necessary for their activities shall be deemed public information subject to disclosure.

(6) Access to business secrets in connection with access to and publication of information of public interest shall be governed by the relevant provisions of the Civil Code.

(7) The availability of public information may also be limited by European Union legislation with a view to any important economic or financial interests of the European Union, including monetary, budgetary and tax policies.

Section 19/A

(1) Any data compiled or recorded by an agency referred to in Subsection (1) of Section 19 as part of and in support of a decision-making process for which it is vested with powers and competence, shall not be made available to the public for ten years from the date it was compiled or recorded. Access to these data may be authorized - in light of what is contained in Subsection (1) of Section 19 - by the head of the agency that controls the data in question.

(2) A request for disclosure of data underlying a decision may be rejected after the decision is adopted, but within the time limit referred to in Subsection (1), if disclosure is likely to jeopardize the agency's legal functioning or the discharging of its duties without any undue influence, such as in particular the freedom to express its position during the preliminary stages of the decision-making process on account of which the data was required in the first place.

(3) The time limit for restriction of access as defined in Subsection (1) to certain specific data may be reduced by law.

Section 20

(1) Information of public interest shall be made available to anyone upon a request presented verbally, in writing or by electronic means.

(2) The agencies processing information of public interest must comply with requests for information without any delay, and shall provide it within not more than 15 days.

(3) The applicant may also be provided a copy of the document or part of a document containing the data in question, regardless of the form of storage. The agency controlling the information in question may charge a fee covering only the costs of making the copy, and shall communicate this amount in advance when requested.

(4) If a document that contains information of public interest also contains any data that cannot be disclosed to the applicant, this data must be eliminated or rendered unrecognizable on the copy.

(5) Data shall be supplied in a readily intelligible form and by way of the technical means requested by the applicant, provided it does not entail

unreasonably high costs. A request for data may not be refused on the grounds that it cannot be made available in a readily intelligible form.

(6) When a request for information is refused the applicant must be notified within 8 days in writing, or by electronic means if the applicant has conveyed his electronic mailing address, and must be given the reasons of refusal.

(7) A request for information of public interest by an applicant whose native language is not Hungarian may not be refused for reasons that it was written in his native language or in any other language he understands.

(8) State or local public authorities and agencies and other bodies attending to the public duties specified by law shall adopt regulations governing the procedures for satisfying requests for information of public interest.

(9) The agencies specified in Subsection (1) of Section 19 shall notify the data protection commissioner once a year on refused requests, including the reasons of refusal.

Section 21

(1) When a person's petition for public information is refused, he may file for court action.

(2) The burden of proof of compliance with the law lies with the data processor agency.

(3) The lawsuit shall be initiated within 30 days from the date of refusal, or from the last day of the time limit specified in Subsection (2) of Section 20 if the refusal was not communicated, against the agency that has refused the information.

(4) Any person who cannot sue or be sued may also be involved in such lawsuits.

(5) Lawsuits against agencies of nationwide jurisdiction shall be filed at the competent county (Budapest) court. Lawsuits against local agencies shall be filed at the central county court, or at the Central Pest District Court in Budapest. The competency of the court is determined based on the location of the agency that refused to provide information.

(6) The court shall hear such cases under priority.

(7) When the decision is in favour of the plaintiff, the court shall order the data processor agency to provide the information.

Section 21/A

(1) The agencies specified in Subsection (1) of Section 19 may not render access to public information contingent upon the disclosure of personal identification data. The processing of personal data for access to information of public interest that has been published by electronic means is permitted only to the extent required for technical reasons, after which such personal data must be erased without delay.

(2) The processing of personal identification data in connection with any disclosure upon request is permitted only to the extent absolutely necessary, including the collection of payment of any charges. Following the disclosure of data and upon receipt of the said payment, the personal data of the applicant must be erased without delay.

(3) Provisions may be prescribed by law in derogation from what is contained in Subsections (1) and (2).

6. ***Act no. XIX of 1998 on the Code of Criminal Procedure***

Right to defence

Section 5

(1) Defendants shall have the right to defend themselves.

[...]

Section 46

The involvement of a defence counsel in the criminal proceedings is mandatory where

a) the offence is punishable under the law with imprisonment of 5 years or more

b) the defendant is detained

c) the defendant is deaf, mute, blind or is – regardless of his legal responsibility – of insane mind,

d) the defendant does not speak Hungarian or the language of the proceedings,

e) the defendant is unable to defend himself in person for any other reason,

f) it is expressly stipulated so in this Act.

