



FACULTY OF LAW
Lund University

Christina Prinzhorn

The Principle of Public Access to Official Documents

Implications from International Law
concerning the Implementation
within the National Legal Systems of
the Member States of the European
Union

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Professor Gudmundur Alfredsson

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Summary

This thesis analyses the implications from international law concerning the implementation of the principle of public access to official documents.

With a view to the current discussion among the member states of the European Union as to the scope of a principle of that kind this thesis will confine itself to an analysis of the implications from international law binding on the member states of the European Union. Thus, it will refer to universal human rights instruments as well as to regional standards binding on the member states of the European Union. The latter include Community law of the European Union as a category of its own in international law.

Starting with some general remarks concerning the principle of public access to official documents this thesis will then examine each of the instruments with regard to two questions:

First of all, whether the principle of public access to official documents is a standard deriving from these instruments.

And secondly, whether these instruments imply restricting impacts on the scope of the granting of a right of that kind within the national legal systems of the member states of the European Union.

The result of this analysis will be summarized within the concluding arguments at the end of the thesis.

Preface

Why to analyse the Principle of Public Access to Official Documents?

What could be more interesting subject to juridical analysis other than a right incorporating both the very basis of democratic participation on the one hand as well as a threat to the right to privacy on the other hand? The principle of public access to official documents is situated at this very brink. It bears enormous chances for enhancing the legitimacy of the power held by institutions of a democratically organized state as well as it at the same time can be the basis for infringements of this delegated power violating individual rights.

This tightrope between promise and threat, between what is desirable and what is to be prevented in a democratic state makes an analysis of public transparency rights *politically* interesting.

Besides, an analysis of the principle of public access to official documents seems promising also from the *juridical* point of view.

Law reveals its quality when conflicting rights are successfully set into balance. As a matter of fact, any concrete case will bring about a unique constellation of the rights affected. Dynamic mechanisms have to be found in order to meet the full range of situations. An analysis of whether international law implies obligations affecting this very process of weighing thus offers interesting juridical insights.

Why to analyse the Implications from International Law concerning the Implementation of the Principle of Public Access to Official Documents within the National Legal Systems of the Member States of the European Union?

The right of public access to documents held by a state has become a widespread principle at least in democratic countries. Within the common law system the USA, Canada, Australia, as well as New Zealand have by now implemented an individual right of access to documents irrespective of a juridical interest. The same is true for the majority of the members of the European Union and also for the European Union as a legal person itself. Among its 25 members only Germany, Austria and Luxemburg had refused to implement a right of this kind for a long time. In Germany a law on public transparency finally entered into force in January 2006, but already a quick look at the text reveals that its implementation rather is due to certain coercion within the democratic world than to conviction.

Within the member states of the European Union two mainstreams can therefore be identified. Whereas a minority of states is rather reluctant about the implementation of the principle of public access to official documents

within its national legal systems, another group of states on the contrary has imparted extraordinary standing to it. This is especially true to the status the principle has obtained in Sweden, where it enjoys an extraordinary long tradition. Worldwide, Sweden was the first nation ever to grant both freedom of press and thought as well as an individual right of free access to documents held by public authorities¹. Being often quoted as one of -if not *the*- furthest scoped right of its kind, it could well become a model role for other countries still in process of introducing or strengthening transparency of state held documents.

On the other hand, the widespread fear of other states as regards the enhancement of public transparency has to be taken seriously. In order to meet both the demand for a further development of democratic legitimacy of state power as well as the call for an effective protection of the right to privacy, it is worth a closer look, whether international law implies standards in either respect.

¹ Ever since 1766 the right of access to documents has been granted as part of the right to freedom of press in the Swedish constitution. Besides, Sweden has developed a highly detailed catalogue of exemptions within a simple law during the last century.

Abbreviations

ArchVR	Archiv des Völkerrechts (Journal)
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHZ	Bundesgerichtshof, Zivilsachen (Judgements of the German Federal Supreme Court concerning Private Law)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Judgements of the German Federal Constitutional Court)
BVerwG	Bundesverwaltungsgericht (German Federal Administrative Court)
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (Judgements of the German Federal Administrative Court)
CSCE	Conference on Security and Cooperation in Europe
DÖV	Die Öffentliche Verwaltung (Journal)
EC	European Community
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
EPL	Environmental Policy and Law (Journal)
EU	European Union
EuR	Europarecht (Journal)
HRLJ	Human Rights Law Journal
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep.	International Court of Justice, Reports of Judgements, Advisory Opinions and Orders
NJW	Neue Juristische Woche (Journal)
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for Economic Cooperation
OSCE	Organization for Security and Cooperation in Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN- Charter	Charter of the United Nations
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (Journal)

1 Introduction

The following chapter will provide some general remarks about the principle of public access to official documents.

1.1 Definition

During the past decade, the presumptions of the classical liberal doctrine have been increasingly challenged. It has been held that defining the contents of a right without regard to prevailing values will only result in an abstract conceptualizing of the rights, still leaving them empty of content². In order to be capable of grounding a coherent problem-solving practice it has been suggested that any definition of general principles of law as well as their contents has to be determined through interpretation in relation to the context of the social fabric of the society in question³.

Whenever discussed, the principle of public access to official documents is named in connection with what is called the rights of freedom of communication, i.e. the freedom of opinion, the freedom of expression or speech, the freedom of information and the freedom of press, more comprehensively often just referred to under the notion of freedom of expression⁴. And actually, the truth of the above said in particular becomes obvious when analysing the implementation of these freedoms of communication: Constitutional clauses protecting freedom of expression are very similar all over the world, and yet their interpretation is very different⁵.

Though accepting that the more general a juridical notion is, the more difficult it becomes to define its contents, I still believe that at as far as concrete individual rights are concerned, definitions actually are possible and necessary. This thesis will focus on the principle of public access to official documents. Although deriving from more general principles such as transparency, open government, as well as freedom of expression, the principle of “public access to official documents” is granting a concrete right to the individual, thus its contents can be clearly defined.

Generally speaking, it is all about enforcing one’s wish of taking knowledge about any record held by state- authorities concerning a certain topic, case, or proceeding of which one normally does not get grip to without further

² J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 397

³ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 397

⁴ G.-H. Gornig, *Äußerungsfreiheit und Informationsfreiheit als Menschenrechte*, p. 190

⁵ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 397

ado through submission of a certain document⁶. In *juridical* terms, it implies the right of the individual to be informed by the state about any record held by its authorities, irrespective of any further conditions other than his application, and limited only by what is prescribed by law. The most significant feature thus is the absence of a legal interest in access, or – in other words- the abolishment of the formerly required “need” to know in favour of a “right” to know.

1.2 Terminology

Having defined the essential contents of the right here discussed, there still remain problems concerning the use of a terminology being capable of precisely reflecting these contents.

Both in the American as well as in the international law practice, the notion of “Freedom of Information” has become common.

This notion, however, is far from being clear-cut. On the one hand, it leaves open, whether it refers to the freedom to *receive* or the freedom to *impart* information or to *both*. And besides, even supposed the freedom to receive information was comprised, this would not automatically imply an obligation on the part of the state to grant individual access to information held by its authorities: So far, the notion of freedom of information has only been used in the conventional sense as to guarantee that a state enables “the perception of what is perceptible” and “the access to what is accessible”⁷. According to the above named definition, however, the subject of this thesis rather is the right to *establish* perceptibility and accessibility.

Other terminology has been equally criticised. The application of the notion “right of access to data” has been blamed for suggesting that only electronically stored information is comprised, whereas the notion “right of access to documents” has been criticised for the exact opposite risk of narrowing the scope to information stored in conventional written form, so that instead, the notion “civic right of access to information” has been proposed⁸.

Being aware of this discussion, I will apply the notion used by the European Community in Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data⁹. No. 72 of the opening paragraphs of this directive refers to “*the principle of public access to official documents*”. This formulation was

⁶ I. Höffler, Akteneinsichtsrechte des Bürgers bei deutschen Verwaltungsbehörden, p. 3

⁷ H. Windsheimer, Die „Information“ als Interpretationsgrundlage für die subjektiven öffentlichen Rechte des Art. 5 Abs. 1 GG, p. 143

⁸ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 31

⁹ Directive 95/46/EC of the European Parliament and of the Council, OJ No L 281, 24.10.1995, p. 31

made in response to the Swedish efforts in safeguarding its standards of open government and transparency with a particular view to the individual right of access to state-held information as incorporated by its national legal system. Due to the fact that the latter comprises all characteristic traits of the right here discussed, I consider it to be a sufficient term for the subject of this thesis.

1.3 Origins

1.3.1 Freedoms of Communication

It has already been stated that –whenever granted- the principle of public access to official documents is categorized among the freedoms of communication, i.e. the freedom of opinion, the freedom of expression or speech, the freedom of information, and the freedom of press. Even though the principle of public access to official documents is often discussed in context with the freedom of information, the particular communication freedoms cannot be viewed separately. Rather, they constitute a set of freedoms mutually affecting each other.

All rights connected with the freedoms of communication share a common trait: Their origins are twofold. They all can be approached both on an individual as well a social or political level. On the one hand, they support personal autonomy and self- realization of the individual, and on the other hand, they guarantee the democratic process of society¹⁰.

1.3.1.1 Individual Dimension

From the very beginning, theories concerning fundamental freedoms and rights have been built upon the conviction that individual liberty is a product of the natural and inalienable rights of man. The idea that all human beings are endowed with a unique individual identity separate from and to be protected by the state is the merit of the school of natural law¹¹. It was *John*

¹⁰ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 394

¹¹ For a good outline see S. Davidson, *Human rights*, p. 27 pp: The modern school of natural law emerged in the medieval times with the writings of the early Christian philosophers foremost among whom was *Saint Thomas Aquinas*. Part of this early natural law philosophy was the idea that each person's life was determined by God and that all people – whatever their status- were subject to the authority of God. From this it was possible to state that not only the royal authority of monarchs was constrained by divine rules, but that all human beings were endowed with a unique individual identity which was separate from the state. This latter facet of the doctrine may actually be seen as containing the seeds of the natural rights idea that each person constitutes an autonomous individual. The Dutch lawyer *Grotius* then severed the concept of natural law, which he considered the basis of all positive or written law, from its religious origins and made it a product of enlightened secular rational thought. Arguing that all individuals were endowed by nature with the inherent rights to life, liberty and property which were their own and could not be removed or abrogated by the state, *John Locke* added the idea, that mankind had entered into a social

Locke who came to the conclusion, that due to these inalienable rights grounding in the unique identity of each person, the individual is an autonomous being capable of exercising choice, and who stated that as a consequence, legitimacy of government depends upon its willingness and ability to protect these individual natural rights¹².

Given that the unique identity of any person is the basis for the existence of inalienable rights as well as for the delegation of state- power aiming at the protection of these rights, the development of this very identity becomes one of the foremost aims in life. Due to the uniqueness of any human being, a life in dignity rests on the account of human possibility¹³. As a thinking human being living in community with others, the freedoms of communication thus are essential to actually develop and reveal this unique identity.

In particular, the relation of each of the freedoms of communication with regard to the development of personal individuality is as follows:

The freedom to hold and express one's opinion is a necessary prerequisite for the development of one's own personality. Free communication from "mind to mind" is being seen as one of the richest sources of human learning and therefore cannot be alienated without further causing a loss of personality¹⁴. According to the English philosopher *John Stuart Mill*, freedom of speech is essential for the mental well-being of any people and thus also the basis for the well- being of a nation in any other respect¹⁵. Others say that there is no other mean to obtain internal and external sovereignty as well as mutual understanding but freedom of expression¹⁶.

Besides, it is significant of human personality to absorb any information present¹⁷. The German Constitutional Court (Bundesverfassungsgericht) considered it to be one of the most elementary human needs to multiply one's knowledge in order to display one's personality¹⁸. Thus, freedom of information is a prerequisite for the formation of an opinion and therefore necessary for the social, economical, cultural, and political development of each human being¹⁹.

As far as the individual dimension of freedom of press is concerned, it basically can be said that the press is a multiplier of what the freedoms of

contract or voluntary association by which the exercise of these inalienable rights was transferred to the ruler of a state. Any violation of the natural rights of the individual would justify the discharge of the ruler.

¹² S. Davidson, *Human Rights*, p. 28

¹³ J. Donnelly, *International Human Rights*, p. 21

¹⁴ J. G. Fichte, *Zurückforderung der Denkfreiheit*, p.16pp

¹⁵ J. S. Mill, *Über Freiheit*, p. 64

¹⁶ J. C. G. Schaumann, *Kritische Abhandlungen zur philosophischen Rechtslehre*, p. 199

¹⁷ J. G. Fichte, *Zurückforderung der Denkfreiheit*, p.16

¹⁸ BVerfGE 27, 71 (81p)

¹⁹ So said in The Declaration of the Council of Europe 29.04.1982, English text in: ArchVR Bd. 21 p. 124p

speech and information guarantee. The press thus becomes an informing medium supporting the forming²⁰ and spreading²¹ of the citizens` opinions. A free press has therefore been called a “mouthpiece” of the people.

1.3.1.2 Political Dimension

Apart from their essentiality for the self- realization of man, the importance of communication freedoms for the proper social- life of a nation has always been equally recognized²².

And just like the individual dimension, this political dimension is in fact rooted in the natural- law school. Developing *Locke's* theory of the social- contract, *Rousseau* argued that beside creating individual natural rights, natural law conferred inalienable sovereignty on the citizens of a state as a whole and thus, whatever rights were derived from natural law, dwelt within the people as a collective and could be identified by reference to the “general will”²³.

In this respect, communication- freedoms are essential both for the formation of a general will as well as for any continuous control of whether the ruling entities still act according to it. Without the existence of freedom of expression it cannot be ensured that the will of the people serves as the basis of authority of the government. It is basically due to this idea of popular sovereignty, why freedom of speech had a special importance in the doctrine of the enlightenment²⁴. And although the concept of popular sovereignty happened to serve as a justification for demagoguery and totalitarianism through a perversion of the general-will thesis in the further development of the French Revolution²⁵, it later became the basis for establishing democracy as the political form best serving its purpose. All power in a democratic society has to be legitimated by the will of the people. The formation and expression of that will, however, is fully dependent on the existence of communication freedoms. Thus they constitute absolute prerequisites for a democratic society²⁶.

In particular, the relation of each of the freedoms of communication with regard to the democratic organization of a state is as follows:

Freedom of speech is crucial to the formation of a public will. The possibility of free communication enables public competition of alternative ideas and the formation as well the articulation of groups in a pluralist

²⁰ G.H.Gornig, *Äußerungsfreiheit und Informationfreiheit als Menschenrechte*, p. 119

²¹ G.H.Gornig, *Äußerungsfreiheit und Informationfreiheit als Menschenrechte*, p. 120

²² J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 394

²³ S. Davidson, *Human Rights*, p. 28

²⁴ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 399

²⁵ S. Davidson, *Human Rights*, p. 28

²⁶ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 410

society, which then function to be an institution of critics and control serving as an effective corrective of state-power²⁷. Furthermore, it is a prerequisite of any democratic decision-finding process. Objective decisions serving public weal can only be reached, provided all possible outcomes have earlier been estimated in open and free discussion²⁸. Besides, freedom of speech is a guarantor for stability of any society, because it enables adjustment to new social and economical developments far from needing revolutions²⁹.

Freedom of information on the other hand again is a prerequisite for the freedom of holding and expressing one's opinion. It enables any citizen to provide itself with the knowledge needed to fulfil one's political as well as personal tasks. In brief, freedom of information enables anybody to act responsible in a democratic sense³⁰.

The freedom of the press again serves as a multiplier of these effects.

1.3.2 Principle of Free Flow of Information

Apart from this strong relation to the communication- freedoms, the principle of public access to official documents is also connected with the so- called "principle of free flow of information".

Realizing that states could easily restrict the actual effect of a granted freedom of information by simply holding back information from their own part³¹, international law developed the principle of free flow of information as a concept partly coinciding with the freedom of information and partly going beyond.

Just like the freedom of information, the principle of a free flow of information consists of both an active as well as a passive aspect.

The active aspect comprises an obligation on the part of the state to accept that all people living within its territory have the right to transmit information abroad. The same right applies on the part of the state, the latter of which is not comprised by the freedom of information³². Additionally, it also obliges the state to forward information deriving from private as well as official sources abroad³³.

²⁷ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 114

²⁸ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 115

²⁹ T. Fleiner- Gerster, Allgemeine Staaatslehre, p. 102

³⁰ M. Löffler, Die Kommunikationsfreiheit im Einordnungsverhältnis, in: NJW 1984, p. 1206, 1208

³¹ D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 73

³² G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 225, 226

³³ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 225

The passive aspect comprises the obligation on the part of the state to guarantee its citizens a right to freely obtain information from private as well as official sources abroad³⁴. Whereas the passive aspect of the freedom of information only comprises the access to what is accessible and the perception of what is perceptible, the passive aspect of the concept of a free flow of information also implies the *creation* of accessibility and perceptiveness³⁵.

This sounds promising with a view to the subject of this thesis. However, the principle of a free flow of information does not comprise implications concerning the granting of the principle of public access to official documents for two reasons.

For one thing, as can be seen from the definitions given above, the principle of free flow of information was created to provide for a better transfer of information *across the state- borders*. Thus, its scope does not comprise cases with only national relation.

And secondly, its legal character differs significantly from that of the freedom of information. Whereas the latter provides for individual rights by its nature as a fundamental freedom, the principle of free flow of information only creates obligations and rights on the part of states³⁶. Individuals only may benefit indirectly from the principle of free flow of information.

The principle of free flow of information does not imply the creation of an individual right of public access to official documents. Rather, its contents are vague and thus relative in effect. As far as the creation of accessibility and perceptiveness is concerned, the principle of free flow of information therefore does not require that *particular* pieces of information from abroad are made available. Rather, it obliges the states to be “more generous” when creating accessibility and perceptiveness in order to accept a more free and more comprehensive flow of information³⁷. Thus, the only demand implied is to create what could be called an infrastructure for the transfer of information across state- borders. Lacking precise and executable obligations, however, this demand is already met when the state’s activity concerning the disposal of information into both directions across the border proves to be more liberal in relation to what earlier had been the case³⁸.

This lack of implications concerning the granting of the principle of public access to official documents shall not deceive about the impact the principle

³⁴ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 226

³⁵ Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 74

³⁶ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 227

³⁷ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 226

³⁸ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 226

of free flow of information has had on the enhancement of the transfer of information across the world, however.

1.4 Conflicting Rights

As already mentioned at the beginning, the principle of public access to official documents implies both positive as well as negative effects. Just like the granting of a principle of public access can serve the enhancement of democratic structures as well as individual freedom and progress, also interfering rights can be of either individual or public nature. In order to prevent these risks, the principle of public access to official documents cannot be granted without exceptions providing secrecy in certain cases. As far as the terminology is concerned, it has been suggested to call those exceptions aiming at the protection of affected individual rights as serving the ends of “data protection” and those protecting the sphere of the state as serving the ends of “secrecy”³⁹. Unfortunately, the use of this differentiation is not always observed.

1.4.1 Individual Dimension

The principle of public access to official documents is not only strongly rooted in the fundamental freedoms of communication. Its granting can also interfere with individual rights of others.

The rights comprised by communication- freedoms are so- called civil rights and fundamental freedoms in the traditional sense, i.e. bearing the classical individual emphasis⁴⁰. In brief, this kind of rights can be described as freedoms from state interference⁴¹.

Nevertheless, the exercise of these liberal rights is not without limits: The scope of this category of rights is restricted by civil rights and fundamental freedoms of others.

1.4.1.1 Right to Privacy

In this respect, the right to privacy has to be named among the individual rights of third persons possibly interfering with the principle of public access to official documents.

The right to privacy implies private autonomy. This means that each person can freely decide whether to disclose data concerning his person or whether

³⁹ R. Görschner, *Transparente Verwaltung: Konturen eines Informationsverwaltungsrechts*, in: *VVDStRL* 63 (2004), p. 368

⁴⁰ J. Kortteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 394

⁴¹ S. Davidson, *Human Rights*, p. 41

to keep it secret. As a consequence, the state is only allowed to raise such data which is necessary for state- performance prescribed by law and furthermore its authorities are bound by certain limits when processing personal data, no matter whether the person concerned was obliged to forward it or voluntarily informed the authority⁴².