Section 48

(1) The court, the prosecutor or the investigating authority shall appoint a defence counsel where defence is mandatory and the defendant has no defence counsel of his own choice [...]

(2) The court, the prosecutor or the investigating authority shall also appoint a defence counsel where defence is not mandatory but the defendant requests for the appointment of a defence counsel because of his lack of adequate means to provide defence for himself.

(3) The court, the prosecutor or the investigating authority shall [...] appoint a defence counsel where they find it necessary in the interest of the defendant.

[...]

(5) The appointment of a defence counsel shall not be subject to appeal but the defendant may – upon valid reasons – request for the appointment of another defence counsel. Such requests shall be determined by the court, prosecutor or investigating authority before which the proceedings are pending.

(6) In justified cases the appointed defence counsel may request release from the appointment. Such requests shall be determined by the court, prosecutor or investigating authority before which the proceedings are pending.

[...]

(9) The appointed defence counsel shall be entitled to a fee and remuneration for appearing before the court, the prosecutor or the investigating authority when summoned or notified, for studying the case file and for counselling the detained defendant at the detention facility premises.

7. *Jurisprudence*

BH2011. 69.

A defence counsel may not be regarded as *other person performing public duties* therefore the investigating authority as data manager is not obliged under Section 19(4) of Avtv. to disclose as public data of public interest the name of the defence counsel and the number of his appointments (Section 19 of Act no. LXIII of 1992)

The applicant requested for particular data under Section 19 (4) of Avtv. According to this provision, the personal data of persons acting within the powers and competences of bodies specified in subsection (1) shall constitute public data of public interest, unless otherwise provided by the law and inasmuch as the data relate to those powers. Access to such data shall be governed by the Avtv. provisions governing access to public interest data.

Hence, under the legal regulation access to public data of public interest is to be secured in respect of bodies and persons specified under Section 19(1) of Avtv. and in respect of personal data related to *other persons performing public duties*, inasmuch as the data are related to those powers.

Under Section 2(5) of Avtv., public data of public interest shall mean any data other than public interest data, whose disclosure or accessibility is ordered under the law in the interest of the public.

Based on these provisions it had to be determined whether defence counsels were or were not to be regarded as *other persons performing public duties.*

The Supreme Court held, in line with recommendation no. 1234/H/2006 of the parliamentary commissioner for data protection, that the issue as to whether a person was to be regarded a person performing public duty had to be determined solely under the Avtv. provisions; and only a person vested with independent powers and competences was to be regarded a person performing public duties, provided that the person was not a body specified under Section 19 (1) of Avtv.

Therefore, in determining this issue the applicant's reference to Section 137(2) point *e)* of the Criminal Code (henceforth: Btk.) is irrelevant because defence

counsels are to be regarded as *persons performing public duties* solely for the purposes of Btk. but not for the purposes of Avtv. or any other legal relationship.

Under Article 57(3) of the Constitution, to secure the right of defence is a task for the State. The court, the public prosecution and the investigation authority perform this task by ensuring the right of defence (under Section 5(3) of the Code of Criminal procedure [Be.]) or by appointing a defence counsel under Sections 46 and 48 of Be.

By doing so, these bodies accomplish their public duty obligations which thus become completed with the defence counsel's appointment. Following his appointment a defence counsel's activities constitute private activities even if they also serve a public goal. A defence counsel cannot be regarded to be an *other person performing public duties* since no powers and competences specified in the law are vested with him. The fact that under the procedural laws rights and obligations are specified for persons who perform the task of defence in criminal proceedings may in no way be regarded to constitute powers and competences specified in law. In respect of securing the right of defence the Code of Criminal Procedure confers obligations solely on the authorities. The provision contained in Section 1 of Be., according to which in the criminal procedure the tasks of prosecution, defence and adjudication are separated, does support this interpretation.

Hence defence counsels' names and the number of their respective appointments constitute personal data (Section 2 (1) of Avtv). Therefore, though in respect of these data the respondents are to be regarded as data managers under Section 2 (8) of Avtv, under Section 19 (4) of Avtv. they cannot be obliged to disclose such personal data. Therefore the second instance court acted correctly in rejecting the plaintiff's action.

For the foregoing reasons the Supreme Court upholds the final judgment under Section 275(3) of Pp. *(Legf. Bír. Pfv. IV. 20.901/2010.)*

8. ***Recommendation no. 1234/H/2006 of the Parliamentary Commissoner for Data Protection on the harmonisation of laws applicable to the disclosure of personal data related to the functions of persons performing public duties***

II

Interpretation of Section 19 (4), aspects to be taken into consideration in its application

b) In determining the notion of „*other person performing public duties*" an autonomous interpretation taking into account the inner logic of this Avtv. provision and independent of the use of the term in other laws should be made. For example, the interpretative provision of the Criminal Code (henceforth: Btk.) on the notion of „person performing public duty" (Section 137 point 2 of Btk.) cannot be used, because in light of the other rules of Avtv. one part of the content of that provision falls under the first phrase of Avtv., whereas other parts of the content fall outside the scope of Avtv.

Therefore, in the context of that subsection the notion of „*other person performing public duties*" includes state and municipality officials (for example, the president of the republic, the president of the Parliament, the president of the Constitutional Court, the president of the Supreme Court, the president of the State Court of Audit, the president of the Hungarian National Bank, the prime minister, the ministers) having independent functions and competences and operating as one-person institutions. The addressees of state and municipality tasks and competences are the persons who hold such offices; and they are personally responsible for surrendering the data relevant to them.

9. ***Relevant international instruments***

Council of Europe Convention on Access to Official Documents (Tromsø, 18.VI.2009): ETS 205 *(Not in force yet)*

Article 2 – Right of access to official documents

1 Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.

Article 3 – Possible limitations to access to official documents

1 Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

a national security, defence and international relations;

b public safety;

c the prevention, investigation and prosecution of criminal activities;

d disciplinary investigations;

e inspection, control and supervision by public authorities;

f privacy and other legitimate private interests;

g commercial and other economic interests;

h the economic, monetary and exchange rate policies of the State;

i the equality of parties in court proceedings and the effective administration of justice;

j environment; or

k the deliberations within or between public authorities concerning the examination of a matter.

Concerned States may, at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that communication with the reigning Family and its Household or the Head of State shall also be included among the possible limitations.

2 Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

3 The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.

10. ***Right of access to information in EU law***

Under **Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents** (henceforth: Regulation), the right of access shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union. The institutions shall refuse access to a document where disclosure would undermine the protection of, among others, the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. The institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, court proceedings and legal advice, the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

Article 8 of the Charter of Fundamental Rights provides that everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

The **European Data Protection Supervisor** has issued **a Background Paper** (Public Access to Documents and Data Protection[1]) on the possible ways of resolving potential tensions between the two rights, namely the right to receive information about public interest data (the right of access to documents) and the right to enjoy protection of personal data. Under Article 4(1) of Regulation (EC) No 1049/2001 the institutions shall refuse access to a document where disclosure would undermine the protection of privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. Access must be prohibited where three conditions are met: 1. the privacy of the person whose data are mentioned in a document is at stake; 2. the person concerned would be substantially affected by the disclosure; 3. public access is not allowed by data protection legislation. Officials employed in EU institutions are normally expected to show a higher level of tolerance than persons employed in the private sector.

In its decision in the preliminary proceedings instituted in **joined cases C-92/09 and C-93/09**[2] the Court of Justice has considered that the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter, concerns any information relating to an identified or identifiable individual[3], and the limitations which may lawfully be imposed on the right to the protection of personal data correspond to those tolerated in relation to Article 8 of the Convention. The decision also recalls that Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Articles 7 and 8 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights

[1] Peter J. Hustinx: Public access to documents and data protection, Background Paper Series, 2005 July. Available from: http://www. edps.europa.eu

[2] Judgment of 9 November 2010. Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen.