Whenever the right of public access to official documents refers to personal data of another person in a particular case, the right therefore interferes with the right to privacy of that other person. This necessitates a careful balancing of the two conflicting rights.

1.4.1.2 Trade and Business Secrets

Corresponding with the protection of personal data as far as individual persons are concerned is the protection of trade and business secrets as regards the business-sector.

In this respect, so- called “trade secrets” refer to the technical sphere of a company, i.e. data concerning the production- process or research, whereas so- called “business secrets” refer to the commercial sphere, i.e. data concerning customer- listings or balance- sheets⁴³.

We talk about trade and business secrets, whenever data is connected with business establishment and only known by a limited number of persons and according to the will of the management of a company subject to data- protection and –as a last condition- whenever this interest in secrecy is justified by a legitimate economic concern⁴⁴.

1.4.2 Public Dimension

According to the theories discussed above, the state primarily functions to organize society in a manner which is providing the widest possible scope to civil rights and fundamental freedoms. As a matter of fact, the state can only do so, if its own existence and functioning is equally safeguarded. Therefore, the principle of public access to official documents is not only limited by the protection of civil rights and fundamental freedom of others but also by conflicting public interests.

⁴² D. Kugelmann, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 67

⁴³ D. Kugelmann, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 70

⁴⁴ D. Kugelmann, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 70

Being often used as a quick excuse rather than a legitimate reason for not granting the principle of public access to official documents, these interests particularly require clear definition and careful implementation.

1.4.2.1 Functioning and Efficiency of the Administration

The proper *functioning of the administration* is to a great extent dependent on cooperation with the citizens: State activity often needs information which only the citizen can offer. The willingness to cooperate, however, requires a basis of mutual trust⁴⁵. Hence, secrecy concerning the identity of the person providing information often is a prerequisite for any continuing or repeated cooperation.

Besides, the functioning of the administration is to a certain extent dependent on the existence of room reserved for the internal process of decision- finding:

Firstly, the granting of public access to official documents actually can lead to the effect that the *success* of necessary authoritative means is at stake in certain cases. This is in particular true to any supervising administrative work, within the police's work of surveillance, as well as during criminal proceedings and any execution of sentence⁴⁶.

Secondly, public access to official documents at an early stage can harm the *unaffected process* of decision- finding. Office- holders who experience or fear observance might tend towards abstaining from recording their considerations. Besides, public observance creates public opinions and interests which might at this early stage influence the decision and therefore endanger the impartiality of authoritative work⁴⁷.

Another public interest possibly interfering with the granting of a principle of public access to official documents is the *efficiency of administrative work*. The right of public access to official documents brings about a multitude of extra activity authorities have to carry out apart from their traditional work. In particular, it necessitates advice and help regarding the applicant, the reception and screening of the application, the confirmation of reception, the investigation of the application, the removal of data which is subject to secrecy, the production of copies, the calculation of fees, as well as the control during the stage of actually granting access. In certain cases,

⁴⁵ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 221

⁴⁶ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 224

⁴⁷ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 225

these increased demands can become a burden to the normal course of business within the authority in question not to be refused⁴⁸.

1.4.2.2 National Security

Besides, the principle of public access to official documents can interfere with the public interest of national security.

Secrecy of data endangering the national security of a state is justified by the consideration that effective protection of rights and freedoms can only be provided for within a stable state and that state authorities can only carry out their work within an atmosphere of national security. National security in this respect comprises aspects both of external security such as military state- defence or relations in international law with regard to other countries or international organizations as well as aspects of internal security such as the prevention and removal of internal disturbances or the protection of the constitution⁴⁹.

1.5 Function of the Principle of Public Access to Official Documents

The functions connected with the principle of public access to official documents are above all strongly determined by its origins. Its impact on the protection of the communication- freedoms as well as on democratic state-structures in general have already been outlined at an earlier point of this thesis. This paragraph shall therefore focus on the particular functions the principle of public access to official documents fulfils within contemporary Europe.

Within a changed political setting, the benefits which may be received from the principle of public access to official documents go beyond its original contribution. In this respect, two profits offered by the principle of public access to official documents within contemporary Europe seem worth mentioning:

First of all, two tendencies have to be identified, both of them leading towards an ever decreasing degree of democratic legitimacy of state-activity within the European Union. On the one hand, with the state affecting an ever increasing part of everybody's life, more and more decisions which originally were stipulated by the legislator are being conferred upon the administration. And on the other hand, the role of the national parliaments as directly democratically legitimated legislators has decreased due to the fact that an increasing amount of legislation is actually

⁴⁸ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 227, 228

⁴⁹ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 231

made by the European Community, the legislative organs of which mostly lack direct democratic legitimacy. This growing lack of democratic legitimacy of state action requires an enhanced standard of transparency, to the latter of which the principle of public access to official documents can contribute⁵⁰. It thus offers compensation for the ever decreasing democratic legitimacy of state- activity in contemporary Europe and therefore helps to create acceptance and control of state- action beside the democratic legitimacy mediated by parliaments.

And secondly, due to the comprehensive prohibition of the use of force as provided for under Article 2 (4) of the United Nations Charter, which furthermore is a rule of customary international law⁵¹, the communication freedoms have been held to be the only legitimate means to change the *status quo*⁵². Considering that public discourse about the best policy in government can only take place where transparency of state- activity is granted, the principle of public access to official documents seems to be of contributory value also in this respect.

⁵⁰ On the other hand, it has to be kept in mind that the fact that the state disposes about an ever increasing amount of information also brings about a need for increased data-protection.

⁵¹ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 309

⁵² D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 67

2 Implications concerning the Principle of Public Access to Official Documents from Universal Instruments in International Law

The principle of public access to official documents is part of modern international law.

Originally, international law was defined as the law governing relations between nation- states exclusively, i.e. only states were subjects of and had legal rights under international law. Individuals, on the contrary, were not deemed to have international rights as such and thus considered objects rather than subjects of international law⁵³. To the extent obligations of states were relating to individuals, they were deemed to be obligations owed to the states whose nationality the individuals possessed⁵⁴. Human rights violations committed by a state against individuals having its nationality were deemed to fall within the exclusive jurisdiction of that state⁵⁵.

Due to the principle in international law, however, that a state may limit its sovereignty by treaty and thus internationalize a subject which is otherwise not regulated by international law, human rights, i.e. inalienable rights of the individual against state- power, have increasingly become a matter of international law. As a result, states can no longer assert that how they treat their own nationals is a subject falling exclusively within their own domestic jurisdiction. Thus, modern international law differs most significantly from its historical antecedents in that today individuals are deemed to have internationally guaranteed rights as individuals and not as nationals of a particular state and that there exists a growing number of international institutions with jurisdiction to protect individuals against human rights violations committed by states of their own nationality⁵⁶.

In the course of time, it has become common to speak of different “generations” of human rights. In this respect, “first generation rights” are deemed to comprise civil rights in the sense of individual freedoms from state interference, “second generation rights” are deemed to comprise social rights in the sense of rights to claim welfare benefits from the state and in recent years the notion of “third generation rights” has been suggested to

⁵³ Th. Buergenthal, *International Human Rights in a Nutshell*, p. 2

⁵⁴ Th. Buergenthal, *International Human Rights in a Nutshell*, p. 2

⁵⁵ Th. Buergenthal, *International Human Rights in a Nutshell*, p. 3

⁵⁶ Th. Buergenthal, *International Human Rights in a Nutshell*, p. 19

apply to collective rights such as a right to peace, to a clean environment, or to development⁵⁷.

This concept has been widely criticized. It has been argued, that the idea of successive generations of human rights replacing each other is unsound⁵⁸. Certainly, the existence of a second generation right will not be capable of functioning as a substitute for the existence of a right belonging to the so-called first generation. Also, the risk of deeming the different generations as being of more or lesser importance is to be criticized. In this respect, it cannot be denied that in many parts of the world social and economic rights have the same or even greater importance for the individual than the rights of liberty⁵⁹. Besides, it has to be taken into consideration that rights originally belonging to the “first generation” can develop to entail positive obligations in the sense of “second generation rights”. Keeping in mind the very essence of the concept of human rights, which is that every individual has certain inalienable and legally enforceable rights protecting him or her against state interference and the abuse of power by governments⁶⁰, civil rights and liberties basically comprise a negative aspect granting liberty from state interference to the individual. This does not lead to the effect, however, that the same rights cannot – according to the finances, resources and political development of the state in question- also require positive guarantees to be provided for by the state⁶¹.

This applies also in respect with the principle of public access to official documents. According to the argumentation outlined above, the right to freedom of information primarily has to be categorized as a classic civil right with an emphasis on freedom from state- interference. Still, it is possible that it comprises also positive obligations on the part of the state, under which the principle of public access to official documents could indeed come.

Thus, the principle of public access to official documents is generally qualified for coming under international human rights law.

2.1 United Nations Charter

The UN- Charter⁶² includes several references to human rights and fundamental freedoms.

⁵⁷ P. Malanczuk, Akehurst's Modern Introduction to International Law, p. 210

⁵⁸ P. Malanczuk, Akehurst's Modern Introduction to International Law, p. 210

⁵⁹ P. Malanczuk, Akehurst's Modern Introduction to International Law, p. 211

⁶⁰ P. Malanczuk, Akehurst's Modern Introduction to International Law, p. 209

⁶¹ The freedom of religion for example is a classical liberty right. Thus, it primarily implies a prohibition on the part of the state to impose a certain belief on its nationals or to discriminate for religious reasons. However, it also obliges the state to create conditions enabling the individual to exercise its religious belief, for example by granting public holidays on symbolic religious days.

⁶² Text in: I. Brownlie, Basic Documents in International Law, p. 1pp

Article 1 (3) of the UN- Charta names among the purposes of the UN “*To achieve international co- operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*”.

According to Article 56 of the UN- Charter, its members “[...] *pledge themselves to take joint and separate action in co- operation with the Organization for the achievement of the purposes set forth in Article 55*”, among which the “*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion*” are expressly named.

2.1.1 Binding Character

The binding character of these references is subject to controversy.

In the course of discussing the future Charter in the San Francisco Conference, two opposing points of view existed:

Some suggested that each member should pledge itself to take independent, separate, national action to achieve the purposes set forth in Article 55 of the UN- Charter, whereas others opposed that such a pledge of separate national action went beyond the proper scope of the Charter – the encouragement of international cooperation- and might infringe upon the domestic jurisdiction of members provided for in Article 2 (7) of the UN- Charter⁶³.

As a consequence, the phraseology finally agreed upon was a compromise and clearly is capable of more than one interpretation.

It has been argued, that the use of the word “*pledge*” implies a legal obligation, but that this obligation is probably not to observe human rights *now*, but to work towards their fulfilment in the *future*⁶⁴. Others have argued that Article 56 of the UN- Charter at least obliges the members to contribute *somehow* to the achievement of the purposes set forth in Article 55 of the UN- Charter and thus implies a prohibition *not* to do anything at all⁶⁵. Even though the vagueness of the language actually leaves wide discretion to the states as regards the speed and means of carrying out their obligations, it has been held that a state deliberately moving backwards in the protection of human rights would be regarded violating its obligation under Article 56 of the UN- Charter⁶⁶.

⁶³ Goodrich, L. M.; Hambro, E.; Simons, A. P., Charter of the United Nations, Art. 56, p. 381

⁶⁴ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 212

⁶⁵ B. Witzmann, Völkerrechtliche Aspekte der Bemühungen um eine neue Weltinformationsordnung, p. 108

⁶⁶ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 212

Besides, the limited obligatory function of Article 56 of the UN- Charter is also the result of the wording of Article 55 of the UN- Charter, to which it refers. Article 56 of the UN- Charter can only create *substantive* obligations -as opposed to *procedural* obligations- in so far as Article 55 contains a corresponding basis in that respect⁶⁷. The latter only describes *purposes* –as opposed to *substantive obligations*- that “*shall*” be achieved. In contrast to the supplement “*without distinction as to race, sex, language, or religion*” named in Article 55 (c) of the UN- Charter which actually circumscribes a fixed and directly executable legal obligation, the first part of the paragraph concerning the “*universal respect for, and observance of, human rights and fundamental freedoms*” has been formulated merely as a *general objective*⁶⁸.

Even though the extent to which Articles 56 and 55 of the UN- Charter impose legally binding obligations on the member- states is far from being clear- cut, it is by now widely accepted that they do impose *some* obligations and therefore in fact are legally binding.

Still, it has to be taken into account that whatever legal obligations may or may not be imposed by Articles 56 and 55 of the UN- Charter, these provisions confer no international rights on individuals, but only benefits⁶⁹.

2.1.2 The Principle of Public Access to Official Documents as a Standard in the UN- Charter

Whether the principle of public access to official documents falls within this obligatory effect of the UN- Charter, depends upon the scope of the notion of “*human rights*” applied. The lack of any concrete listing or catalogue of human rights within the UN- Charter leaves the term subject to interpretation⁷⁰. Due to the differing standards of human rights protection reached in the member states, the term applied in the UN- Charter only allows for a narrow interpretation.

From the Advisory Opinion held by the International Court of Justice in the *Namibia Case*, it can be concluded, that only the most elementary human rights can be regarded as being protected by the UN- Charter. The latter thus comprises the minimum standard of human rights which can be identified as the common possession of the human kind irrespective of antagonist ideologies. More precisely, the ICJ held that “*To establish [...] and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin,*

⁶⁷ B. Simma, *The Charter of the United Nations, A Commentary*, p. 794

⁶⁸ B. Simma, *The Charter of the United Nations, A Commentary*, p. 794

⁶⁹ P. Malanczuk, *Akehurst`s Modern Introduction to International Law*, p. 212

⁷⁰ R. Geppert, *Informationsfreiheit ein Menschenrecht*, p. 36

*which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter*⁷¹.

Carrying on this sentence, the minimum standard has been held to comprise the right to life, personal liberty, freedom of religion and non-discrimination as to race and origin⁷².

Consequently, communication- freedoms are not comprised by the obligatory effect of the UN- Charter, and all the more can no individual right concerning the access to official documents be derived from it.

Nothing else can be concluded when applying the more general approach of classifying the principle of public access to official documents as a precondition for a democratic society.

First of all, the UN- Charter does not explicitly highlight the requirement of popular sovereignty and democratic processes⁷³. Some references, however, can be seen in the need to take into account “*the freely expressed wishes*” and “*political aspirations of the peoples*” concerned as stipulated in Article 73 (b), Chapter XI of the UN- Charter on non- self- governing territories and in Chapter XII, Article 76 (b) of the UN- Charter on the international trusteeship system⁷⁴.

Furthermore, the demand for democratic structures has been discussed in connection with the principle of self- determination provided for under Article 1 (2) and Article 55 of the UN- Charter⁷⁵.

In contrast to the obligation to promote the respect for, and observance of, human rights and fundamental freedoms, the principle of self- determination is merely named among the “*purposes*” as well as the “*bases*” of the United Nations in both provisions.

Consequently, references to Article 56 of the UN- Charter by the General Assembly and ECOSOC have only been made in connection with the human rights provisions as well as the economic and social provisions of Article 55⁷⁶, i.e. to those provisions Article 55 of UN- Charter declares to be *promoted*. Considering that even as far as these provisions are concerned, the binding and obligatory character has been subject to controversy, the derivation of a legal obligation on the part of the member- states concerning the concrete implementation of the principle of self- determination would clearly all the more go beyond the intention of the UN- Charter.

⁷¹ *Namibia Case* (1971), ICJ Rep. 1971, 16- 345, at 57, para. 131

⁷² R. Geppert, Informationsfreiheit ein Menschenrecht, p. 36

⁷³ A. Rosas, Article 21, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 301

⁷⁴ A. Rosas, Article 21, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 301

⁷⁵ For a more detailed explanation see 3.3.3.2 of this thesis.

⁷⁶ B. Simma, *The Charter of the United Nations, A Commentary*, p. 794

2.1.3 Limits concerning the Principle of Public Access to Official Documents deriving from the UN- Charter

Just alike, the UN- Charter neither provides for limits as to the scope of a principle of public access to official documents when granted within domestic legal systems of the member- states for reasons of protecting the rights of others nor does it for reasons of guaranteeing the internal stability of a member- state.

None of the conflicting rights is comprised by the above named minimum standard of human rights or any other standard set forth by the UN- Charter. This is not only true concerning the right to privacy and trade and business secrets, but also as regards the protection of the functioning and efficiency of the administration as well as national security. The UN- Charter provides for sovereign equality of the member- states under Article 2 (1) and a prohibition of threat and the use of force against the territorial integrity and political independence of any state under Article 2 (4). These clearly executable principles are only referring to the *external* independence of all member- states, though. In contrast, aspects of a functioning and efficient administration as well as of national security touch upon the *internal* organization of a state. In how far member- states create internal systems successfully protecting these aspects is left to the nations themselves and cannot be derived from the UN- Charter as a standard in international law.

2.2 Universal Declaration of Human Rights

Proposals that a “Bill of Rights” or “Declaration of the Essential Rights of Man” be appended to the UN- Charter were made but not acted upon at the San Francisco Conference. These efforts were revived at the very first meeting of the United Nations and shortly thereafter the Commission on Human Rights was set up on the basis of Article 68 of the UN- Charter by the Economic and Social Council (ECOSOC) and charged with drafting an “International Bill of Human Rights”⁷⁷.

Being aware of the difficulties, the creation of a legally binding instrument would bring about, the Commission decided to draft a bill in three parts: A declaration clearly circumscribing the particular human rights, a multilateral convention creating legal obligations, and measures safeguarding the execution of the human rights norms⁷⁸. In addition to the human rights provisions of the UN- Charter, the International Bill of Human Rights at the end of the process consisted of the Universal Declaration of Human Rights

⁷⁷ Th. Buergenthal, *International Human Rights in a Nutshell*, p. 29

⁷⁸ O. Kimminich, S. Hobe, *Einführung in das Völkerrecht*, p. 341

(UDHR), the two International Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights.

The UDHR was unanimously adopted by the General Assembly of the United Nations on the 10th of December 1948 with only 8 abstentions. It became the first comprehensive catalogue of human rights and liberties on an international level. Among this listing, Article 19 of the Declaration was the first implementation of communication freedoms in international law⁷⁹.

2.2.1 Binding Character

Without doubt the UDHR possesses high moral status and political importance and has become an international standard by which the conduct of governments is judged both within and outside the United Nations and which inspired a multitude of treaties and is reflected in many national constitutions⁸⁰.

Despite widespread agreement about its enormous factual impact, the legal character of the Declaration has often been discussed.

According to Article 38 (1) of the Statute of the International Court of Justice⁸¹, which usually is accepted as constituting a list of the sources of international law⁸², these are international conventions, international custom, general principles of law, as well as judicial decisions and the teachings of learned writers as subsidiary means for the determination of rules of law.

In the formal sense, the UDHR is a resolution adopted under Article 13 of the UN- Charter by the General Assembly of the UN. Law acquires its normative binding force from the source or authority it emanates from⁸³. According to Articles 10, 11, 13 and 14 of UN- Charter, decisions by the General Assembly have the force of recommendations only⁸⁴. Thus, the UDHR cannot be classified as a source of international law without further ado.

Still, there is by now little doubt concerning the fact that the Declaration indeed disposes about force of law. The question rather turns on the argumentation.

⁷⁹ G.-H. Gornig, *Äußerungs- und Informationsfreiheit als Menschenrechte*, p. 99

⁸⁰ J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in: B. G. Ramcharan, *Human Rights, Thirty Years after the Universal Declaration*, p. 29

⁸¹ Text in: I. Brownlie, *Basic Documents in International Law*, p. 438pp

⁸² P. Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 36

⁸³ J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in: B. G. Ramcharan, *Human Rights, Thirty Years after the Universal Declaration*, p. 29

⁸⁴ Except for resolutions relating to internal or house- keeping matters, which are legally binding.

Three lines of argumentation have been developed in this respect:

The normative character of the UDHR has been argued to derive either from its status as an authoritative interpretation of the human rights contained in the UN- Charter, its status as customary international law, or its status as a general principle of law.

Categorizing the UDHR as a general principle of law is in contradiction to the fact that this source of law only comprises those general principles of law which are universally acknowledged by, and common to all or at least the majority of the national legal systems⁸⁵, and which are of essential importance or serve as guidelines for these systems⁸⁶. Particular norms like those incorporated by the UDHR thus cannot be classified as general principles of law⁸⁷.

The other two lines of argumentation, however, should be seen in correspondence rather than alternatively:

It has become *customary law* to classify the UDHR as being an *authentic interpretation* of the UN- Charter as far as the latter refers to human rights⁸⁸.

According to Article 38 (b) of the Statute of the International Court of Justice international custom is a “*general practice*” which is “*accepted as law*”. The International Court of Justice later referred to the general practice as the “*objective element*” and the acceptance as law as the “*subjective element*”, the so- called *opinio iuris*⁸⁹. The notion of general practice implies an element of time, even though the necessary duration need not be long⁹⁰. Evidence of customary law is to be found in the actual practice of states as expressed in statements, correspondence, and published material by the executive authorities of a country, as well as in the laws and judicial decisions of a state⁹¹. Besides, as a result of their participation in international organizations, states express their juridical opinion as to the existence of particular customary rules also through their practice within these organizations. Therefore, there is growing support for the proposition

⁸⁵ K. Ipsen, *Völkerrecht*, p. 199

⁸⁶ K. Ipsen, *Völkerrecht*, p. 199

⁸⁷ General principles in this sense are e.g. the principle of liability, reparation as well as the principle of unjust enrichment, K. Ipsen, *Völkerrecht*, p. 200

⁸⁸ J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in: B. G. Ramcharan, *Human Rights, Thirty Years after the Universal Declaration*, p. 37

⁸⁹ *Nicaragua case*, *Nicaragua v. USA (Merits)*, ICJ Rep. 1984, 14, at 97

⁹⁰ *Continental Shelf case*, *Libya v. Malta*, ICJ Rep. 1985, 29

⁹¹ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 39

that the collective acts of international organizations are themselves evidence of the development of customary rules⁹².

The General Assembly itself invoked two of the provisions of the UDHR only five months after its adoption in another resolution, stating that the measures in question “*were not in conformity with the Charter*”⁹³. Since the UN- Charter neither catalogues nor defines human rights, the only conclusion possible is that the states which voted for the resolution were invoking the UDHR to interpret the UN- Charter. The General Assembly used this method time and again both in subsequent resolutions as well as in further declarations⁹⁴, and so do resolutions by the Security Council⁹⁵ as well as many other collective acts by international organizations⁹⁶.

The normative force of the UDHR as an authoritative interpretation of the human rights references of the UN- Charter thus has become customary international law.

2.2.2 Enforceability

Another question is, whether the legally binding rights set forth in the UDHR are enforceable. Considering that the creation of legal rights is just as good as their implementation is guaranteed, obligations usually show much more effect, if their violation is monitored and sanctioned.

The UDHR as such does not provide for safeguards concerning the actual implementation of the rights guaranteed⁹⁷. Until 1967 both the Commission on Human Rights itself as well as ECOSOC agreed on the fact that the Commission had no power to take any action in regard to complaints concerning human rights⁹⁸. Having completed the process of standard-setting, the Commission then requested authority from ECOSOC to review its functions and to be empowered to make recommendations about specific violations brought to its attention⁹⁹.

This request was approved in Resolution 1235 which was adopted by ECOSOC in 1967¹⁰⁰. It authorizes the Commission on Human Rights as

⁹² J. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in: B. G. Ramcharan, *Human Rights, Thirty Years after the Universal Declaration*, p. 31

⁹³ G.A. Resolution 285 (III)

⁹⁴ See e.g. G.A. Resolution 1514 (XV) of 14 December 1960; G.A. Resolution 1904 (XVIII) of 20 November 1963; Resolution 2145 (XXI)

⁹⁵ Resolution S/5471

⁹⁶ See e.g. Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May 1968, A/Conf. 32/41 p.4

⁹⁷ This is due to the fact that the Human Rights Commission was a solely political organ and originally exclusively charged with standard- setting, Th. Schilling, *Internationaler Menschenrechtsschutz*, p. 5

⁹⁸ See e.g. Resolution 728F, U.N. Doc. E/ 3290 (1959)

⁹⁹ F. Newman, D. Weissbrodt, *International human rights: law, policy, and process*, p. 111

¹⁰⁰ U.N. Doc. E/4393 (1967)

well as the Sub- Commission on the Prevention of Discrimination and Protection of Minorities under paragraph 2 “*to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid [...] and racial discrimination [...] contained in the communications listed by the Secretary- General pursuant to Economic and Social Council resolution 728 F*”. In case this examination discloses the existence of “*situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid [...] and racial discrimination*” the Commission is according to paragraph 3 empowered to undertake a “*thorough study*” and to report its conclusions to ECOSOC. In practice, Resolution 1235 has served as the basis for annual debate during the sessions of the Commission and Sub- Commission on human rights violations around the world¹⁰¹. In addition, the Commission developed a practice of appointing special rapporteurs, special representatives, experts, and other envoys to monitor human rights violations in particular countries¹⁰².

However, the need for a confidential procedure, enabling a better cooperation of the states under examination, as well as the fact that Resolution 1235 does not provide for a mechanism as regards consideration or analysis of the communications themselves, led to the adoption of Resolution 1503 in 1970¹⁰³.

According to paragraph 1 of this resolution, the Sub- Commission is authorized “*to appoint a working group [...] to meet once a year in private meetings*” to examine the communications received from individuals and other private groups by the UN with a view to identifying those which “*appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub- Commission*”. Paragraph 5 of the resolution “*Requests the Sub- Commission [...] to consider in private meeting, in accordance with paragraph 1 [...], the communications brought before it [...] with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission*”. Having examined the communications, the Commission then is requested to determine according to paragraph 6 of the resolution “*Whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235*” or “*Whether it may be a subject of an investigation by an ad hoc committee to be appointed by the Commission which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant cooperation with that State and under conditions determined by agreement with it*”.

¹⁰¹ F. Newman, D. Weissbrodt, *International human rights: law, policy, and process*, p. 112, 113

¹⁰² F. Newman, D. Weissbrodt, *International human rights: law, policy, and process*, p. 113

¹⁰³ U.N. Doc. E/4832/Add.1 (1970)

Two aspects seem worth special emphasis:

First of all, it has to be stressed that no individual petition system exists in the realm of the UDHR. Although individuals have standing to file petitions, their cause of action is based on a showing of large- scale or systematic denials of human rights rather than violations of one individual's rights.

And secondly, according to both procedures, enforceability is not granted in respect to *any* violation of a human right provided for by the UDHR. Rather, it is restricted to situations revealing consistent patterns of gross and reliably attested violations of human rights. The resolutions themselves do not stipulate what kind of state- conduct actually constitutes human rights violation of this kind. It therefore has to be inferred from the names of the countries mentioned by the Chair of the Commission on Human Rights at the end of the Commission's 1503 deliberations and from publicly available information about those countries what sort of situations constitute such violations. The governments of the countries which have so far been considered under the 1503 process were responsible for a large number of cases involving torture, political detention, summary or arbitrary killing, and disappearance¹⁰⁴.

Irrespective of whether the UDHR entails implications as regards the principle of public access to official documents, it thus already has to be pointed out at this stage of the thesis that no violation seems grave enough to actually be enforceable under the above named procedures. Nevertheless, the UDHR is legally binding also in respect to those kind of rights set forth which are not capable of being enforceable. An analysis of implications concerning the principle of public access to official documents deriving from the UDHR thus nevertheless makes sense.

2.2.3 The Principle of Public Access to Official Documents as a Standard in the Universal Declaration of Human Rights

With a view to the lack of explicit references regarding the principle of public access to official documents in the UDHR, provisions referring to the origins of the principle, i.e. communication freedoms and democratic participation, have to be scrutinized. Doing so, it has to be kept in mind, that the UDHR acquires its binding character from customary international law. Hence, the scope of the rights granted can only rely on customary law, too. It therefore has to be taken into account, in how far state practice provides for evidence concerning the interpretation of the provisions in question.

¹⁰⁴ F. Newman, D. Weissbrodt, *International human rights: law, policy, and process*, p. 121

2.2.3.1 Communication Freedoms

The freedoms of communication are provided for under Article 19 of the UDHR, which reads:

“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.”

Comparing the wording of this provision with that of equivalent provisions in other human rights instruments, one aspect is particularly evident:

The freedom to *seek* information is explicitly granted beside the right to *receive* information¹⁰⁵.

The question arises, whether this allows for an interpretation to the effect that a freedom to *receive* information merely implies a prohibition on the part of the state to hinder the individual from getting grip of generally accessible information, whereas the freedom to *seek* information would also imply a right of being granted access to those pieces of information not yet accessible. A right of public access to official documents would then come under the scope of Article 19 of the UDHR.

Very clearly, an interpretation of this kind would neither be in line with the original intention at the time the UDHR was adopted, nor with the general practice conducted by the majority of states thereafter.

The communication freedoms provided for under Article 19 of the UDHR have to be classified as what is called “political freedoms”. As opposed to the so- called “civil- rights” which are only protecting the individual from state- interference with his personal sphere, political freedoms comprise those human rights guaranteeing the individual’s participation in the conduct of state- activity, or -in other words- they safeguard his position as a citizen¹⁰⁶.

Despite the *function* of political freedoms to enable individual participation in state- activity, this does not change their legal character, however. It therefore has to be stressed that also political freedoms remain typical “first-generation” rights, originally only created as rights protecting against state-interference¹⁰⁷.

The historical context does not allow for any other conclusion:

¹⁰⁵ The same applies for the ICCPR, whereas the ECHR only provides for the freedom to *receive* information.

¹⁰⁶ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 36

¹⁰⁷ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 36

The gap between the Western and the socialist world concerning the concept of political freedoms left its marks on the drafting of Article 19 of the UDHR. Whereas Western powers deemed political freedoms to be unalterable prerequisites for a democratic life in a state- system based solely on the rule of law, socialist states considered a comprehensive protection of the rights of the individual to be unnecessary, since the former gap between state and individual had been overcome in a socialist system by the fact that the state was governed by the working- class only¹⁰⁸. According to this latter argumentation, the primary task of any state is the enhancement of the political power of the working- class, which can best be achieved by a system of state- steered information – as a consequence, freedom of information is deemed inconsistent with a socialist system¹⁰⁹.

These differing concepts remained incompatible so that the adoption of the UDHR implied open dissent as to the scope of the political freedoms¹¹⁰.

Read in its ordinary meaning, Article 19 of the UDHR establishes a world for the purpose of receiving and imparting information as an individual right – the aim was to promote an unobstructed flow of information in all directions and regardless of frontiers¹¹¹. Whereas the objective of the principle of public access to official documents is the participation of the individual in the democratic state- government, the Commission of Human Rights was primarily lead by the experience of propagandistic information doctrines in the Second World War. Hence, the only motivation behind granting the freedom of seeking, receiving, and imparting information was to create a free flow of information in order to prevent indoctrinating propaganda in the future¹¹².

Considering that not even the intention to provide for a free flow of information by Article 19 of the UDHR was backed by the majority of states, it becomes obvious that even Western states could not expect any interpretation still going beyond this scope. Against this historical background, the principle of public access to official documents can therefore not be deduced from the freedom to seek information as originally granted in Article 19 of the UDHR.

Nothing else applies with a view to subsequent state- practice:

Not even after the end of the Cold War the deduction of the principle of public access to official documents from the freedom to seek information as

¹⁰⁸ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 39

¹⁰⁹ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 39

¹¹⁰ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 40

¹¹¹ J. Korteinen, K. Myntti, L. Hannikainen, Article 19, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, (1999), p. 403

¹¹² N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 43

provided for by Article 19 of the UDHR by means of customary law has taken place. Even though by now probably only China still stands for this former socialist concept of political freedoms, there is no general practice of the majority of states giving evidence of an understanding of Article 19 of the UDHR as to imply positive obligations. Just like in the beginning, it is still seen as a classical political freedom imposing a prohibition of state-interference only. If states are granting the principle of public access to official documents, they voluntarily go beyond what Article 19 of the UDHR obliges them to do – and this is also their understanding when doing so.

2.2.3.2 Democracy

The application of a more general approach classifying the principle of public access to official documents as a precondition for a democratic society does not lead to any other result.

The UDHR explicitly refers to a “democratic society” only in Article 29. The notion there appears merely in the context of a limitation clause¹¹³. Consequently, no individual rights can be deduced from this article.

In contrast to this, Article 21 of the UDHR does not use the actual concept of democracy, but instead emphasizes the notion of participation. Undoubtedly, the choice to avoid this concept in Article 21 had to do with the divergent connotations it raised, i.e. people’s democracy, parliamentary democracy, etc.¹¹⁴.

Article 21 (3) of the UDHR reads as follows:

“The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

Article 21 of the UDHR breaks new grounds in the field of political freedoms: It requires minimum standards concerning the structure and internal organization of states¹¹⁵.

In particular, it stipulates that the authority of government needs to be based on the will of the people and that there has to be a system of democratic participation with equal political rights for each citizen. Thus, Article 21 of the UDHR deals with the members of an existing political community rather

¹¹³ A. Rosas, Article 21, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 306

¹¹⁴ A. Rosas, Article 21, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 306

¹¹⁵ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 43

than with the individual as such – it focuses on the system the individual needs for successfully making use of his rights¹¹⁶.

The notion of requiring that the will of the people shall be the basis of the authority of government was vigorously disputed during the *travaux préparatoires*. The United Kingdom feared an obligation to apply these standards within its colonies and the American delegate justified his abstention during the voting by arguing that this concept was a political principle and not a human right. The American attempt to implement an individual right instead was rejected by France arguing that implementing the “principle of the will of the people” in the form of an individual right would be inconsistent with the tradition of the Roman law¹¹⁷.

Unlike the first two paragraphs of Article 21 of the UDHR which proclaim the right to take part in government and the right to equal access to public services, this third paragraph does not in terms enunciate any right of the citizen, but rather is in the nature of a constitutional prescription¹¹⁸. It primarily provides for institutional rights. Besides, Article 21 (3) of the UDHR expressly stipulates that the will of the people shall be expressed in elections. From this close and only conjunction given, it has to be concluded that the only concrete state- obligation deriving from requiring that the will of the people is the basis of the government thus is the existence of elections. Within the realm of the provision in question, only this latter requirement has by now reached the status of an individual right. Even though the principle of public access to official documents would actually contribute to the fact that the will of the people is the basis of government, it is not comprised as a standard required by Article 21 (3) of the UDHR.

2.2.4 Limits concerning the Principle of Public Access to Official Documents deriving from the Universal Declaration of Human Rights

Even though states granting the principle of public access to official documents voluntarily go beyond their obligations under the UDHR, they are, however, not released from other obligations imposed on them by the latter.

As mentioned before, the granting of individual rights is limited by the existence of individual rights of other persons. In particular, the principle of public access to official documents can interfere with another person’s right to privacy as well as with trade and business secrets.

¹¹⁶ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 43

¹¹⁷ N. Weiß, Die Allgemeine Erklärung der Menschenrechte und die Gewährleistung politischer Freiheitsrechte, in: Themenheft „50 Jahre AEMR“, p. 44

Concerning the public dimension, interference is possible with the functioning and efficiency of the administration as well as with national security.

2.2.4.1 Right to Privacy

The right to privacy is provided for under Article 12 of the UDHR and reads as follows:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

It has been argued to distinguish between three different spheres of privacy, i.e. physical integrity, mental integrity, and a sphere of intimate relationships (from the German expression *“Intimsphäre”*), and that a fourth aspect could be the need for a protection of privacy in the workplace and other places¹¹⁹.

This argumentation, however, is not free from ambiguity. Apart from the protection of the sphere of intimate relationships, the scope of the right to privacy would namely not go beyond what Articles 3 and 18 of the UDHR already guarantee: Physical integrity is already provided for under the notion of *“security of the person”* in Article 3 of the UDHR¹²⁰. And the sphere of mental integrity in the sense of a right to freely determine what one thinks is comprised by the freedom of thought as provided for under Article 18 of the UDHR. In sum, the notions *“thought”*, *“conscience”* and *“religion”* cover *“all possible attitudes of the individual toward the world, toward society, and toward that which determines his fate and the destiny of the world, be it a divinity, some superior being or just reason and rationalism, or chance”*¹²¹. If the sphere of mental integrity functioned to protect the reputation and honour of a person, however, the express protection of these two aspects in the second part of the first sentence of Article 12 of the UDHR would be unnecessary.

Rather, I consider the German counterpart concerning the protection of privacy, i.e. Article 2 (1) of the German Constitution, worth a closer look for two reasons: First of all, the technical term *“sphere of intimate relationships”* used on the international level was borrowed from the findings of the German courts, which shows that the rather sophisticated interpretation by German judiciary as regards the right to privacy apparently

¹¹⁹ L.A. Rehof, Article 12, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 188

¹²⁰ L.A. Rehof, Article 3, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 77

¹²¹ K.J. Partsch, Freedom of Conscience and Expression, and Political Freedoms, in: L. Henkin, *The International Bill of Rights, The Covenant on Civil and Political Rights*, p. 213

has inspired learned writers in their interpretation also of Article 12 of the UDHR. And secondly, the UDHR and the German Constitution are comparable in that they both provide for the protection of a right to life and personal integrity as well as for freedom of thought, conscience and religion under separate articles. This could well speak for comparability also as regards the interpretation of the scope of the provisions in question.

What is called the right to privacy in the UDHR is called the right to freely develop and display one's personality in Article 2 (1) of the German Constitution.

The German Constitutional Court has defined Article 2 (1) of the German Constitution as granting a so-called "comprehensive right to personality". The different spheres covered do not relate to different aspects in life, but to different manners of personal development and display. In particular, the comprehensive right to personality has been found to comprise the spheres of self-determination, self-preservation, and self-presentation¹²².

In this context, the *right to self-determination* grants the right of the individual to freely find out about and determine who he is¹²³. This comprises e.g. a right to know one's descent¹²⁴, to keep one's name¹²⁵, as well as to freely determine one's gender¹²⁶ and personal status¹²⁷.

The *right to self-preservation* implies the right of the individual to withdraw, to screen, to be with oneself, and to be left alone¹²⁸. This has to be understood in the social context only, since the protection of privacy of certain locations is already comprised by the right to protection of the home as provided for separately both in the UDHR as well as in the German Constitution.

Within this aspect of self-preservation the German Constitutional Court furthermore differentiates between an absolutely and under all circumstances protected "sphere of intimate relationships" as the nucleus of the right in question on the one hand, as well as a so-called "sphere of privacy" on the other hand, which may under obedience of the rules of proportionality be subject to certain interferences. This sphere comprises health-records deriving from relationships marked by particular professional trust, e.g. between doctor and patient¹²⁹, other data concerning

¹²² B. Pieroth, B. Schlink, Grundrechte, Staatsrecht II, p. 86

¹²³ B. Pieroth, B. Schlink, Grundrechte, Staatsrecht II, p. 86

¹²⁴ BVerfGE 90, 263 (270p); This does include a right to be granted access to data needed to find out about one's descent. Due to the fact that this right of access is limited to data concerning one's *own* descent, this aspect of the right to privacy can nevertheless not be seen as a standard providing for a principle of *public* access to official documents.

¹²⁵ BVerfGE 78, 38 (49)

¹²⁶ BVerfGE 47, 46 (73)

¹²⁷ BVerfGE 49, 286 (298)

¹²⁸ B. Pieroth, B. Schlink, Grundrechte, Staatsrecht II, p. 86

¹²⁹ BVerfGE 32, 373 (379)

one's health, mental constitution and character¹³⁰ as well as the secrecy of one's diary¹³¹.