[3] ECHR judgment of 16 February 2000 in the case of Amann v Switzerland, § 65 and ECHR judgment of 4 May 2000 in the case of Rotaru v Romania, § 43.

and freedoms of others. The Court has held that **derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary**[4]. The decision has also stated that as far as natural persons are concerned, the institutions must, **before disclosing the information**, strike fair balance between the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other. And **the goal of securing transparency may in no way enjoy priority over the right to protection of personal data**[5]**.**

Judgment of 29 June 2010 of the European Court of Justice (Grand Chamber) in Case C-28/08 P, Commission v. the Bavarian Lager Co. Ltd

"76 This Court finds that, by releasing the expurgated version of the minutes of the meeting of 11 October 1996 with the names of five participants removed therefrom, the Commission did not infringe the provisions of Regulation No 1049/2001 and sufficiently complied with its duty of openness."

Judgment of 9 November 2010 of the European Court of Justice (Grand Chamber) in Joined Cases C-92/09 and C-93/09C, Volker und Markus Schecke Gbr and Hartmut Eifert v. Land Hessen

"85 [...] It is necessary to bear in mind that the institutions are obliged to balance, before disclosing information relating to a natural person, the European Union's interest in guaranteeing the transparency of its actions and the infringement of the rights recognised by Articles 7 and 8 of the Charter. No automatic priority can be conferred on the objective of transparency over the right to protection of personal data [...], even if important economic interests are at stake."

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[4] Judgment in the case of Tietosuojavaltuutettu v Satakunnan Markkinapörssi and Satamedia, § 56.
[5] Judgment in the case of Bavarian Lager Co. Ltd v Commission of the European Communities, §§ 75–79.

Part III

The Law

Alleged violation of Article 10 of the Convention

III.1. Applicability of Article 10

[Question no. 1]

11. Insofar as the applicant organisation complains that its right of access to information was violated, the Government are of the opinion that Article 10 is not applicable in the present case.

Article 10 reads as follows:

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

In contrast to the wording of Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the text of Article 10 of the Convention covers only the freedom to receive and impart information while the reference to the „freedom to seek" information was deliberately omitted during the drafting process. Accordingly the Court found in the case of *Leander v. Sweden* (26 March 1987, § 74, Series A no. 116) that „the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing

to impart to him." It follows that Article 10 does not confer on the individual a right of access to information which is not intended to be imparted.

In the case of *Társaság a Szabadságjogokért v. Hungary* (37374/05, 14 April 2009) relied upon by the applicant, the Court itself stated that the case did not concern the denial of a general right of access to official documents (§ 36). Although the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (see *Sdružení Jihočeské Matky c. la République tchèque* (dec.), no. 19101/03, 10 July 2006) and thereby towards the recognition of a right of access to information, it was in a case which was not communicated to the Government concerned and therefore the objection to such an approach could not be raised. Nor was this objection raised and thus examined in any other cases before the Court.

12. The Government are of the opinion that the fact that the Member States of the Council of Europe felt the need to elaborate a separate, specific convention on the right of access to official documents (ETS no. 205) which was opened for signature on 18 June 2009 is a confirmation that Article 10 of the Convention was not intended by its drafters to cover the right to seek information from public authorities but only the right to receive information which had already been made public.

The fact that the High Contracting Parties provide for the right to seek information in their domestic law or by way of other international treaties does not justify that the same right be interpreted into Article 10 of the Convention in spite of its wording and the intentions of its drafters since the High Contracting Parties are free to provide a higher level of protection in their legal systems and also to ensure other human rights not enshrined in the Convention and the Protocols thereto without subjecting them to the control mechanism established by the Convention.

Therefore the Government consider that the right to seek information is not ensured by Article 10 and thus Article 10 is not applicable in the present case. Therefore the application is inadmissible *ratione materiae* in accordance with Article 35 § 3 (a) of the Convention.

13. Insofar as the applicant organisation complains that its freedom of expression (freedom to impart information and ideas) was violated by the denial of its access to the requested information, the Government note that the applicant organisation was not prevented by the lack of the requested data to publish its opinion on the shortcomings of the functioning of the system of legal aid defence counsels in Hungary. The lack of the requested information did in no way affect the effectiveness of the applicant's contribution to the debate of an issue of public interest. Insofar as Article 10 is applicable (in respect of the applicant's freedom to impart information) there has been no interference by the public authorities with that right and thus the applicant cannot be regarded as a victim of violation for the purposes of Article 34 of the Convention.