And the *right to self-presentation* implies the right of the individual to be protected from degrading, false or simply unwanted presentation in public as well as unwanted secret observance of one's person¹³². According to the German Constitutional Court, this comprises e.g. the protection of personal honour¹³³, property rights concerning one's picture¹³⁴ and writing¹³⁵, as well as the protection from interception and secret recording¹³⁶.

Carrying on this jurisdiction, the German Constitutional Court later developed a so-called "comprehensive right to self-determination as regards the sphere of information" ("*Recht auf informationelle Selbstbestimmung*")¹³⁷. It held that the right of private autonomy implies a right of the individual to freely decide when and to what extent facts concerning his personal life are being revealed¹³⁸. Due to the fact that data which may be of absolutely no interest when viewed isolated can gain a totally different standing through its processing and combination with other data, any piece of information concerning a certain person is sensitive and to be protected irrespective of the sphere of life it actually derives from¹³⁹. As a consequence, according to German constitutional law, both raising information as well as its processing and accessibility is subject to strict rules of justification and proportionality. This has been the basis for comprehensive legislation as regards data-protection.

According to the German judiciary, the right to privacy thus implies limits as to the scope of the principle of public access to official documents in two respects: Access to personal data deriving from confidential relationships such as between doctor and patient regarding the latter's health and mental constitution interferes with the sphere of social preservation protected by the right to privacy. Other personal data is comprehensively protected by the right to self-determination as regards the sphere of information.

Returning to the international perspective, this approach is only partly applicable.

On the one hand, it can be argued that the explicit reference to protection of honour and reputation in Article 12 of the UDHR –both of which are aspects of the sphere of self-presentation– *beside* the right to privacy, suggests that

¹³⁰ BVerfGE 89, 69 (82p)

¹³¹ BVerfGE 80, 367 (373pp)

¹³² B. Pieroth, B. Schlink, Grundrechte, Staatsrecht II, p. 87

¹³³ BVerfGE 54, 208 (217)

¹³⁴ BVerfGE 35, 202 (220)

¹³⁵ BVerfGE 54, 148 (155)

¹³⁶ BVerfGE 34, 238 (246)

¹³⁷ „Volksbestimmungsurteil“ BVerfGE 65, 1pp; BVerfGE 80 367 (373)

¹³⁸ BVerfGE 65, 1 (42); BVerfGE 80, 367 (373)

¹³⁹ BVerfGE 65, 1 (45)

other aspects of self- presentation are not comprised by the scope of the provision.

But even considering that the number of subtle interferences has grown considerably during the last years in connection with sophisticated technological developments and the building up of comprehensive computerized file systems and data banks¹⁴⁰, the principle of public access to official documents nevertheless does not interfere with the right to privacy as provided for under Article 12 of the UDHR:

The latter namely only contains a prohibition of “*arbitrary*” interference with somebody’s privacy.

The word “interference” has thus been combined with a further qualification of restrictive character¹⁴¹. During the negotiations of Article 12 of the UDHR the terminology of this restrictive qualification had been vigorously discussed, ranging from “arbitrary” or “abusive” to “unreasonable” or “unlawful” and “illegitimate”¹⁴². The official records reveal the understanding of the actually chosen version “arbitrary” as comprising everything that was not in accordance with well- established legal principles¹⁴³ or as comprising “Any action taken at the will and pleasure of some person who could not be called upon to show just cause for it”¹⁴⁴ or as comprising everything “without justification in valid motives and contrary to established legal principles”¹⁴⁵.

Clearly, this qualification is narrowing the scope of interference with the right to privacy prohibited by Article 12 of the UDHR to a minimum standard: Interference with the right to privacy only is in breach with the obligations set forth in Article 12 of the UDHR when lacking *any* legal basis and justification.

And even if that was the case, no enforcement mechanism would apply, because interferences with the right to privacy neither constitute gross violations of human rights and fundamental freedoms as exemplified by the policy of apartheid and racial discrimination as needed for the proceeding under resolution 1235, nor can the denial of the right to privacy appear to reveal a consistent pattern of gross and reliably attested violations of human rights as required for the 1503 procedure.

¹⁴⁰ L.A. Rehof, Article 3, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 77

¹⁴¹ L.A. Rehof, Article 12, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 189

¹⁴² L.A. Rehof, Article 12, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 189

¹⁴³ Official Records, p. 276

¹⁴⁴ Official Records, p. 306

¹⁴⁵ Official Records, p. 143

2.2.4.2 Trade and Business Secrets

As regards the business sector, the granting of public access to official documents can interfere with trade and business secrets.

In this context, two rights granted by the UDHR are worth a closer look: The right to work as provided for under Article 23 of the UDHR as well as the right to property as provided for under Article 17 of the UDHR.

Article 23 (1) of the UDHR reads as follows:

“Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

And Article 17 of the UDHR provides:

“Everyone has the right to own property alone as well as in association with others.

No one shall be arbitrarily deprived of his property.”

Marking off the scope of the right to work in relation to the right to property, it has been found that the right to work protects the acquisition, whereas the right to property protects what already has been acquired. Considering that interference with trade and business secrets presupposes their existence, limits concerning the granting of a principle of public access to official documents in this respect thus can only arise from the UDHR, if the protection of trade and business secrets comes under the scope of the right to property as provided for under Article 17 of the UDHR.

Considering that the right to property is not protected under either of the Covenants, Article 17 of the UDHR is of exclusive legal effect.

First of all, it has to be taken into account, whether also legal entities enjoy rights under the law in question, whenever the legal personality of an enterprise is not that of an individual person but of a body corporate. As regards the protection of trade and business secrets, this question is of particular significance, since business actors often possess legal rather than individual personality. Just like individuals, corporations that have acquired the status of legal entities under municipal law can derive rights or benefits from international law, if the treaty in question so determines¹⁴⁶.

In contrast to Article 1 of the Protocol No. 1 to the ECHR, which reads *“Every natural and legal person is entitled to the peaceful enjoyment of his possessions”*, Article 17 of the UDHR does not expressly refer to the legal status of its beneficiaries. It only stipulates that *“Everyone has the right to own property alone as well as in association with others”*. Even though this enables for a broad and comprehensive interpretation of the scope of the

¹⁴⁶ K. Ipsen, Völkerrecht, p. 83

rights guaranteed¹⁴⁷, the wording of the article carefully connects the right with a natural person in both its alternatives. As a consequence, it applies to both individual and collective forms of property- ownership¹⁴⁸. The express listing of both alternatives has to be seen from the historical background of the Western and socialist systems: The communal and collective ownership favoured by many socialist states in line with their traditions, customs and political and economical systems¹⁴⁹ were assimilated in status with the idea of individual property of the Western world. Nothing in the wording, however, indicates an applicability concerning legal entities other than individual persons.

Concerning the remaining cases, the protection of trade and business secrets as part of the right of property can be approached in two different ways:

It has been argued that the protection of a so- called “*right of the established and exercised enterprise*” (from the German notion of “*Recht am eingerichteten und ausgeübten Gewerbebetrieb*”) comes under the right to property. According to this argumentation, the right to property comprises everything constituting the economic value of the enterprise¹⁵⁰. The enterprise is thus defined as being the actual but not the legal sum of the goods and rights belonging to its assets. Objecting this argumentation, it has been held that the protection of an enterprise may not go beyond the protection already enjoyed by its economic basis¹⁵¹. As a consequence, given facts such as the contemporary economic standing or existing business- relationships cannot be comprised¹⁵².

The second line of argumentation categorizes the protection of trade and business secrets as a proprietary right as such, arguing that the right to freely dispose about one’s property particularly comprises those values achieved by personal effort and capital and which thus have become part of the existing assets of an enterprise¹⁵³. As far as trade and business secrets have been developed within the enterprise or have been acquired for it, they thus constitute proprietary rights as such¹⁵⁴.

However, both approaches seem to be too far reaching for the purpose of defining the contents of Article 17 of the UDHR.

¹⁴⁷ G. Alfredsson, Article 17, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 256

¹⁴⁸ G. Alfredsson, Article 17, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 256

¹⁴⁹ G. Alfredsson, Article 17, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 260

¹⁵⁰ BGHZ 23, 157 (162p); 92, 34 (37); BVerwGE 62, 224 (226)

¹⁵¹ BVerfG 58, 300 (353)

¹⁵² BVerfG, 77, 84 (118)

¹⁵³ D. Kugelman, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 71

¹⁵⁴ D. Kugelman, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 71

The fact that the right to property has not been incorporated in either of the two Covenants shows that even though agreeing on its existence, no consensus could be reached as to its binding contents¹⁵⁵.

At an earlier stage of the drafting process, a proposal concerning the wording read as follows: *“Everyone has the right to own personal property. No one shall be deprived of his property except for public welfare and with just compensation. The State may determine those things, rights and enterprises that are susceptible of private appropriation and regulate the acquisition and use of such property”*¹⁵⁶. Even though listing enterprises among the rights protected, the definition of the scope of the rights entailed was explicitly left to the margin of appreciation of the states within this draft. Considering that the drafters could not even agree on this wording, the general form the provision finally obtained does not allow for an interpretation comprising the explicit contents of the draft that earlier had been rejected.

Furthermore, it has to be taken into account that the protection of intellectual property rights is subject to international treaty law¹⁵⁷. Extending the scope of Article 17 of the UDHR in a manner implying the protection of trade and business secrets would conflict with the fact that a protection of “non- physical” property- rights apparently is meant to be limited to intellectual property rights on the international level. Consequently, trade and business secrets which have not reached the status of an intellectual property right cannot be considered as being comprised by the scope of Article 17 of the UDHR.

2.2.4.3 Public Dimension

Concerning limits as to the scope of the principle of public access to official documents deriving from the public dimension, aspects of the functioning and efficiency of the administration as well as that of national security have been named earlier. Clearly, all of these aspects are lacking a status as individual rights by their very nature.

Article 28 of the UDHR reads as follows:

“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

¹⁵⁵ C. Krause, The right to property, in: A. Eide, C. Krause, A. Rosas, *Economic, Social and Cultural Rights: A Textbook*, p. 146

¹⁵⁶ E/CN.4/21m pp. 76-77

¹⁵⁷ Convention of Paris for the Protection of Industrial Property, 1884

Without doubt this article –being phrased in general and vague terms– cannot be qualified as conferring identifiable and subjective rights onto individuals¹⁵⁸.

The question remains, whether aspects of a functioning and efficient administration nevertheless are binding standards set forth by the UDHR. In national legal systems which are equally lacking respective subjective rights, the aspect of the efficiency of the administration nevertheless has been held to enjoy the status of a constitutional standard¹⁵⁹. It has been argued that the demand of the constitution for a separation of powers only can be met with a functioning executive. Even though not being a subjective right, the efficiency of the administration has thus become on the one hand a constitutional standard applicable when interpreting other national laws, as well as on the other hand a standard which has to be balanced against the granting of other constitutional rights¹⁶⁰. In particular, this means that the efficiency of the administration is a legitimate purpose which generally is capable of justifying restrictions on the granting of other constitutional rights, if considered proportional in the particular case¹⁶¹.

As regards the system of the UDHR, however, no such standard of a separation of powers is set forth. The existence of a national *social* order in which the realization of the rights granted is possible as required by Article 28 of the UDHR, is devoted to the economic national order rather than to the functioning of an effective administration.

Nothing else can be concluded from Article 29 (2) of the UDHR, which reads as follows:

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

Even though naming public order and general welfare, which might well be defined as comprising aspects of a functioning and efficient administration as well as of national security, Article 29 (2) of the UDHR solely does so in connection with the exercise of rights and freedoms set forth in the Declaration. Since the principle of public access to official documents is not a standard provided for by the UDHR, the provision in question

¹⁵⁸ A. Eide, Article 28, in: G. Alfredsson, A. Eide (eds.), *The Universal Declaration of Human Rights*, p. 439

¹⁵⁹ As an example see the findings of the German judiciary, BVerwGE 67, 206 (209)

¹⁶⁰ D. Kugelmann, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 74

¹⁶¹ D. Kugelmann, Die informatorische Rechtsstellung des Bürgers: Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung, p. 75

consequently does not constitute any limits as to the scope of a “voluntarily” granted right of access to documents.

2.3 International Covenant on Civil and Political Rights

After twelve years of negotiations the United Nations General Assembly finally completed the drafting of an International Bill of Human Rights by the adoption of two treaties on 16 December 1966: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹⁶². Both Covenants entered into force in 1976. The communication freedoms can be found in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).

In many of its articles, the ICCPR closely follows the UDHR. However, the catalogue enumerated in this Covenant is drafted with greater juridical specificity and lists more rights than the UDHR, which on the other hand contains some important rights not implied by the Covenant¹⁶³.

2.3.1 Binding Character

In contrast to the UDHR, the binding status of the ICCPR is clear-cut: As an international treaty it creates binding legal obligations for state- parties according to Article 38 (1) (a) of the Statute of the International Court of Justice¹⁶⁴. Issues between the parties relating to compliance with the enjoyment of the rights guaranteed by the Covenants therefore are matters of international concern and no longer within their domestic jurisdiction¹⁶⁵.

Furthermore, the ICCPR is of legally binding effect not only to the parties but due to its connection with the UN- Charter and the UDHR also to other UN- members¹⁶⁶. The ICCPR accomplishes Article 1 (3) of the UN- Charter by enumerating in a legally binding manner the catalogue of human rights which are to be respected. This can be deduced from the preamble to the ICCPR, which refers to “*the obligation of States under the Charter of the United Nations to promote universal respect for, and the observance of, human rights and freedoms*”. Besides, the preamble of the ICCPR also refers to the UDHR. In reproducing the contents of the latter to a large extent, the ICCPR confirms the UDHR and furthermore safeguards its actual implementation¹⁶⁷. Thus, the ICCPR is the catalogue of human rights

¹⁶² Text in: I. Brownlie, Basic Documents in International Law, p. 262 and 270

¹⁶³ Th. Buergenthal, International Human Rights in a Nutshell, p. 40

¹⁶⁴ The same applies to the International Covenant on Economic, Social and Cultural Rights.

¹⁶⁵ Th. Buergenthal, International Human Rights in a Nutshell, p. 38

¹⁶⁶ R. Geppert, Informationsfreiheit ein Menschenrecht, p. 37

¹⁶⁷ R. Geppert, Informationsfreiheit ein Menschenrecht, p. 37

and fundamental freedoms which had been lacking so far and which has to be adhered to according to the obligations set forth in Articles 1 (3), 55 c and 56 of the UN- Charter.

2.3.2 Enforceability

Each of the Covenants establishes a distinct international enforcement system designed to ensure that state- parties comply with their obligations.

According to Article 28 of the ICCPR a Human Rights Committee composed of 18 members elected by the state- parties is set up to carry out the measures of implementation set forth in the Covenant. In contrast to the UN Human Rights Commission, its members are elected as individuals, not as government representatives¹⁶⁸.

The only compulsory mechanism under the Covenant is the reporting system provided for under Article 40 of the ICCPR, requiring states to submit reports on their national human rights situation every five years. These reports are studied and commented upon by the Human Rights Committee which may ask for additional information.

As an optional procedure according to Article 41 of the ICCPR states may grant other states the right to bring a complaint against them before the Human Rights Committee alleging violations of human rights, if both states concerned have accepted the procedure and local remedies have already been exhausted. Considering that this procedure can at best effect be a conciliation attempt and does not entail reference to a judicial body empowered to reach binding decisions, the actual effect of this procedure is rather weak¹⁶⁹.

These measures of implementation are amplified by Article 1 of the Optional Protocol to the Covenant, providing for individual petitions claiming to be victims of a violation of the rights set forth in the ICCPR. According to Article 2 of that Optional Protocol, the exhaustion of local remedies is required also here. And according to Articles 4 and 5 of the Optional Protocol, the authorization of the Human Rights Committee also here only comprises to call upon the state concerned for explanation and to make recommendations.

¹⁶⁸ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 215

¹⁶⁹ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 215

2.3.3 The Principle of Public Access to Official Documents as a Standard in the International Covenant on Civil and Political Rights

Lacking explicit references to the principle of public access to official documents, it has to be analysed, whether the latter can be derived as a standard comprised by the scope of the communication- freedoms or the more general principle of democracy as provided for under the ICCPR.

2.3.3.1 Communication Freedoms

Just like in the UDHR, the freedoms of communication are set forth in Article 19 of the ICCPR, which reads:

- “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, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.(...)”*

Drawing on and developing the corresponding Article 19 of the UDHR, the ICCPR implies a distinction between freedom of opinion and freedom of expression and furthermore explicitly categorizes the right to seek, receive, and impart information and ideas as being part of the latter¹⁷⁰.

The terminology of Article 19 of the ICCPR does not reveal the differing concepts of human rights in the Western and Socialist world against which it was drafted. Tacitly, however, the civil- liberal concept has been underlying its creation¹⁷¹. This understanding is reflected by the wording of the particular rights, which have been created as subjective rights in Article 19 of the ICCPR¹⁷². As a consequence, the states of the socialist world changed their strategy and shifted the protection of the socialist concept of media onto the level of restrictions for purposes of public order and national security in paragraph 3 of Article 19 of the ICCPR¹⁷³. This underlying liberal concept has to be taken into account when interpreting Article 19 of the ICCPR: In dubio pro libertate.

¹⁷⁰ As will be analysed later, this classification has impacts on differing possibilities of restriction.

¹⁷¹ See Statement of the UN- General Secretary, UN Doc. A/2929, p. 50, Pt. 136

¹⁷² D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 71

¹⁷³ D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 71

During the drafting process of the ICCPR the wording of Article 19 had been subject to controversy:

As opposed to the Soviet draft¹⁷⁴, the French proposal included the freedom of information¹⁷⁵.

And besides, the three elements “*seek, receive and impart*” information were only retained after vital discussion.

As already mentioned in the realm of the UDHR above, the right *actively* to *seek* information goes beyond mere *passive reception*.

On the basis of an Indian proposal, seven Afro-Asian States had objected that the right “*to seek*” information was too “*aggressive*” and could be misused to probe into the affairs of others and therefore had suggested a right only “*to gather*” information¹⁷⁶. This change was not accepted after all. In particular, Western Europe and America argued that the notion “*to gather*” only indicated a passive receiving of information made available by the government¹⁷⁷. It was decided that the right of active inquiry and probing should not be abandoned. Misuse should rather be prevented under the limitations clause in paragraph three¹⁷⁸.

This does not answer the question, however, what the scope of the right to “*seek*” information actually is. Though the answer to this question is far from being clear-cut, no discussion as to the contents of that right has so far been taken place by the Human Rights Committee¹⁷⁹ -with one exception concerning a case involving the freedom of press, which shall be analysed at a later stage of this thesis¹⁸⁰.

The right to seek information has been held to relate to all “*generally accessible information*”¹⁸¹.

Equally, however, there seems to be common agreement as to the fact that this definition also marks the limit of the right to inform oneself by means of active inquiry¹⁸²:

The freedom to “*seek*” information is not considered implying an obligation on the part of the state to “*deliver*” information¹⁸³.

¹⁷⁴ Yearbook on Human Rights 1948, p. 475p; 1949, p. 334p

¹⁷⁵ Yearbook on Human Rights 1948, p. 475

¹⁷⁶ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 343

¹⁷⁷ N. Weiß, Menschenrechtssausschuß und Meinungsäußerungsfreiheit, in: Themenheft „25 Jahre Sozial- u. Zivilpakt“, p. 79

¹⁷⁸ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 343

¹⁷⁹ K.J. Partsch, Freedom of Conscience and Expression, and Political Freedoms, in: L. Henkin, *The International Bill of Rights, The Covenant on Civil and Political Rights*, p. 222

¹⁸⁰ Gauthier v. Canada, comm. no. 633/1995, §13.5

¹⁸¹ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 343

¹⁸² N. Weiß, Menschenrechtssausschuß und Meinungsäußerungsfreiheit, in: Themenheft „25 Jahre Sozial- u. Zivilpakt“, p. 79

Only *Nowak* explicitly indicates the question, whether the right to seek information entails obligations on the part of the states to provide for positive measures granting access to state or private information or to make information available themselves¹⁸⁴. He points out that the rapid development of the modern information and communication society in many states is leading to progressive statutory duties to provide information - particularly on the part of public administration¹⁸⁵. Unfortunately, also he does not bring up any argument for his conclusion that no such obligation is implied by Article 19 of the ICCPR other than that a subjective right to be informed is still largely unrecognized in case law¹⁸⁶.

To my mind, support for this narrow interpretation can indeed be drawn from the above mentioned liberal understanding of the rights guaranteed by Article 19 of the ICCPR. This concept originally defined human rights as constituting obligations on the part of the state only in so far as to refrain from infringing on the rights guaranteed. In contrast, the socialist understanding stressed the participatory dimension of human rights. According to the socialist view, human rights in general are aiming not at warding off interference, but rather at the social integration of the individual in society and at the collective structuring of social relations¹⁸⁷. As regards the freedoms of communication, the socialist approach therefore focuses on their political, collectivizing function for the purpose of achieving a socialist democracy – consequently, socialist constitutions only granted freedom of expression in conjunction with socialist objectives¹⁸⁸.

Almost ironically, as regards freedom of information, nothing therefore indicates an understanding of the provision as to entail positive obligations from the socialist perspective - even though aspects of participation had actually been part of the socialist approach to human rights. Assuming that the only objective in the socialist concept is the strengthening of the political power of the working- class and considering the conviction that the knowledge about how to do so is in the sole possession of the government, political pluralism for the purpose of revealing alternative problem-solutions or in favour of an effective control of the government are to be rejected. From the socialist perspective the ultimate content of the freedom to seek information as provided for under Article 19 of the ICCPR was thus an obligation on the part of the state not to hinder individual accessibility concerning those pieces of information which already were on the market.

On the contrary, a modern approach could well support the existence of positive obligations deriving from Article 19 of the ICCPR. Considering

¹⁸³ D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 71

¹⁸⁴ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 344

¹⁸⁵ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 344

¹⁸⁶ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 344

¹⁸⁷ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 337

¹⁸⁸ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 338

that the liberal concept contains as its primary objective the restriction of state- power as to the minimum necessary standard, it can be argued that with regard to freedom of information this goal can best be reached by creating not only negative, but also positive obligations on the part of the state, i.e. obligations to disclose information held by its authorities. Without doubt, this would create transparency and external control as well as self-control of the administration concerning the latter's obedience to the maxim of a "minimum- state".

From the perspective of the classical liberal doctrine, however, which was prevailing during the creation of the ICCPR, freedom of information was considered to be a liberal right enabling the individual to ward off interference by the state which is not obliged to give further effect to the right by positive means¹⁸⁹. As far as Article 19 of the ICCPR is concerned, this understanding was in line with the socialist view. Thus, the creation of positive obligations on the part of the state to grant information was not intended by either side¹⁹⁰. Defining the scope of the freedom to seek information in another manner would thus be against its historical background.

Nothing else can be deduced from the above mentioned finding of the Human Rights Committee concerning the *freedom of press* in *Gauthier*, which was the only case in which the latter has dealt with positive state-activity providing access to information.

The freedom of the press is also implied by Article 19 (2) of the ICCPR and generally also limited to negative obligations on the part of the state: It provides for the right of having free access to events and generally accessible sources of information, but not on the other hand for a subjective right against the state to be "equipped" with any piece of information wanted¹⁹¹.

In *Gauthier* the Human Rights Committee held that access to state- financed institutions which have been established for the purpose of enabling the press to report about the work of parliament has to be granted to all qualified journalists due to the particular importance of the right to access to information for the democratic process. The limitation of access to these institutions only to those journalists who are members of a private press-club interferes with the right to freedom of information of other journalists¹⁹².

¹⁸⁹ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 337

¹⁹⁰ The only positive obligation deriving from the freedom of information is to provide not only for an absence of state- interference, but interference in general, i.e. also from private actors ("horizontal effect")

¹⁹¹ D. Blumenwitz, The Right to Freedom of Opinion and Information under Article 19 of the International Covenant on Civil and Political Rights, in: *Fortschritt im Bewußtsein der Grund- u. Menschenrechte*, p. 72

¹⁹² *Gauthier v. Canada*, comm. no. 633/1995, §13.5

At first sight, it is tempting to take this statement as evidence for the existence of positive obligations deriving from Article 19 (2) of the ICCPR.

Doing so, however, would not only deny the exceptional role of the press within the democratic process as well as the fact that the information concerned refers to the work of parliament as being the very centre of democratic participation. It would also exceed what the statement actually contains:

The Human Rights Committee does *not* state in its findings that the state actually is obliged to provide for access to institutions disclosing information concerning the work of parliament.

In contrast, it merely states, that *in the case* of implementing this kind of institutions the state *then* has to grant *equal* access to *all* qualified journalists.

Thus, the Human Rights Committee rather refers to the implications of democracy as well as the prohibition of discrimination than to the scope of the freedom to seek information.

Neither against their historical background, nor according to the contemporary discussion in international law, nor according to the findings of the Human Rights Committee can the communication- freedoms as provided for under Article 19 of the ICCPR thus be interpreted as implying the principle of public access to official documents.

2.3.3.2 Democracy

Also in the realm of the ICCPR the principle of public access to official documents cannot be derived from a standard of democratic participation.

Though not explicitly, the ICCPR refers to the principle of democratic participation in Article 25 (a), which reads:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

To take part in the conduct of public affairs, directly or through freely chosen representatives;
(...).”

In the context of this provision the Human Rights Committee has held that the state- parties determine within their domestic law the modalities concerning the participation in the conduct of public affairs and that no individual right as to a direct participation can be deduced from Article 25 (a) of the ICCPR due to the fact that the conduct of such affairs in a

democratic state generally is the task of the elected representatives and lawfully designated public servants¹⁹³.

Besides, as already mentioned earlier, democratic participation is being discussed in connection with the right of self- determination common to both Articles 1 of the two Covenants. They read:

“1. All peoples have the right of self- determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

(...)

3. The States parties to the present Covenant, (...) shall promote the realization of the right of self- determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

Despite its landmark political significance and the fact that it has reached the status of *ius cogens* as far as its application to peoples under alien subjugation, colonial domination, and exploitation is concerned¹⁹⁴, common Article 1 of the two Covenants is extremely unclear and controversial as regards its legal nature and content.

In contrast to Articles 1 (2) and 55 of the UN- Charter, which merely refer to the “*principle*” of self- determination, Article 1 of the two Covenants explicitly talks about a “*right*” of self- determination. This induced the Human Rights Committee to conclude that Article 1 of the two Covenants constitutes a subjective collective right and not only a political principle¹⁹⁵.

As regards the legal content of the right in question, it has to be distinguished between internal and external self- determination, with the latter meaning the right of every people to determine its political status and socio- economic development free from external interference¹⁹⁶.

The right of *internal* self- determination comprises a democratic element, however, which furthermore implies a permanent character, i.e. it is not consumed after exercise, but –as indicated by the use of the present tense (“*have a right*”)- has to be exercised, asserted, and perhaps renewed or redefined in a continual process¹⁹⁷. This process can only be guaranteed by granting participation in the state’s political decision- making process¹⁹⁸.

Clearly, the principle of public access to official documents contributes to democratic participation. The scope of democratic participation granted by the right to internal self- determination can, however, not go beyond what other political rights and freedoms of the Covenant contain in this respect.

¹⁹³ Grand Chief Donald Marshall a.o. v. Canada, comm. no. 205/1986, §5.4p

¹⁹⁴ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 8

¹⁹⁵ E.P. et al. v. Colombia, comm. no. 318/1988, §8.2

¹⁹⁶ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 22

¹⁹⁷ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 16

¹⁹⁸ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 23

Considering that Article 25 (a) of the ICCPR neither implies requirements as to the modalities of participation in public affairs nor does it comprise any right of *direct* participation it can only be concluded that the right of self- determination cannot be interpreted in that manner, either¹⁹⁹. The principle of public access to official documents thus is not comprised by the right to self- determination as a standard the state parties are obliged to implement

2.3.4 Limits concerning the Principle of Public Access to Official Documents by the ICCPR

Irrespective of the fact that the principle of public access to official documents cannot be derived as a standard from the ICCPR, the latter might well imply limits as to its scope if granted.

Again, interference is possible with the right of privacy and trade and business secrets as regards the individual dimension and with the functioning and effectiveness of the administration as well as with national security on the public level.

2.3.4.1 Right to Privacy

The right to privacy is provided for by Article 17 of the ICCPR, which reads as follows:

- “1. *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
2. *Everyone has the right to the protection of the law against such interference or attacks.”*

Apart from protecting “privacy”, Article 17 of the ICCPR also lists a prohibition of interference with family, home, correspondence, honour, and reputation. All of these aspects may be seen as part of privacy in a larger sense, but obviously, the right includes much besides these private matters explicitly listed²⁰⁰. Ascertaining the exact scope of application of the term “privacy” seems difficult, however, not last due to the fact that its adoption was subject of virtually no debate during its drafting.

In a broad sense, the right to privacy has been defined as protecting that particular area of individual existence and autonomy that does not touch

¹⁹⁹ The right of internal political self- determination e.g. contains a right of revolution against dictatorships which systematically and grossly violate human rights, M. Nowak, U.N. Covenant on Civil and Political Rights, p. 23

²⁰⁰ F. Volio, Legal Personality, Privacy, and the Family, in: L. Henkin, *The International Bill of Rights, The Covenant on Civil and Political Rights*, p. 192

upon the sphere of liberty and privacy of others. In a narrow sense, it has been held to include all manifestations which additionally do not fall under one of the particular special categories also enumerated by Article 17 (1) of the ICCPR²⁰¹.

In particular, it has been held that the right to privacy comprises the protection of identity, integrity, intimacy, autonomy, communication, and sexuality²⁰². Among these aspects, the protection of personal data falls under the protection of intimacy: The prohibition of interference with the right to intimacy provides for secrecy of private characteristics, actions or data from the public²⁰³. Thus, data-protection as provided for by Article 17 (1) of the ICCPR is limited to *private* data. In contrast to the German jurisdiction referred to earlier, which establishes a comprehensive protection of *all* personal data, the scope of the right granted by Article 17 (1) of the ICCPR thus appears more restricted.

Even though it has been held that the protection of personal data is a special form of respect for intimacy having become necessary in the course of technological developments in electronic data processing and that state parties are obligated by Article 17 (2) of the ICCPR to regulate the recording, processing, use, and conveyance of automated personal data²⁰⁴, international law obviously does not refer to *all* personal data in this context. In determining whether personal information is so private that its publication constitutes impermissible interference with privacy, a variety of factors are held to be taken into consideration, including the specific conduct and the subjective feelings of the person concerned²⁰⁵. In this context, generally recognized obligations of confidentiality like that of physicians and priests as well as guarantees of secrecy such as the right to vote secretly have been named and qualified protection is said to be enjoyed by that data from the intimacy sphere whose procurement, conveyance and publication would be embarrassing or awkward for the person concerned for reasons of morals²⁰⁶.

Neither can further limits concerning the granting of a principle of public access to official documents be derived from the prohibition of unlawful attacks on honour and reputation as granted for by Article 17 (1) of the ICCPR. In this context, Article 17 (1) of the ICCPR only prohibits impairments that are committed unlawfully and intentionally and are based on untrue allegations²⁰⁷. Assuming that information held by state authorities is either correct or -in the case of being incorrect- not dismissed intentionally to the public, it seems hardly possible that the granting of a

²⁰¹ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 294

²⁰² M. Nowak, U.N. Covenant on Civil and Political Rights, p. 294pp

²⁰³ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 296

²⁰⁴ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 297

²⁰⁵ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 296

²⁰⁶ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 296

²⁰⁷ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 306

principle of public access to official documents can interfere with Article 17 (1) of the ICCPR in this respect.

Thus, only as regards the restricted area of *private* personal data as described above, limits concerning the domestic granting of a general principle of public access to official documents can generally be derived from Article 17 (1) of the ICCPR.

And furthermore, even as regards this kind of data, it has to be taken into account that Article 17 (1) of the ICCPR only provides for a prohibition of interference which is “arbitrary” or “unlawful”. When interpreting these notions, it has to be taken into account that according to the *travaux préparatoires* proposals to include an exhaustive listing of all permissible purposes for interference were defeated, since they would have excessively restricted the right of state- parties to determine the precise limitations on the provision²⁰⁸.

After a course of vital attempts to define the contents of the notions in question, the Human Rights Committee held in a general comment that “*The term “unlawful” means that no interference can take place except in cases envisaged by the law*”²⁰⁹. According to Article 17 (2) of the ICCPR, authorization to interfere with privacy must be based on generally accessible provisions of law in the formal sense, proclaimed prior to interference²¹⁰. Furthermore, due to the positive duty of protection set forth in Article 17 (2) of the ICCPR, a state party is not able to avoid its obligation simply by failing to enact the relevant prohibitive norms or by providing its organs with unreasonably broad discretion for interfering with privacy²¹¹. As regards the granting of the principle of public access to official documents this means that as far as private personal data is concerned, the national legal systems are obliged to implement provisions stipulating access to that kind of data without leaving room for unreasonably broad discretion.

Besides, the Human Rights Committee stated in its General Comment that “*the expression “arbitrary interference” can also extend to interference provided for under the law*” and that its introduction leads to the effect “*that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances*”²¹². Apart from the requirement of conformity with national law, it must therefore be reviewed whether the granting of access had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of rule of law and, in particular, whether it was reasonable, i.e. proportional, in the

²⁰⁸ F. Volio, Legal Personality, Privacy, and the Family, in: L. Henkin, *The International Bill of Rights, The Covenant on Civil and Political Rights*, p. 192

²⁰⁹ GenC 16/32 of 23 March 1988

²¹⁰ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 292

²¹¹ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 292

²¹² GenC 16/32 of 23 March 1988

relation to the purpose to be achieved²¹³. In defining purposes which are legitimate in this sense, it will be necessary to draw upon the purposes set down in the legal provisos found in Articles 12 (3), 18 (3), 19 (3), 21 and 22 (2) of the ICCPR, because with regard to the relatively far-reaching possibilities for interference on the basis of these legal provisos and the significance of the right to privacy, it will be difficult to view interference for other reasons as being compatible with Article 17 of the ICCPR²¹⁴. In particular, these purposes are national security, public safety, public order, public health or morals and the rights and freedoms of others. In any case, precise balancing of the circumstances in a given case, paying regard to the principle of proportionality, is required²¹⁵.

2.3.4.2 Trade and Business Secrets

As regards possible interference of the principle of public access to official documents with trade and business secrets two aspects have to be taken into account.

For the first, according to Article 2 (1) of the ICCPR, the rights implemented by the Covenant only benefit “individuals”. The *travaux préparatoires* confirm that the term “individuals” rather than “persons” was applied to leave no doubt that the reference was to natural persons only²¹⁶. The Covenant thus does not confer human rights to corporations and other legal entities²¹⁷.

And for the second, it has to be taken into account that in contrast to the UDHR, the ICCPR does not imply a right to property. A possible protection of trade and business secrets of natural persons could thus only be inferred from the right to privacy just discussed. Due to the argumentation outlined earlier, according to which only interference with intimate, private personal data is prohibited by Article 17 (1) of the ICCPR, trade and business secrets are not comprised by the scope of protection set forth: Trade and business secrets do not refer to *personal* data in this sense.

2.3.4.3 Public Dimension

Just like the UDHR, the ICCPR does not imply limits as to the scope of the principle of public access to official documents for reasons of a functioning

²¹³ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 293

²¹⁴ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 293

²¹⁵ M. Nowak, U.N. Covenant on Civil and Political Rights, p. 293

²¹⁶ Th. Buergenthal, To Respect and to Ensure: State Obligations and Permissible Derogations, in: L. Henkin, *The International Bill of Rights, The Covenant on Civil and Political Rights*, p. 73

²¹⁷ In some circumstances, however, measures against a juridical entity might constitute a violation of the Covenant, namely if they infringe upon the rights of individuals. For example, the outlawing of labour unions would violate the right of the individual union members to freedom of association; the prohibition of religious associations would presumably violate both the freedom of association as well as the freedom of religion. No such case can appear concerning the protection of trade and business secrets, however.

and efficient administration or of national security. Apart from the fact that these aspects due to their very nature do not constitute individual subjective rights, they neither have become general binding standards set forth by the ICCPR. Like the UDHR, the ICCPR does not provide for a separation of powers irrespective of the rights granted. As far as Article 2 (3) (b) of the ICCPR refers to judicial, administrative and legislative authorities, it does so only in connection with the granting of national remedies for violations of the rights set forth in the ICCPR and not as a standard as such which could then obtain a binding status of its own, applicable when interpreting other laws and to be balanced against other rights set forth.

Accordingly, even though the Covenant refers to public aspects such as the protection of national security and public order in Article 19 (3) (b) of the ICCPR, it does so only in respect of legitimate restrictions of the rights and freedoms provided for in that provision. As stated before, the principle of public access to official documents is not a standard granted by Article 19 - nor any other provision- of the Covenant. Thus, restrictions on the principle do not have to be in line with the respective standards set forth by the ICCPR, either.

2.4 The Principle of Public Access to Official Documents as a Standard in other Universal International Agreements

Even though a number of universal agreements in international law comprise references to freedom of information as well as to the principle of a free flow of information, none of them is concrete enough to create identifiable and enforceable individual rights²¹⁸. Besides, none of them explicitly names the principle of public access to official documents. As far as they refer to the freedom of information or the free flow of information, they thus do so in the traditional sense, i.e. defining freedom of information as constituting the right to seek information but not as creating an obligation on the part of the state actively to make information held by its authorities accessible and defining the free flow of information as granting access to information already circulating irrespective of frontiers.

Consequently, they can be seen as promoting the idea of an effective freedom of information and also the aim of granting a free flow of information and as such possess a potential to implement the granting of public access to official documents on the long run. For the time being,

²¹⁸ Resolutions 59 I and 381 V by the General Assembly; the draft of a Declaration on Freedom of Information by ECOSOC, as well as a draft Convention on Freedom of Information by the General Assembly; for a good outline of their contents see: G.-H. Gornig, *Äußerungs- und Informationsfreiheit als Menschenrechte*, pp. 265- 274

however, none of the universal instruments can be regarded as implementing the principle of public access to official documents as a standard in international law.

2.5 The Principle of Public Access to Official Documents as a Standard of International Custom

Article 38 (1) of the Statute of the International Court of Justice lists “*international custom, as evidence of a general practice accepted as law*” as a second source of international law. According to the *Nicaragua* case, international customary law is constituted by two elements, the objective one of a “general practice”, and the subjective one “accepted as law”, the so-called *opinio iuris*²¹⁹. According to the findings of the Court in the *Continental Shelf* case, the substance of customary international law must be “looked for primarily in the actual practice and *opinio juris* of States”²²⁰. Similarly, judgements of national and international tribunals as well as international treaties can be evidence of international custom²²¹. According to the analysis given so far, even among democratic states clearly no general consent concerning the existence of the principle of public access as a standard implied by international customary law can be verified. And the same applies to judgements of national and international tribunals. Lastly, an interpretation of universal international treaties does not entail the principle as a standard implied by the individual rights set forth. Consequently, the principle of public access to official documents is not a standard implied by international customary law.

²¹⁹ *Nicaragua v. USA (Merits)*, ICJ Rep. 1986, 14, at 97

²²⁰ *Libya v. Malta*, ICJ Rep. 1985, 29

²²¹ P. Malanczuk, *Akehurst's Modern Introduction to International Law*, p. 39, 40

3 Implications concerning The Principle of Public Access to Official Documents from Regional Standards in International Law binding on the Member States of the European Union

The European system for the protection of human rights originally was established by the Council of Europe, a regional intergovernmental organization created in 1949 by a group of Western European nations committed to the preservation of individual freedom and democracy²²². After the end of the Cold War an increasing number of Eastern and central European nations joined the Council of Europe. The intense activity of the Council of Europe in the field of human rights has had an impact on the human rights practice of other organizations, i.e. the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE), as well as the Organization for Economic Cooperation and Development (OECD).