III.2. Possible content of a right of access to information under Article 10

[Question no. 2(b)]

14. The Court found in the case of *Leander v. Sweden* (26 March 1987, § 74, Series A no. 116) that „the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." Accordingly any "right of access to information" can only be construed as a "**right to receive information imparted by others**". There is a **negative obligation** on the part of the State not to hinder unjustifiably **access to publicly available information**, e.g. by blocking or by obliging media service providers to block access to certain types of content or for certain categories of customers or by any other means unless the conditions set forth in § 2 of Article 10 are met (e.g. in order to protect the rights of children or to eliminate hate speech).

Therefore the Government are of the opinion that there has been **no interference** with the applicant's freedom to receive information, as protected by Article 10. Neither was there any interference with the applicant's right to express its opinion since it was not prevented by the lack of the requested information from publishing its conclusions as pointed out above.

It follows that compliance with the conditions set out in § 2 of Article 10 cannot be examined and Question no. 4 cannot be answered from the perspective of the State's negative obligations under Article 10 as proposed in Question 2(b). Question no. 4 can only be answered from the perspective of positive obligations on the part of the State authorities [as proposed in Question no. 2(a)], that is if Article 10 is interpreted to impose upon the authorities an obligation to make certain information publicly available or, in other words, an obligation to impart information. Thus Questions nos. 3 and 4 are overlapping and therefore they will be dealt with together below.

III.3. Whether there is an obligation to impart information under Article 10

[Questions nos. 2 (a), 3 and 4]

15. Should the State be held to have a positive obligation under Article 10 to impart information to the public on issues of public interest, this obligation – and the corresponding right to receive information – is subject to the restriction clause set forth in § 2 of Article 10.

Moreover, any positive obligation under Article 10 must be construed in the light of the authorities' obligation to respect and ensure the enjoyment of other rights enshrined in the Convention and to strike a fair balance not only between private and public interests but also between competing private interests. The present case raises issues of conflicts between the rights enshrined in Articles 8 and 10. The right to receive information and any corresponding obligation to impart

information under article 10 is restricted by the right to respect for one's private life, including the protection of personal data under Article 8 of the Convention.

Therefore the Government are of the opinion that in order to trigger any State obligation to impart information consisting of personal data there must be a pressing social need to impart that information and the applicant's interest to receive that information, even in the context of a public debate, is not sufficient.

(a) *The nature of the information requested and application of the lawfulness test*

16. The applicant organisation requested the names of legal aid defence counsels appointed by the respective police departments. Names are indisputably personal data. These personal data were undisputedly in the possession of the police authorities. However, these personal data could be processed only in accordance with the law and could be made public only if authorised by law. Any law authorising interference with the rights under Article 8 must be narrowly construed in order to comply with the requirement of foreseeability.

One of the provisions authorising publication of personal data was, at the relevant time, Section 19 (4) of the Data Act 1992 specifying that „the personal data of other persons performing public duties shall be deemed public information subject to disclosure". Recommendation no. 1234/H/2006 of the parliamentary commissioner for data protection clarified that the term of *„persons performing public duties"* had an autonomous meaning in the context of the Data Act 1992 irrespective of the provisions of the Criminal Code. In this context, *persons performing public duties* included public officials who operated as one-person institution vested with independent powers and competences. This interpretation is justified in light of the purpose of the right of access to information that is ensuring transparency of the exercise of public power. The separate reference to *persons performing public duties* was necessary in Section 19(4) because these persons do not act „in the name and on behalf of the agencies specified in Section

19(1)" within the meaning of the first part of Section 19(4) but they exercise public power on their own behalf. These persons who are vested with independent powers and competences are personally responsible for surrendering the data relevant to them and any request for such data should be addressed directly to them.

17. Legal aid defence counsels do not exercise public powers either in the name of the criminal authorities appointing them or on their own behalf. They operate on the private market of legal counsels, they have rights and duties as members of the Bar Associations, they have rights and duties under the rules of criminal proceedings but they are not vested with independent powers and competences. Thus legal aid defence counsels could not foreseeably qualify as *persons performing public duties* for the purposes of Section 19(4). Therefore the Supreme Court had to conclude that Section 19(4) of the Data Act 1992 did not authorise the publication of the names of legal aid defence counsels actually appointed by the police. Neither was there any other legal provision authorising the police to process the names of legal aid defence counsels for purposes other than proceeding in a specific criminal case. Collection and grouping of the personal data of legal aid defence counsels as requested by the applicant was not authorised by any legal provisions.

That was the state of applicable Hungarian law as established by the Supreme Court in the present case, as a leading case on the issue, and followed in other similar cases. It follows that since the interference, proposed by the applicant, with the rights of legal aid defence counsels under Article 8 was not prescribed by law, the obligation to refrain from imparting the requested information (the limitation to the purported positive obligation to impart information) was „prescribed by law".

18. Insofar as the applicant argues that the denial of access to the requested information was not prescribed by law because, based on a pure grammatical

interpretation and leaving aside the general legal context as well as the object and purpose of the provision and the autonomous meaning of certain legal terms, it has found another interpretation of the term of „persons performing public duties" which was more suitable to its purposes, the Government note that the Court has acknowledged in its jurisprudence that any legal provision intended for general application may leave room for various interpretations and therefore the term „law" should be understood as „the law as interpreted and applied by the domestic authorities". The interpretation applied by the Supreme Court in the present case was foreseeable in light of the recommendation of the parliamentary commissioner for data protection and was consistently applied in all subsequent similar cases. Therefore it cannot be argued that the relevant law was lacking the quality of law or gave rise to seriously divergent interpretations by the domestic authorities (see, *a contrario*, *Jėčius v. Lithuania,* judgment of 31 July 2000, application no. 34578/97).

On the other hand, the interpretation proposed by the applicant clearly disregarded the principles governing interference with the rights of others and was not supported by the object and purpose of the provision either. Legal aid defence counsels indeed perform public duties in the sense that they contribute to the effective enjoyment of constitutional rights which the State is obliged to ensure. So do all defence counsels irrespective whether they provide their services for market fees or legal aid fees. Moreover, teachers and health care professionals also perform public duties in this sense irrespective whether they are employed by a publicly financed institution or by a private institution or as self-employed. Should they all qualify as persons performing public duties, they would also be liable to make public all information relevant to their work. Therefore the interpretation proposed by the applicant would create an extremely vague exception to the right to protection of personal data which would not be justified under Article 8 of the Convention.

In addition to not exercising public powers, legal aid defence counsels are not the beneficiaries of public funding either. The beneficiaries of the legal aid are the defendants, only for practical reasons the legal aid lawyer's fees are paid directly to the defence counsel. Part of the sums paid in legal aid might also be eventually recovered by the state from the defendant as procedural costs. Moreover, legal aid lawyer's fees are much below market fees therefore working as a legal aid lawyer cannot be regarded as a privilege but rather as performing a civic obligation (see *Van der Mussele v. Belgium*, 23 November 1983).

19. Therefore the data requested by the applicant qualified as personal data under Hungarian law and the denial of access to these personal data was prescribed by law within the meaning of § 2 of Article 10 of the Convention.

(b) *Application of the necessity test*

20. Protection of personal data serves the protection of the rights of others and thus it is a legitimate aim within the meaning of Article 10. The Government are of the opinion that the protection of personal data is a legitimate aim in itself irrespective whether the reputation of the person concerned is also at stake.

21. Having regard to the objective protection provided by law to personal data, it was not necessary for the Hungarian authorities to examine the possible effects of the publication of the data at issue on the reputation of the persons concerned. However, under the circumstances of the present case, having regard to the conclusions of the survey published by the applicant organisation, the non-disclosure of the personal data requested was also justified by the necessity to protect the reputation of others within the meaning of Article 10.

The applicant organisation, without verifying the actual quality of the work of each of the legal aid defence counsels whose frequency of appointment was made known to it, concluded that the most frequently appointed legal aid defence

counsels are those who are the least active in defending their clients, in other words, who provide the lowest quality of service. Had the applicant published any names alongside with that conclusion, which had been a well-known position of human rights defenders for years, it would have been harmful to the reputation of the lawyers concerned as well as to their business interest as actors on the (private) market of legal counselling. The applicant organisation itself did not feel either proper or necessary to make public any of the names obtained from the police in the context of its survey. It published only anonymous statistical data on the frequency of appointments, no names were found necessary to support their position.

22. This fact also shows that the data at issue were not necessary for the applicant to express its opinion on an issue of public interest. Its need for information would have been satisfied by a request for anonymous statistical data on the share of the two or three most frequently appointed legal aid defence counsels in all of the appointments. It follows that since public debate was not hindered by the lack of publication of the requested personal data the interference with the legal aid defence counsels' rights under Article 8 would not have been justified by a pressing social need which, insofar as it existed, could be satisfied by other means involving no interference with the right to protection of personal data.