3.1 Council of Europe

Alike the Charter of the United Nations, the Statute of the Council of Europe names in Article 1 (b) “[...] *the maintenance and further realisation of human rights and fundamental freedoms*” among the aims of the organization²²³. And according to Article 3 of the Statute “*every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms [...]*”. Just like within the UN, the catalogue of human rights and fundamental freedoms protected is not listed within the Statute itself but left to following treaties.

In 1950 the European Convention on Human Rights (ECHR)²²⁴ was signed by the representatives of 13 member states. The human rights system established by the Convention is not only the oldest but also the most advanced and effective of those currently in existence. The ECHR

²²² Th. Buergenthal, *International Human Rights in a Nutshell*, p. 102

²²³ UNTS, Vol. 87, p. 103 pp

²²⁴ Text in: I. Brownlie, *Basic Documents in International Law*, p. 328pp

guarantees basic civil and political rights²²⁵, and therefore is of central concern when analysing, whether the principle of public access to official documents is set forth or limited by the laws created by the Council of Europe.

Besides, when interpreting the rights set forth in the ECHR, other documents passed by organs of the Council are worth a closer look. In this respect, the Declaration on Freedom of Expression and Information²²⁶ passed by the Council's Committee of Ministers and its Recommendation No. R (1981) 19 On Access to Information held by Public Authorities, as well as the Consultative Assembly's Resolution 428 (1970)²²⁷ and its Recommendation 854 (1979) On Access by the Public to Government Records and Freedom of Information²²⁸ are to be mentioned. And the same applies to the Colloquy about the European Convention on Human Rights held in Rome in 1975²²⁹ as well as the Colloquy about the Freedom of Information and the Obligation of Authorities to provide for Access to Information held in Graz in 1976²³⁰. Concerning limits as to the scope of the principle of public access to official documents the Convention on Data Protection²³¹ and the Guidelines for the Protection of Individuals with regard to the Collection and Processing of Personal Data on Information Highways²³² are to be taken into account.

3.1.1 Binding Character of the European Convention on Human Rights

The ECHR has the legal status of a treaty concluded under the rules of international law. Thus, it creates obligations between the member states. The European Court of Human Rights held in *Ireland v. U.K.* that the ECHR “creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a “collective enforcement””²³³. Article 1 of the ECHR stipulates that the rights conferred onto individuals under the treaty are *individual* rights created by public international law. The wording “shall secure” as opposed to the earlier draft “undertake to secure” gives evidence

²²⁵ This is complemented by the European Social Charter proclaiming a catalogue of economic and social rights.

²²⁶ ArchVR, Bd. 21, p. 124pp

²²⁷ Res. 428 (1970), Council of Europe, Consultative Assembly, Twenty- First Ordinary Session (Third Part), 22- 30 January 1970

²²⁸ European Yearbook, no. 27, p. 363pp

²²⁹ see report by W. Pahr, To what extent has freedom of expression evolved?, in: *Proceedings of the fourth international Colloquy about the European Convention on Human Rights* (Rome, 5-8 November 1975), p. 119pp and the report by C. Morrisson jr., Freedom of Expression: The search for standards, in the same publishing, 131pp

²³⁰ see report in EuGRZ 1976, p. 447 pp

²³¹ Übereinkommen zum Schutz des Menschen bei der automatischen Verarbeitung personenbezogener Daten vom 28.1.1981, BGBl. II 1985, 538

²³² <http://www.datenschutz-berlin.de/doc/eu/eurat/guidel.htm>

²³³ *Ireland v. U.K.*, 1978, Series A 25, p. 90

to the fact that these rights are created by the ratification of the Convention and must be respected by the states without further ado, i.e. irrespective of additional acts of implementation²³⁴.

3.1.2 Enforceability of the European Convention on Human Rights

The peculiar feature of the ECHR is the machinery of collective enforcement by Convention organs on the basis of individual or state complaints.

The fact that the Convention creates legally binding obligations on the part of the member states which can be enforced on the international level irrespective of additional implementation in the national legal systems has to be differed from the question, whether the ECHR creates an obligation under public international law to make it as such internally applicable within the signatory states²³⁵. Even though Articles 1 and 13 of the ECHR allow for an interpretation to this extent, the practice of states shows clearly that many of them do not interpret the Convention to go that far²³⁶. In this context, the European Court of Human Rights stressed that the drafters' intention finds a particular faithful reflection in those instances where the Convention has been incorporated into domestic law, but it rejected that a formal obligation to that effect exists²³⁷.

Whereas most of the member states transformed the Convention into municipal law, others have not done so²³⁸. As regards the latter, the Convention consequently only provides for enforcement on the international level, whereas individuals cannot invoke the rights and freedoms granted at national courts. Even in these countries, however, the national courts frequently look to the Convention when interpreting and applying domestic law in order to avoid violating the obligations under this treaty²³⁹.

As regards international enforcement, recourse to the international institutions may according to the local-remedy rule provided for under Article 26 of the ECHR only be had when domestic law does not provide relief capable of remedying a violation of the Convention, i.e. after the exhaustion of all available local remedies. Originally, only state complaints

²³⁴ Ireland v. U.K., 1978, Series A 25, p. 91

²³⁵ Differing state practice in this context is due to the existence of two differing theories concerning the domestic effect of international law. According to the monist view, both international and municipal law are understood as forming part of one and the same legal order, whereas the dualist theory assumes that they are two separate legal systems existing independently from each other. See P. Malanczuk, Akehurst's Modern Introduction to International Law, p. 63

²³⁶ Encyclopedia of Public International Law, European Convention on Human Rights

²³⁷ Silver and others v. UK, 1983, Series A 61, para. 113

²³⁸ This applies to all Scandinavian countries as well as Great Britain, Ireland, and Malta, G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 282

²³⁹ Th. Buergenthal, International Human Rights in a Nutshell, p. 109

were compulsory according to former Article 24 of the ECHR, whereas individual complaints according to Article 25 of the ECHR only were admissible if the state in question so had recognised within a special declaration. Complaints were settled by means of a rather complex proceeding involving the Committee of Ministers, the European Human Rights Commission, and the European Court of Human Rights.

This system has been changed fundamentally through the entering into force of the Additional Protocol No. 11 in 1998. Basically, according to Articles 33 and 34 of the ECHR, both state as well as individual complaints now are obligatory for all members. Besides, the European Commission of Human Rights was abolished and all complaints to be addressed directly to the European Court of Human Rights, which –in contrast to the secret proceedings under the ICCPR- deals with the complaint in public hearings according to Article 38 of the ECHR. According to Article 46 (2) of ECHR, the final judgement of the European Court of Human Rights is forwarded to the Committee of Ministers, which then supervises its implementation.

3.1.3 The Principle of Public Access to Official Documents as a Standard in the European Convention on Human Rights

Due to a lack of explicit reference to the principle of public access to official documents within the ECHR, recourse must again be had to communication freedoms as well as to the principle of democratic participation.

One of the particularities of the Convention is the existence of a so- called evolutive interpretation²⁴⁰. Given, the principle of public access to official documents does not come under the original scope of the rights and freedoms granted, this approach allows for an analysis, whether it can *by now* be derived from the rights guaranteed. Considering that the member states of regional instruments necessarily share common values, practice, and aims to a much higher extent than members of universal instruments, it is obvious that means of interpretation can actually go beyond scrutinizing what originally was intended or what has been established by means of customary law as is the case with universal instruments. In this, the ECHR fundamentally differs from the instruments so far discussed.

3.1.3.1 Communication Freedoms

The Convention guarantees the communication- freedoms in Article 10, which reads as follows:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas

²⁴⁰ P. van Dijk, G. van Hoof, Theory and Practice of the European Convention on Human Rights, p.77; see detailed explanation in 3.1.3.1h

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.

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 interest 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 literature on the UDHR and the ICCPR, authors do not merely leave it at stating that freedom of information does not imply a right to be granted access to state- held documents when commentating the communication- freedoms of the ECHR, but actually discuss the issue.

- Implication of the Freedom to Seek Information

At first sight, the terminology of Article 10 (1) of the ECHR suggests that deducing the principle of public access to official documents seems even more far- fetched than it does in respect to the communication- freedoms granted by the UDHR and the ICCPR:

Article 10 (1) of the ECHR namely only provides for the freedom to *receive* and *impart* information, whereas –in contrast to the UDHR and the ICCPR– the right to *seek* information is not explicitly granted

And obviously, this did not happen by mistake. From the fact that an earlier draft actually explicitly contained the right to seek information, it has to be concluded that the wording was altered intentionally²⁴¹.

As a consequence, the question, whether the right to receive information as granted by Article 10 (1) of the ECHR only implies the right to “take notice” of any information which in fact is available²⁴² or whether it is not confined to opening eyes and ears, but also allowing anyone to actively secure information²⁴³, is vividly disputed.

²⁴¹ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 292; .K .J. Partsch, *Die Rechte und Freiheiten der EMRK*, in: *Bettermann u.a., Die Grundrechte* Bd. I/1, pp. 435,436

²⁴² K. J. Partsch, *Die Rechte und Freiheiten der EMRK*, in: *Bettermann u.a., Die Grundrechte* Bd. I/1, p. 435; P. C. Ragaz, *Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention*, p. 56,57; Th. Schilling, *Internationaler Menschenrechtsschutz*, p. 120

²⁴³ J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention - Kommentar*, p. 390; M. Bullinger, *Freedom of expression and information: an essential element of democracy*, in: *Human Rights Law Journal* Vol. 6, No. 2-4, p. 338 (353)

The only argument against an implication of a freedom to obtain information by active commitment going beyond reference to the fact that the wording does not provide for a right to seek information can be found with *Partsch*. He is arguing that according to Article 10 (2) of the ECHR, the freedoms set forth in the first paragraph may be restricted for preventing the *disclosure* of information received in confidence and that given Article 10 (1) of the ECHR also provided for a right to seek information, paragraph two actually would have required a protection against *investigation* and not only disclosure²⁴⁴.

This argument, however, cannot fully convince. As mentioned before, also the right to seek information only refers to information which is generally accessible. Information –even if received in confidence- which already is available, does not require protection against investigation. In that case, protection namely cannot be *necessary* in the sense of Article 10 (2) of the ECHR.

The European Court of Human Rights applied this very argumentation in various cases concerning the freedom to *receive* information. In *Weber* it held that restrictions cannot be considered necessary if the piece of information in question has become accessible for the public for other reasons²⁴⁵. In *Observer & Guardian v. UK* (the so- called “*Spycatcher*”-case) it found that the prohibition of the publication of memories of a former member of British intelligence could not be considered necessary in the UK after the respective book had been published in the United States²⁴⁶.

Article 10 (2) of the ECHR does not provide for a prohibition of investigation due to the fact that this kind of restriction by nature cannot be necessary in the legal sense. It thus cannot be interpreted as evidence for the non- implication of the right to seek information by the scope of Article 10 (1) of the ECHR.

Rather, decisions of Convention organs provide for the opposite. The Commission of Human Rights implicitly recognised the right to seek information in the sense of active commitment as being comprised by Article 10 (1) of the ECHR in *A. v. Switzerland*, where the right to set up individual antennas -which is nothing else than an “active” searching for information- was in principle brought under Article 10 of the ECHR²⁴⁷.

The right to receive information as provided for by Article 10 (1) of the ECHR thus comprises a right to seek information in the sense of including the use of all technical means and any form of personal commitment, if the

²⁴⁴ K. J. Partsch, *Die Rechte und Freiheiten der EMRK*, in: *Bettermann u.a., Die Grundrechte* Bd. I/1, p. 436

²⁴⁵ *Weber*, Series A 177, p 23 (=EuGRZ 1990, p. 265, 266)

²⁴⁶ *Observer and Guardian v. UK*, 1991, Series A 216, p. 33pp (=EuGRZ 1995, p. 16)

²⁴⁷ *A. v. Switzerland*, appl. no. 10248/83

piece of information in question is meant for or is by its nature open to public²⁴⁸.

- Implication of the Principle of Public Access to Official Documents

Another question is, whether this freedom to receive and seek information needs to be complemented by a right to information in the sense of a right to public access to official documents.

- Legal Character of the Rights provided for by Article 10 of the ECHR

First of all, the traditional legal character of the rights granted in the Convention rather provides for the opposite. The communication freedoms are explicitly created as purely negative freedoms: According to the wording of Article 10 (1) of the ECHR, the freedoms granted are protected against “*interference by public authority*”. Positive, affirmative state- action is not explicitly required.

- Wording of Article 10 of the ECHR

Besides, it has been argued by national courts that the reason for not naming the right to seek information in Article 10 (1) of the ECHR was to prevent any future effort to create positive state- duties regarding the disclosure of information²⁴⁹ and that consequently, no such right exists under the scope of this provision²⁵⁰.

- “Right of the Public to be Informed” in the Context of the Freedom of Press

It seems, however, that Convention organs have increasingly acknowledged such an affirmative duty also concerning the freedom of information.

In *Sunday Times* the Court stated that in a democratic society the public has a right to receive information and ideas whose dissemination is the task of the media²⁵¹. The remarkable aspect about this judgement is the fact that the European Court of Human Rights does not only talk about a right of the public to receive information disseminated by the press, but furthermore about a “right to be adequately informed” as such²⁵². Background to the case was that the publisher, editorial staff, and general editor of the Sunday Times had complained about the ban imposed by an English court on the

²⁴⁸ This does not cover intruding into private or administrative secrets by electronic eavesdropping or similar devices, however: M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 338 (353)

²⁴⁹ Th. Schilling, Internationaler Menschenrechtsschutz, p. 120

²⁵⁰ Schweizerisches Bundesgericht, Lausanne (BGer), P166, 180/76 in: EuGRZ 1979, p. 3pp

²⁵¹ *The Sunday Times v. UK*, 1979, Series A 30, p. 40 (no. 65) (= EuGRZ 1979, p. 386)

²⁵² J. Frowein, W. Peukert, Europäische Menschenrechtskonvention - Kommentar, p. 391

publication of an article concerning the so-called “thalidomide children”, i.e. children born with serious malformations of limbs, because their mothers had used the sedative thalidomide during pregnancy. An analysis of the findings has to take into account the reasoning of the Court, however, according to which the legitimacy of restrictions on the freedom to impart information by the press should be weighed against the public’s “right” to be informed in order to identify whether restrictions are justified according to Article 10 (2) of the ECHR²⁵³. Considering this argumentation, it becomes clear that the judgement of the Court can only be understood as to grant a right to have free access to information which either is generally accessible or which is meant to be accessible according to the will of the author and not in the sense of an individual right of access to official documents²⁵⁴.

Still, it has to be taken into account that also within the realm of the Convention the freedom to seek information has been recognised as being of primary importance for an open democratic society. An open discussion in a pluralistic democratic society depends to a considerable extent on the government and mass media making available the information of which they dispose. Consequently, the scope of Article 10 (1) of the ECHR has to be interpreted as to comprise an obligation on the part of the state to guarantee a system in which it is possible to in fact inform oneself about essential questions. Otherwise, the right of the public to be informed which has been recognized by the Court would be without substance and effect²⁵⁵. To a certain extent, Article 10 (1) of the ECHR therefore does imply positive obligations. However, this democratic obligation on the part of the government and other public authorities to keep the people informed on important matters is to be understood in the sense of a constitutional obligation the enforcement of which is left to parliament – consequently, it does not give rise to corresponding individual rights on the part of the citizens²⁵⁶.

- Freedom to Receive Information Other Persons Wish to Publish

Nothing else can be deduced from other cases dealt with by the Convention organs.

Whereas in *Sunday Times* the right of the public to be informed was only considered within the examination whether the restriction of the *freedom of expression* of the applicant was justified according to Article 10 (2) of the

²⁵³ M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 338 (354)

²⁵⁴ W. Peukert, Die Kommunikationsrechte im Lichte der Rechtsprechung der Organe der Europäischen Menschenrechtskonvention, in: Däubler- Gmelin, *Festschrift für E. Mahrenholz*, p. 277 (280)

²⁵⁵ J. Frowein, W. Peukert, Europäische Menschenrechtskonvention - Kommentar, p. 392

²⁵⁶ M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 338 (354)

ECHR, Convention organs have also been concerned with restrictions of the right to *receive* information as such.

So was the case with *Little Red Schoolbook*²⁵⁷ and *Open Door and Dublin Well Woman*²⁵⁸.

As regards the first, British readers complained about being denied access to the so-called “little red schoolbook” which had been confiscated by a British court in 1971. The Commission left open, whether Article 10 of the ECHR comprises the right to receive all information another author wishes to publish because in the particular case the book was allowed to be published after minor changes and thus the right not held to be violated.

In *Open Door and Dublin Well Woman* the Irish prohibition to inform about abortion in the UK was considered to be also a violation of the freedom to receive information.

It has to be stressed, however, that even though these cases refer to breaches of the right to *receive* information according to Article 10 (1) of the ECHR, their findings are of limited effect for the question, whether the principle of public access to official documents can be derived from the rights guaranteed by this provision. Both cases namely do not refer to information held by state authorities but to information other persons or companies wish to publish. Again, freedom of information here appears as the other side of the freedom of expression of a third party. Thus, *Little Red Schoolbook* and *Open Door and Dublin Well Woman* can only give evidence to the fact that Article 10 (1) of the ECHR indeed guarantees the right to receive information deriving from generally accessible sources free from state interference. As mentioned before, this is not the case with state-held information.

- Freedom to Receive Information held by State- Authorities

The Commission also dealt with two cases referring to information held or delivered by state authorities.

In *X. v. The Federal Republic of Germany* the applicant argued that the Post Office’s failure to forward his mail to the address indicated by him constituted an interference with his right to receive information implied by the right to freedom of expression according to Article 10 (1) of the ECHR²⁵⁹. Like in the above named cases, the Commission considered “*that it follows from the context in which the right to receive information is mentioned in the above named provision [Art. 10 (1)] that it envisages first of all access to general sources of information which may not be restricted*”

²⁵⁷ Little Red Schoolbook, appl. no. 5528/72, DR 5, 5

²⁵⁸ Open Door and Dublin Well Woman v. Ireland, 1992, Series A 246 (= Human Rights Law Journal Vol. 13, No. 9-10, 1992, p. 378)

²⁵⁹ X. v. The Federal Republic of Germany, appl. no. 8383/78, DR 17, 227

by positive action of the authorities unless this can be justified under the second paragraph of Article 1”²⁶⁰.

At least the use of the words “*first of all*” when referring to the general sources of information as being envisaged by the provision leaves room for speculation, whether also other pieces of information might be comprised.

In its argumentation the Commission further states that “*However, even assuming that the right to receive information may under certain circumstances include a right of access by the interested person to documents which although not generally accessible are of particular importance for his own position, it must be observed that in the present case there is no such question of the applicant being as such denied access to the specific information which was contained in the letter sent to him. A right to receive such information within a specified period of time by way of correspondence cannot be derived from Article 10.1 of the Convention [...]*”²⁶¹.

A few things require special mentioning as regards the effect of this finding for the existence of the principle of public access to official documents:

First of all, these findings are by no means an *obiter dictum* stating that a principle of public access to official documents is provided for under Article 10 (1) of the ECHR. The statement rather is of a hypothetical kind and meant to point out that in the case under consideration a violation of Article 10 (1) of the ECHR cannot be construed in any respect. Thus, the intention of the Commission was not to widen the scope of the respective Article but to eliminate all possibilities of finding the case before it being in breach with the Convention.

And secondly, the above cited statement in fact attaches strict conditions to the hypothetical existence of a principle of access to state- held documents. As regards the applicant in question, it considers a right of being granted access to information due to the fact that “*under certain circumstances*” documents might be “*of particular importance for his own position*”. Consequently, the Commission does not refer to a principle of *public* access to official documents, but of *individual* access to that kind of information which is of extraordinary importance for the applicant. On the contrary, it is one of the most significant particularities of the principle of public access to official documents that the latter is bound to no special legal need or justification other than mere demand. A right of this kind is not even envisaged by the above named hypothesis of the Commission.