It also follows that any information, especially any information consisting of personal data, which is not necessary to prove a statement of fact in a public debate cannot be the subject of an obligation to impart information by the state. As long as individuals or organisations are free to express their opinion without any solid factual basis, their freedom of expression is not hindered by the lack of a positive obligation on the part of the authorities to impart information.

23. In the context of proportionality, it must also be borne in mind that the applicant organisation had alternative means of gathering information necessary for their survey. They could have requested anonymous statistical data from the

police – which was exactly the form in which the data were finally published. The applicant, as an NGO, also had the possibility – which, in fact, it did avail itself of – of engaging in a co-operation with the National Police Headquarters in order to evaluate police practices concerning appointment of legal aid defence counsels. This method could have provided even better quality of information than the method of seeking the number of appointments per names because it could have shed light not only on the disproportionality in the distribution of cases but also on the reasons thereof. Since the alternative means of gathering information enabled the applicant to contribute more effectively to the debate concerning an issue of public interest, the denial of access to the requested information did not constitute a disproportionate interference, if any, with the applicant's freedom of expression (right to impart information).

(c) Significance of the applicant's watchdog role in the present context

24. Should the Court find that there is a positive obligation on the part of the State to facilitate the exercise of the freedom of expression, or should the same obligation be construed as a negative obligation not to hinder the flow of information, that obligation should be limited to cases when the information requested is necessary to fend off the liability of the applicant for his or her statements expressed concerning an issue of public interest. As long as the applicant is free to express an opinion without engaging any liability for the accuracy of the statement, the lack of access to the information held by the state is not an obstacle to the exercise of the freedom of expression. In this context, the liability of NGOs is much less likely to be engaged than that of a journalist (and the media as their employers) who is bound by stricter professional standards as regards the factual foundations of his statements.

In the present case it is also questionable whether the applicant acted in its role as a public watchdog or whether it had any ulterior motive as an association with a network of lawyers providing legal aid also in criminal cases who might be

potential competitors to legal aid defence counsels. There is no explanation in the methodology of the survey why exactly those 28 police departments were selected out of hundreds of police departments and why did they insist on the disclosure of the names of the appointed legal aid defence counsels when the names were not necessary to support their conclusions and were not published in their reports and when the statistical data necessary for their research as a watchdog organisation could have been obtained without insisting on the disclosure of the protected personal data of the legal aid defence counsels.

(d) Margin of appreciation of the State

25. In the circumstances of the present case, the extent of the State's margin of appreciation is determined by the extent of the State's margin of appreciation in interfering with the right to the protection of personal data under Article 8 of the Convention. There should be no obligation to impart information consisting of personal data when the disclosure of that information is not justified by a pressing social need.

26. In general, should the Court find that there is a positive obligation on the part of the State to facilitate the exercise of the freedom of expression, States should enjoy a wide margin of appreciation in granting access to the requested information limited only by the applicant's overriding interest in supporting his or her statements with facts in order to fend off civil or criminal liability for those statements concerning the exercise of public power and when there are no alternative means for the applicant to obtain the necessary information.

(e) Conclusions

27. In light of the aforesaid, the Government are of the opinion that even if Article 10 is applicable, and even if there was an obligation on the part of the State authorities to impart information, the alleged interference with the applicant's

freedom of expression complied with the requirements of Article 10 (2): it was prescribed by law, pursued the legitimate aim of protecting the rights of others (protection of personal data) and was necessary and proportionate in a democratic society. Therefore the application is manifestly ill-founded within the meaning of Article 35 (a) of the Convention and the applicant's rights under Article 10 have not been violated.

Part IV
Just satisfaction

28. The Government are of the opinion that the applicant's claims for just satisfaction submitted in the proceedings before the Chamber are excessive as regards both damages and costs.

Part V
Conclusions

29. For the above reasons the Government request the Court to conclude that Article 10 of the Convention is not applicable in the present case or to establish that the applicant's rights under Article 10 have not been violated. Should the Court find that there has been a violation of the Convention, the Government request the Court to award a reasonable amount of just satisfaction.

Budapest, 7 September 2015

Zoltán Tallódi
Agent for the Government of Hungary