In *X. v. the United Kingdom* the applicant who was sentenced to life imprisonment complained about being denied access to information concerning the composition of a committee which was tasked with his

²⁶⁰ X. v. The Federal Republic of Germany, appl. no. 8383/78, DR 17, 228

²⁶¹ X. v. The Federal Republic of Germany, appl. no. 8383/78, DR 17, 228, 229

classification in prison²⁶². The Commission explicitly referred to the judgement of the Court in the *Sunday Times* case according to which “*the public has a right to receive information and ideas in areas of public interest*”. It further stated that it “*does not consider however that the concept of information within the meaning of Article 10, paragraph 1 is so extensive as to oblige the divulgence of the names of the members of an administrative committee of this kind*” and concludes that thus, there has been no interference with the applicant’s right under Article 10 of the ECHR to receive information.

The wording of this statement allows for two possible interpretations:

The Commission either generally considers it possible that freedom to receive information comprises a right of public access to official documents and only in the case in question comes to the conclusion that the information here requested does not fall under the scope of that right. In favour of this interpretation is the use of the words that the scope of the concept of information in Article 10 of the ECHR does not oblige the disclosure of the names of the members of an administrative committee “*of this kind*”. The use of this supplement could imply that only the specific character of the committee in question in fact necessitates secrecy²⁶³.

On the other hand, the Commission’s findings can also be understood in the sense that the concept of information within the meaning of Article 10 (1) of the ECHR does not extend to a degree comprising the positive duty of the state to disclose particular pieces of information.

At first sight, the first named interpretation seems to be the only one complying with the wording of the finding. With regard to standards of legal argumentation, however, the second interpretation seems to be much more likely:

If the Commission had been of the opinion that the concept of information as comprised by Article 10 (1) of the ECHR generally entailed an obligation on the part of the state to actively grant access to particular pieces of information if so asked, it would have been required to explain in detail, why it nevertheless came to the conclusion that the kind of information here demanded was not comprised by this duty. If the principle of public access to official documents was comprised by the right to receive information as granted under Article 10 (1) of the ECHR, any restriction or denial of access would have to be justified according to Article 10 (2) of the ECHR, i.e. the denial would have to be prescribed by law and necessary in a democratic society in the interest of one of the aims listed in that paragraph. None of these requirements were analysed within the findings of the Commission. The existence of legal standards requiring a particular proceeding which has to be adhered to by the Convention organ when identifying violations of the rights granted by the ECHR leads to the effect that also the wording of the

²⁶² X. v. UK, appl. no. 8575/79, DR 20, 202

²⁶³ J. Frowein, W. Peukert, Europäische Menschenrechtskonvention - Kommentar, p. 392

decision is required to be capable of verifying the Organ's compliance with this particular proceeding. The statement given can therefore not be seen as evidence for the fact that the Commission had come to the conclusion that the freedom to receive information as provided for under Article 10 (1) of the ECHR entails a principle of public access to official documents.

Besides, also the judgements of the Court in both *Leander*²⁶⁴ as well as in *Gaskin*²⁶⁵ seem to give a negative answer to that question. And in fact, the majority of authors shares this understanding²⁶⁶.

However, with regard to the wording of the two decisions this does not seem to be compelling.

In the *Leander* case the competent authorities refused to appoint Mr. Leander as a museum technician at the Naval Museum on the basis of secret information which they refused to reveal.

With regard to this refusal, the Court held 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. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual*"²⁶⁷.

In the *Gaskin* case, which concerned the failure to grant a person unimpeded access to his case record which had been drawn up while he was in child-care, the Court reached the same conclusion. Quoting the above cited *Leander* findings, the Court held that "*Also in the circumstances of the present case, Article 10 does not embody an obligation on the State concerned to impart the information in question to the individual*"²⁶⁸.

Even though the Court in both cases refuses to find an obligation on the part of state authorities to impart the information in question to the applicant as being entailed by Article 10 (1) of the ECHR, it has to be stressed that the wording applied actually leaves some room for arguing that the freedom of expression may indeed entail such a duty:

First of all, the Court applies the word "*basically*" when stating that the right to receive information entails a prohibition on the part of the

²⁶⁴ *Leander v. Sweden*, 1987, Series A 116, p. 29

²⁶⁵ *Gaskin v. UK*, 1989, Series A 160

²⁶⁶ J. Frowein, W. Peukert, *Europäische Menschenrechtskonvention - Kommentar*, p. 392; W. Peukert, *Die Kommunikationsrechte im Lichte der Rechtsprechung der Organe der Europäischen Menschenrechtskonvention*, in: Däubler- Gmelin, *Festschrift für E. Mahrenholz*, p. 277 (280); J. Meyer- Ladewig, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, Handkommentar, p. 164, no. 14

²⁶⁷ *Leander v. Sweden*, 1987, Series A 116, p. 29, §74

²⁶⁸ *Gaskin v. UK*, 1989, Series A 160, p. 22, §52

government to restrict a person from receiving information that others wish or may be willing to impart to him. Consequently, it can be argued that the Court regards this “classical” prohibition of interference with so-called generally accessible sources of information as being the *primary* obligation implied by the freedom to receive information according to Article 10 (1) of the ECHR. The existence of this *primary* duty does not lead to the effect, however, that the deduction of any *other* obligation is impossible.

This interpretation seems to be confirmed by the fact that the considerations of the Court are expressly based on the *specific “circumstances”* of the two cases as well as the explicit reference to the “*information in question*” or to “*such information*”. If the Court had not seen any possibility for the deduction of a principle of public access to official documents from the right to receive information as provided for under Article 10 (1) of the ECHR, these supplements would in fact have been unnecessary.

On the other hand, it has to be taken into account what already has been mentioned in respect to the decisions of the Commission in *X. v. The Federal Republic of Germany* as well as in *X. v. The United Kingdom*: If the Court had come to the conclusion that the principle of public access to official documents generally can be comprised by the scope of the right to receive information as provided for under Article 10 (1) of the ECHR, any refusal in the cases in question would have required detailed examination of the standards provided for by Article 10 (2) of the ECHR concerning restrictions to the right.

Still, the above cited terminology applied by the Court leaves room for speculating that the Court denied a right to be granted access only due to the particular quality of the information in question which might well have been subject to secrecy.

This would not be in contradiction with other findings of the Court in *Gaskin*, where it also analysed, whether the denial of access was in breach with the *right to privacy* granted by Article 8 of the ECHR. In this context, the Court held that the confidentiality of public records is only in conformity with the principle of proportionality, if the system provides “*that an independent authority finally decides whether access has to be granted in cases where a contributor fails to answer or withholds consent*”²⁶⁹. The fact that the Court has not mentioned a comparable requirement in the context of its findings concerning Article 10 (2) of the ECHR could be taken as evidence for the fact that no right to access is entailed by the latter. Again, this objection is not compelling. Obviously, it can well be argued that the range of information being subject to secrecy in the realm of Article 8 of the ECHR differs from what can be subject to secrecy in the realm of Article 10 of the ECHR. Considering that a right of access to state-held documents according to Article 8 of the ECHR is backed by an individual legal interest whereas the principle of public access to official documents is entailed by

²⁶⁹ *Gaskin v. UK*, 1989, Series A 160, p. 20, §49

Article 10 of the ECHR would be irrespective of any individual legal interest, it can well be justified that the standard of protection is higher as regards a right to access deriving from the right to privacy than in the event of deriving from the freedom to receive information.

- Further evidence for an evolutive interpretation as to imply the principle of public access to official documents

Assuming that the findings of the Court in the above mentioned cases leave room for an understanding of Article 10 (1) of the ECHR as to imply a right to public access to official documents, this would clearly be an evolutive interpretation of the Convention.

As already mentioned above, the standards of the Convention are not regarded as static, but as reflective of social changes. The evolutive approach implies that the Court -and earlier also the Commission- takes into account contemporary realities and attitudes and not the situation prevailing at the time of the drafting of the Convention when interpreting the latter²⁷⁰. The interpretation of the provisions set forth by the ECHR thus takes into consideration the common European standards on the basis of domestic law and practice in the member states of the Council of Europe²⁷¹, other international or European instruments, and the case- law of the Court itself²⁷². Besides, statements made by the member states or organs of the Council of Europe, which are not as such legally binding, may give evidence to the contemporary understanding of the rights set forth by the Convention. In this respect, a number of declarations, recommendations and resolutions passed by several organs of the Council of Europe have dealt with the scope of the freedom to receive information and so have some colloquies held by the Council of Europe. It is significant, however, that literature only implies reference to one or two of them but never makes an effort to give a survey of –at least- a number of them, enabling a decision whether the statements made are capable of giving evidence to either an implication of a principle of public access to official documents by the freedom to receive information by means of an evolutive interpretation or the lack of it. The following shall be an attempt to redress the latter:

In 1970 the Consultative Assembly of the Council of Europe stipulated in Resolution 428 with regard to the right to freedom to expression²⁷³:

“This right shall include freedom to seek, receive, impart, publish and distribute information and ideas. There shall be a corresponding duty for

²⁷⁰ P. van Dijk, G. van Hoof, Theory and Practice of the European Convention on Human Rights, p.77

²⁷¹ Tyrer v. UK, 1978, Series A. 26, p. 15

²⁷² The possibility that the Court’s own judgements may set in motion further European legal developments which in turn influence later rulings by the Court was recognised in the *Salesi* judgment of 26 February 1993, Q.257-E, p. 59

²⁷³ Res. 428 (1970), Council of Europe, Cons. Ass., Twenty- First Ordinary Session (Third Part), 22- 30 January 1970

the public authorities to make available information on matters of public interest within reasonable limits and a duty for mass communication media to give complete and general information on public affairs.”

An extension of the right to freedom of information was also declared as being overly important for any democracy on the Parliamentary Conference held in Vienna in 1971²⁷⁴. It was mentioned at this conference that the text of the former Recommendation 582/ 1970 as well as the corresponding report of the Consultative Assembly presumed that the drafters originally had in mind the interest of the mass media regarding free access to general sources of information²⁷⁵. It was held at the conference that without doubt also the individual had a particular interest in obtaining information held by authorities. In this respect, the conference explicitly referred to the extensive Swedish legislation, according to which state- held documents generally are available for everybody –subject only to exceptions prescribed by law.

Considering that all earlier statements had only referred to a corresponding duty of public authorities to make available information on matters of public interest and besides always did so in the context of the interests of the mass media, the significance of the statements on the Vienna Conference has to be seen in the explicit reference to Swedish legislation. Whereas the obligation on the part of state- authorities as envisioned by earlier statements was limited to making available matters of public concern with a special view to the obligation of enabling the media to carry out its task in imparting information and being the so- called public watchdog, the wording in the Vienna Conference does not leave room for calling in question, whether also a right of public access to official documents was taken into consideration. Since the Swedish legislation has been granting the latter ever since 1766, it is clear that the model promoted by this conference had in mind a right of access to information irrespective of a particular legal interest on the part of the applicant.

As a matter of fact, this clear confession to the principle of public access to official documents has not prevailed without interruption ever since.

The Committee of Ministers tasked an expert Committee on Human Rights in respect with freedom of information as follows²⁷⁶:

“[to study] the extension of the right to freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (which is included in Article 19 (2) of the UNO Covenant on Civil and Political Rights); there should be a corresponding duty on public

²⁷⁴ P. C. Ragaz, Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention, p. 89

²⁷⁵ P. C. Ragaz, Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention, p. 89

²⁷⁶ P. C. Ragaz, Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention, p. 89

authorities to make information available on matters of public interest subject to appropriate limitations”.

Again, already the working task was limited to the information of public concern. And the proposal actually made was even more restricted in scope: In 1975 the Committee of Human Rights submitted a proposal as to add the right to freedom to seek information -i.e. the right to active commitment to obtain information which already is generally accessible- to the scope of Article 10 of the ECHR by means of a new protocol²⁷⁷.

In the same year an International Colloquy on the European Convention took place in Rome. Concerning the question, whether the freedom to receive information comprises an obligation on the part of the state to make available information of public concern, it was held that an evolutive interpretation by Convention organs was actually desirable with regard to the fact that this could make the alteration or adoption of a complementing provision superfluous²⁷⁸.

Only one year later a Colloquy on the Freedom of Information and the Obligation of Authorities to make Information available was held by the Council of Europe in Graz²⁷⁹. Even though reports held by the member states Sweden, Austria and France with regard to legislation implementing respective obligations were differing to a great extent, they all considered it to be an adequate means of establishing the free public exchange of opinions and information. It was held that the availability of information was a fundamental aspect of democracy, since the informed citizen was capable of carrying out the democratic duties attributed to him. Furthermore, it was held that it lead towards a better understanding of state activity – both in general as well as in the case of particular state- measures directed against the individual. Besides, publicity would provide for a better control of the administration. There was common consent as to the fact that problems arising with respect to the number of cases requiring exceptions for the protection of administrative secrecy could actually be solved.

In 1979 the Consultative Assembly passed its Recommendation 854 on Access by the Public to Government Records and Freedom of Information²⁸⁰. It is based on the conviction that representative democracies only can function properly, if the citizen and the elected representatives are sufficiently informed. Due to the fact that the government as well as other state authorities often are in possession of a great amount of information which is not available through generally accessible sources, it is held to be desirable that the public is granted access to these records subject only to inevitable exceptions. Again, it is remarkable that the Recommendation

²⁷⁷ Yearbook, 19/1975, p. 72

²⁷⁸ P. C. Ragaz, Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention, p. 91

²⁷⁹ P. C. Ragaz, Die Meinungsäußerungsfreiheit in der Europäischen Menschenrechtskonvention, p. 91

²⁸⁰ European Yearbook, vol. 27, p. 363 pp

explicitly refers to Swedish legislation as well as to respective legislation of other member states of the Council of Europe as well as the “Freedom of Information Act” and the “Privacy Act” passed in this respect by the United States of America. The Recommendation advises the Committee of Ministers to request the member states to implement a system of freedom of information, i.e. to provide for access to state- held documents including the right to demand and be granted access to information from state authorities as well as to be granted insight as well as correction of personal records.

The Committee of Ministers did so by its Recommendation on Access to Information held by Public Authorities in 1981²⁸¹. It held that “*Considering the importance for the public in a democratic society of adequate information on public issues everyone shall have [subject to exceptions] the right to obtain, on request, information held by public authorities [and that this access to information] shall not be refused on the ground that the requesting person has not a specific interest in the matter*”.

Furthermore, the Committee of Ministers can conclude conventions and agreements, as well as common policies with regard to particular matters according to Article 15 (a) of the Statute of the Council of Europe. It did so in adopting a Declaration on Freedom of Expression and Information in 1982²⁸²:

According to its communiqué²⁸³, the Declaration is aimed at pointing out the shared principles and aims which the member states of the Council of Europe intend to pursue as fundamental elements of a democratic and pluralist society. Within the preamble of the Declaration they consider freedom of expression and information to be part of the principles of true democracy, the rule of law, and respect for human rights, and to be necessary for the social, economic, cultural, and political development of each human being. The member states declare to pursue the protection of freedom of expression and information within the areas of information and mass media and to provide for a prohibition of censorship. Besides, the Declaration sets forth a freedom of information which comprises the freedom to seek information. However, the Declaration lacks references to the principle of public access to official documents and can therefore not be seen as a further milestone in the process of interpreting Article 10 (1) of the ECHR as to imply the latter.

In 1985 another Human Rights Colloquy was held by the Council of Europe in Sevilla²⁸⁴. It examined reports on freedom of expression and information in a democratic society and on the responsibilities deriving from the implementation of the ECHR. As regards a right to individual access to information held by public authorities, the colloquy refers to the above

²⁸¹ Recommendation No. R (81) 19 on access to information held by public authorities

²⁸² ArchVR, vol. 21, p. 124 p

²⁸³ German text see EA 1982, S.D. 280p

²⁸⁴ M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 338pp

named Recommendation No. R (81) concluded by the Committee of Ministers. It commented this recommendation by stating that it seemed that the Committee could not rely on Article 10 of the Convention and that traditionally, constitutional freedom to receive and seek information does not include a general “democratic” right of access of everybody to administrative records or other information. It was held that this “public” access rather depended on additional legislation. The Colloquy found that despite the growing tendency towards granting access- rights, such additional legislation was still inexistent in a considerable number of member states including the Federal Republic of Germany²⁸⁵.

The question is, whether the legislation and practice in the member states has developed since then to an extent which enables an evolutive interpretation of Article 10 (1) of the ECHR as to comprise a right of this kind.

In fact, opposed to the findings of the Sevilla Colloquy, even in Germany a law of that kind finally entered into force in January 2006²⁸⁶. Very clearly, all the above named statements are documents which are not legally binding, but nevertheless indicate trends of legal opinion within the contracting states. No matter whether the documents discussed do or do not refer to the principle of public access to official documents, one thing can clearly be concluded:

The enormous efforts aiming at enhancing the protection provided for by Article 10 (1) of the ECHR by including an obligation on the part of states as to grant information held by their authorities indicate that the Convention was not considered to imply positive duties of that kind at the time these commitments were lanced²⁸⁷. On the other hand, the fact that a number of statements explicitly sue for the freedom of information comprising the principle of public access to official documents as well as the fact that a growing number of states possesses legislation in this respect indicate the trend towards also an extended interpretation of the freedom to receive information.

Still, according to contemporary literature and the judgements which have been pronounced in this respect so far, it seems that the scope of the right has not been interpreted to this extend until now.

In this respect, it has to be kept in mind that the process of an increasing number of members to the Convention does not necessarily contribute to the benefit of the scope of the rights guaranteed. Rather, the concept of democracy within the member states becomes diverse - not always being

²⁸⁵ M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 354p

²⁸⁶ „Gesetz zur Regelung des Zugangs zu Informationen des Bundes“ (Informationsfreiheitsgesetz), text in: BGBl. 2005 Teil I, No. 57

²⁸⁷ The Supreme Court in Switzerland came to the same conclusion in its judgment P 166, 180/76, see EuGRZ 1979, p. 3 (5)

that of a pluralistic democracy²⁸⁸. In this respect, the ratification of the Convention by Russia in 1989 did bear on the one hand the chance to promote human rights standards to the benefit of a large amount of citizens, but on the other hand democratic standards there still differ to a great amount from the Western European states. This clearly creates new obstacles to the evolutive interpretation of Article 10 (1) ECHR as to imply the principle of public access to official documents.

3.1.3.2 Democracy

An analysis of more general principles provided for by the ECHR does not lead to any other result.

Without doubt, democracy is the basis of the European public political system. According to the preamble of the Convention, human rights and fundamental freedoms are best maintained by an effective political democracy. Besides, the fact that according to the requirements of proportionality as set forth in Articles 8, 9, 10 and 11 of the ECHR, restrictions solely are justified if necessary in a democratic society, makes clear that democracy is the only political model taken into consideration by the Convention and, moreover, also the only one considered as being in compliance with it²⁸⁹.

Article 3 of the First Protocol to the Convention provides for free elections. It stipulates the following:

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”

The importance of Article 3 of Protocol No. 1 to the ECHR does not consist in the first place in the obligation of the states to hold free elections at reasonable intervals by secret ballot, but in the connection between those elections and the composition of the legislature. According to a report by the Commission in the *Greek* case Article 3 of Protocol No. 1 to the ECHR indeed presupposes the existence of a representative legislature as the basis of a democratic society²⁹⁰. Considering that it can be regarded as a further elaboration of the concept of an “effective political democracy” referred to in the Preamble and of a “democratic society” mentioned in the provisions named above, the Court emphasized in its first judgment with regard to Article 3 of Protocol No. 1 to the ECHR that “*since it enshrines a characteristic principle of democracy, Article 3 of Protocol no. 1 is accordingly of prime importance in the Convention system*”²⁹¹.

²⁸⁸ M. Bullinger, Freedom of expression and information: an essential element of democracy, in: Human Rights Law Journal Vol. 6, No. 2-4, p. 354

²⁸⁹ Th. Schilling, Internationaler Menschenrechtsschutz, p. 20

²⁹⁰ Report of 5 November 1969, Yearbook XII (1969), p. 179

²⁹¹ Mathieu- Mohin and Clerfayt v. Belgium, 1987, Series A 113, p. 22

It is significant that the provision is formulated neither as a right or freedom nor as an obligation on the part of national authorities to refrain from interfering with the exercise of a right or freedom, but as an undertaking on the part of the contracting states to *do* something – it therefore can be classified as constituting an express and not only implied positive obligation. Whereas this formulation first was taken as evidence for the fact that the provision does not imply a right of the individual citizen, both the Commission as well as the Court later revised this view. The Commission held that “*whatever the wording of Article 3, the right it confers is in the nature of an individual right, since this quality constitutes the very foundation of the whole Convention*”²⁹². The Court approved this interpretation of the right embodied in Article 3 of Protocol No. 1 to the ECHR as a subjective right of participation²⁹³.

On the other hand, the scope of this subjective right of participation is rather restricted. Once the people can participate in the composition of the legislature at regular intervals, the requirements set forth by Article 3 of Protocol No. 1 to the ECHR regarding participation in government have been satisfied. In particular it has been held that this provision does not require that the people shall be consulted via referendum about certain legislative acts²⁹⁴. Consequently, it has to be assumed that the same standard then also applies in the aftermath of administrative actions.

The right to vote as set forth by Article 3 of Protocol No. 1 to the ECHR therefore does not imply a principle of public access to official documents.

Furthermore, also the attempt to deduce a right to access to information held by state authorities from the right to a fair hearing provided for by Article 6 (1) of the ECHR has failed. In *X. v. the United Kingdom*²⁹⁵ the applicant’s implied argument was that the secrecy surrounding the composition of the committee which was tasked with deciding about his particular category of status as a prisoner falls for consideration under Article 6 (1) of the ECHR, which ensures a fair hearing for everyone “*in the determination of his civil rights and obligations or of any criminal charge against him*”. The Commission held that “*the decision of the Committee to classify a prisoner [...] is not a determination of such matters, not being a question of civil rights or obligations or criminal charges, but an administrative classification*”.

From this it can be concluded that information held by state- authorities in the process of administrative activity is not considered to come under the scope of the right to a fair hearing as provided for in Article 6 (1) of the ECHR²⁹⁶.

²⁹² X. v. Federal Republic of Germany, appl. no. 2728/66

²⁹³ Mathieu- Mohin and Clerfayt v. Belgium, 1987, Series A 113, p. 22 (§§48- 50)

²⁹⁴ X. v. Federal Republic of Germany, appl. no. 6794/74, DR 3, 98 (103)

²⁹⁵ X. v. the United Kingdom, appl. no. 8575/79, DR 20, 202 (203)

²⁹⁶ As already mentioned in the realm of the other instruments, a right to be granted access to information regarding administrative proceedings concerning the applicant himself can

3.1.4 Limits concerning the Principle of Public Access to Official Documents by the European Convention on Human Rights

Just like in the realm of the other instruments, the question, whether the Convention implies limits as to the scope of the principle of public access to official documents if granted, has to be answered irrespective of whether the latter is a standard set forth by the respective instrument. Again, interference seems possible with the right to privacy as well as trade and business secrets on the individual level. Regarding the public dimension, conflicts with the functioning and effectiveness of the administration as well as with national security have to be taken into account.

3.1.4.1 Right to Privacy

According to Article 60 of the ECHR, the Convention only aims at providing for a minimum standard of protection. Consequently, if the laws of a member state provide for a protection going beyond the standard set forth by the Convention, the highest available standard applies. On the other hand, this does not release the state in question from obeying the other minimum standards granted by the Convention.

As mentioned before, the disclosure of personal data possibly interferes with the right to privacy of a third person.

The right to privacy is provided for under Article 8 of the ECHR, which reads:

*“1. Everyone has the right to respect for private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”*

In the context of the right to respect for private life, the issue of registration of persons currently attracts a great amount of attention. The Commission and the Court held in the *Leander* case²⁹⁷ that data protection is an issue which falls within the scope of Article 8 of the ECHR. The Commission

under certain circumstances be derived from the right to privacy, see e.g. *Gaskin v. UK*, 1989, Series A 160, p. 20, §49; due to the fact that this right to access is limited to the person concerned and thus requires a specific legal interest, it can nevertheless not be seen as a providing for the principle of *public* access to official documents

²⁹⁷ *Leander v. Sweden*, 1987, Series A 116, p. 38

recalled this in *Lundvall v. Sweden*²⁹⁸. The Court reiterated in *Amann v. Switzerland*²⁹⁹ “that the storing relating to the “private life” of an individual falls within the application of Article 8 §1”.

The question is, however, what kind of data is comprised by this protection.

It has been held in earlier years that only the disclosure of information protected by the duty of professional secrecy is considered as interference with the right to privacy³⁰⁰. Clearly, this does not seem to be a standard appropriate to meet the needs of contemporary practice regarding the data sector.

The right to privacy has been described as comprising the individual aspects of human existence as well as the identity of each human being³⁰¹. As a matter of fact, this sphere can only properly be protected if all personal data is generally comprised by the scope of Article 8 (1) of the ECHR. The particular sensitivity of data which has been received in confidence rather is to be taken into account when judging the justification of the interference in question according to the rules set forth by Article 8 (2) of the ECHR.

This argumentation is in line with what the Court pointed out in *Amman v. Switzerland*. The Court there held that the term “private life” must not be interpreted restrictively and that a broad interpretation tallied with that of the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

This so- called Data Protection Convention became the first international treaty in the realm of data protection³⁰². It does not, however, grant the individual directly enforceable rights. According to Article 4 (1) of the Data Protection Convention, the parties *shall* take the necessary measures in their domestic law to give effect to the basic principles for data protection set out in the Convention. Despite this dependence on compliance of the signing states, the fact that the parties explicitly refer to the right to respect for privacy twice in the preamble as well as in Article 1 indicates that they consider the scope of the Data Protection Convention to fall within the right to privacy as provided for by Article 8 (1) of the ECHR.

According to Articles 1 and 2 of the Data Protection Convention, “data protection” for the purposes of this Convention means protection of the right to privacy with regard to any information relating to an identified or identifiable individual whenever such information undergoes operations such as storage, retrieval or dissemination carried out partly or in whole by automatic means. This then has to apply also with regard to the scope of the

²⁹⁸ *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121 (130)

²⁹⁹ *Amann v. Switzerland*, 2000, appl. no. 27798/95, see HRLJ 2000 Vol. 21, No. 4-7, p. 221 (228)

³⁰⁰ F.G. Jacobs, *The European Convention on Human Rights*, p. 126

³⁰¹ Th. Schilling, *Internationaler Menschenrechtsschutz*, p. 87

³⁰² English text in: *Human Rights Law Journal*, Vol. 2 No. 1-2, p. 201 pp.

right to privacy as provided for by Article 8 (1) of the ECHR³⁰³, so that the protection of personal data is comprised by the Convention's right of respect for privacy.

This comprehensive understanding of data- protection is furthermore in line with the case- law of the Court. Whereas in *Leander* the Commission had stressed that interference depended on the contents of the register concerned, the Court did not share this opinion. The Commission had argued that a register which only contains, for instance, the name and address of an individual does not normally involve any interference with Article 8 of the ECHR, whereas the Court simply stated that it was “*uncontested that the secret police- register contained information relating to Mr. Leander's private life*”³⁰⁴. If the Court considers a person's name and address to come under the scope of the right to privacy, it can be concluded that this applies also in respect to other personal data, which in fact can only be more private in character than name and address.

Thus it can be held at this point of the thesis, that a granting of the principle of public access to official documents generally interferes with the right to privacy provided for by Article 8 (1) of the ECHR at least as far as personal data is concerned. If domestic legislation allows for the availability of such personal data concerning a person other than the applicant himself, the state in question only complies with its duties deriving from the Convention if this interference is justified according to Article 8 (2) of the ECHR.

Comparing the terminology of Article 17 (1) of the ICCPR and Article 8 (2) of the ECHR, it is tempting to conclude that interference is justified in a wider range of cases under the Convention than under the scope of the Covenant. In fact, the opposite is true. In spite of the wide formulation of Article 8 (2) of the ECHR, it actually affords better protection than the vague wording of Article 17 (1) of the ICCPR. The *travaux préparatoires* concerning the Covenant support this view. Proposals to insert a legal proviso modelled on Article 8 (2) of the ECHR, i.e. containing an exhaustive listing of all permissible purposes for interference, were defeated, since they would have excessively restricted the right of state-parties to determine the precise limitations on the provision³⁰⁵.

According to Article 8 (2) of the ECHR, interference breaches the right to privacy unless the granting of access is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and, in addition, is necessary in a democratic society to achieve these aims.

In this respect, the term “in accordance with the law” requires the existence of legislation which can be traced back to an act of parliament and which clearly stipulates the preconditions, limits as well as the proceeding

³⁰³ see also *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121 (first paragraph)

³⁰⁴ P. van Dijk, G. van Hoof, *Theory and Practice of the European Convention on Human Rights*, p. 491, 492; *Leander v. Sweden*, 1987, Series A 116, p. 22

³⁰⁵ M. Nowak, *U.N. Covenant on Civil and Political Rights*, p. 291

regarding interference in order to meet the requirements of accessibility, foreseeability and sufficient preciseness³⁰⁶. The Court held in *Amann* that the respective legislation in Switzerland does “*not contain any appropriate indication as to the scope and conditions of exercise of the power conferred on the Public Prosecutor’s Office to gather, record and store information*”³⁰⁷. It concluded that it “*cannot therefore be considered sufficiently clear and detailed to guarantee adequate protection against interference by the authorities with the applicant’s right to respect for his private life*”³⁰⁸.

Thus, the granting of a principle of public access to official documents which also allows for the availability of personal data concerning a third person does not only require a legal basis of whatever kind, but furthermore, the respective legislation has to indicate with sufficient clarity the scope and conditions of exercise of the authorities’ discretionary power in the area under consideration to meet the requirement of being “in accordance with the law”.

As mentioned above, further requirements have to be met according to Article 8 (2) of the ECHR in order to provide for a justification of the granting of a principle of public access to official documents allowing the disclosure of personal data: The interference needs to pursue one or more of the legitimate aims referred to in paragraph 2 and, in addition, be necessary in a democratic society to achieve these aims. In this respect, the Court granted a wide *margin of appreciation* to the respondent states in assessing the necessity in a democratic society, i.e. the pressing social need for interference, and in particular also in choosing the means for achieving the legitimate aims listed in Article 8 (2) of the ECHR³⁰⁹.

The Commission so far had to deal with the justification of the Swedish legislation regarding the granting of the principle of public access to official documents according to Article 8 (2) in *Lundvall v. Sweden*³¹⁰. It held that the appearance of the name of the applicant in a register of defaulting tax debtors to which the public has access can as such be regarded as an interference with his right to respect for private life as guaranteed by Article 8 (1) of the ECHR. Still, it came to the conclusion that interference in this case has to be “*considered necessary, bearing in mind local conditions, for the economic well-being of the country and the protection of the rights and freedoms of others*”³¹¹. With explicit regard to “*the long-standing principle of free access to official documents prevailing in Sweden as provided for in the Freedom of the Press Act*”, the Commission considered that “*the*

³⁰⁶ J. Frowein, W. Peukert, Europäische Menschenrechtskonvention - Kommentar, p. 329

³⁰⁷ *Amann v. Switzerland*, 2000, appl. no. 27798/95, see HRLJ 2000 Vol. 21, No. 4-7, p. 221 (229)

³⁰⁸ *Amann v. Switzerland*, 2000, appl. no. 27798/95, see HRLJ 2000 Vol. 21, No. 4-7, p. 221 (229)

³⁰⁹ P. van Dijk, G. van Hoof, Theory and Practice of the European Convention on Human Rights, p. 492

³¹⁰ *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121 (130)

³¹¹ *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121

interference with the applicant's rights under Article para. 1 must be regarded as being of a minor nature"³¹². According to the Commission "*this interference is justified under the terms of Article 8 para. 2 as being in accordance with the law and necessary in a democratic society inter alia for the economic well-being of the country and for the protection of the rights and freedoms of others*"³¹³.

The most significant aspect here is the fact that in spite of explicitly naming the Swedish tradition of granting the principle of free access to official documents, the Commission does not seem to consider this right as such as being one of the rights and freedoms of others capable of justifying interference in the sense of Article 8 (2) of the ECHR. Rather, the wording suggests that the Commission had in mind the protection of the right to property of others when stating that the respective interference was justified under the terms of Article 8 (2) of the ECHR for the protection of the rights and freedoms of others. The information in question concerned the fact that the applicant had been registered as being in arrears with his taxes. Due to the fact that this information became publicly available and was transmitted to a credit information company, he was thereby labelled not creditworthy. From the fact that the Commission refers to the economic well-being of the country as the second explicitly named legitimate aim when analysing the justification of interference in the sense of Article 8 (2) of the ECHR, it becomes clear that the Commission weighs the economic risks entailed by a non-disclosure of the fact that a person is being in arrears with his taxes both for the state as well as for other persons against the right to privacy of that person. Thus, it can be concluded from the Commission's statement that even though referring to the long-standing principle of free access to official documents prevailing in Sweden, it does not consider this principle as a right which has to be weighed as such against the right to privacy of another person. Rather, the decision suggests that the disclosure of information in the particular case has to serve an *additional* legitimate aim in the sense of Article 8 (2) of the ECHR in order to justify an interference with the right to privacy of another person. Understood in this sense, the Commission's findings in *Lundvall v. Sweden* would thus imply that a state cannot justify interference with the right to privacy by simply implementing the principle of public access to official documents as an individual right. It has to be mentioned, however, that –unfortunately– the wording of the decision is lacking any explicit reference to what this right or freedom of another person actually is. Neither does the Commission grant insights as regards the exact weighing of the rights concerned according to the rules of proportionality. Thus, the decision leaves room for speculation. But clearly, an interpretation in the above named manner would serve an effective protection of the right to privacy and at the same time enable the implementation of the principle of public access to official documents in domestic legal systems.

³¹² *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121 (131)

³¹³ *Lundvall v. Sweden*, appl. no. 10473/83, DR 45, 121 (131)

Besides, this interpretation would also meet the requirements arising from another principle within the realm of data protection: According to Article 5 (b) of the Data Protection Convention, personal data undergoing automatic processing shall be stored for specified and legitimate purposes and not used in a way incompatible with those purposes.

Obviously, the storage of personal data is bound to the existence of particular purposes. Considering that this requirement has to be seen in connection with the fact that the storage of personal data infringes upon that person's right to respect for privacy as provided for under Article 8 (1) of the ECHR, it has to be concluded that only the legitimate aims listed in Article 8 (2) of the ECHR are capable of meeting the standard set forth by Article 5 (b) of the Data Protection Convention.

But beyond, Article 5 (b) of the Data Protection Convention also requires that the *further use* of the data which has been stored must not be incompatible with these purposes. According to the above applied interpretation of *Lundvall v. Sweden*, which dealt with the disclosure of information stored by the state, the existence of the principle of public access to official documents was not as such regarded as a purpose of this kind. Thus, the Commission gave effect to the requirement that beside the storage of data also its further use, i.e. its disclosure, has to serve the legitimate purposes listed in article 8 (2) of the ECHR.

This actually leads to another question:

Does the further use of the data stored have to serve the *same* legitimate purpose which has earlier justified its storage?

Unfortunately, this question has not been discussed in either literature or findings of Convention organs. Clearly, a requirement of this kind would virtually deprive the principle of public access to official documents of almost all effect. Its scope would be narrowed to an infinitely small number of cases in which the interest of the applicant is identical with that of the state when storing the information. Besides, this would in fact be the backdoor- implementation of requiring the existence of a specific legal interest on the part of the applicant, which again would be contrary to the characteristic traits of the principle of public access to official documents.

In fact, also *Lundvall v. Sweden* does not give evidence of such an interpretation. If the Commission had had this narrow approach in mind, this would have necessitated further analysis of the nature of the purpose for which the information originally was stored as well as an analysis whether the same purpose applied when the information was disclosed. None of this has been provided for by the Commission so that it can be assumed that any further use of the information once obtained can again be justified by the full range of legitimate purposes as listed by Article 8 (2) of the ECHR.

3.1.4.2 Trade and Business Secrets

Lacking any explicit provision, the protection of trade and business secrets again has to be discussed in respect with the right to property. The latter is provided for under Article 1 of Protocol No. 1 to the Convention, which reads as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (...)”

In contrast to the ICCPR, the scope of this provision expressly comprises legal entities.

Besides, the Court confirmed in *Gasus Dosier- und Fördertechnik GmbH* that the notion of “possessions” has an autonomous meaning which is not limited to ownership of physical goods and that certain other rights and interests constituting assets can also be regarded as property rights and thus are “possessions”³¹⁴. As a consequence, Article 1 of Protocol No. 1 to the ECHR applies in relation to a variety of claims “constituting assets”. It is difficult, however, to deduce precise criteria as to the definition of that notion.

From the case law three aspects seem to be considered necessary: State measures need to affect the economic value of the right or interest in question³¹⁵, the object of the possessions must be adequately definable in relation to the claims based thereupon³¹⁶, and as a third requirement the right or interest must be sufficiently established, i.e. the applicant needs to be in a position of arguing that he has at least a “legitimate expectation” that they will realize³¹⁷.

Trade and business secrets do not appear to meet these requirements, nor have Convention organs ever dealt with them under the provision in question. Even though trade and business secrets definitely are of benefit to an enterprise, their economic value can hardly be estimated in concrete terms. Nor can the existence of secrets of this kind be seen as a basis for effecting specific claims. The protection of trade and business secrets therefore is not comprised by the scope of Article 1 of Protocol No. 1 to the ECHR.

Neither has the case law concerning Article 8 (1) of the ECHR ever considered the protection of trade and business secrets as falling under the realm of the right to privacy. The Court held in *Amann* that *“In particular, respect for private life comprises the right to establish and develop*

³¹⁴ *Gasus Dosier- und Fördertechnik GmbH v. Netherlands*, 1995, Series A 306- B

³¹⁵ *Durini v. Italy*, appl. no. 19217/91, DR 65, 250 (261)

³¹⁶ *X. v. Netherlands*, appl. no. 4130/69

³¹⁷ *Van der Mussele v. Belgium*, 1983, Series A 70, p. 23

relationships with other human beings” and that “*there appears, furthermore, to be no reason in principle why this understanding of the notion of “private life” should be taken to exclude activities of a professional or business nature*”³¹⁸. However, the Court here only refers to the conduct of *activity* of an individual within business relationships as falling under the scope of the right to respect for privacy. The findings of the Court cannot, on the contrary, be taken as evidence for the fact that also immaterial *possessions* of enterprises obtain protection under the right to respect for privacy.

Consequently, the Convention does not imply limits as to the scope of the principle of public access to official documents for reasons of protecting trade and business secrets.

3.1.4.3 Public Dimension

Just like in the realm of universal instruments, conflicting interests within the public dimension, i.e. the functioning and efficiency of the administration as well as national security, are lacking status as individual rights. Thus, no obligations as to grant limits for the protection of these conflicting interests when implementing a principle of public access to official documents are implied by the ECHR. They do exist, however, as conflicting interests which are capable of justifying interference with the individual rights granted.

As mentioned before, the *Gaskin* case concerned a complaint about refusal of access to a file containing personal data regarding the applicant. In contrast to *Leander*, *Gaskin* did not complain about the fact that information was compiled and stored about him, nor did he allege that any use was made to his detriment. Rather, he challenged the failure to grant him unimpeded access to that information. The Court expressly held Article 8 of the ECHR to be relevant and then concentrated on the question, whether a fair balance had been struck between the general interests of the community and the individual.

It held as follows:

“In the Court’s opinion, persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in

³¹⁸ *Amann v. Switzerland*, 2000, appl. no. 27798/95, see HRLJ 2000 Vol. 21, No. 4-7, p. 221 (228)

principle be considered to be compatible with the obligations under Article 8, taking into account the State's margin of appreciation."³¹⁹

Special emphasis has to be laid on the fact that the Court explicitly considered the interest of the state in receiving objective and reliable information as a legitimate purpose which may be weighed against the interest of the applicant to be granted access to that information. The Court thus considered the functioning of the administration to be generally capable of justifying an interference with Article 8 (1) of the ECHR.

As a consequence, it then has to be concluded that also the granting of the principle of public access to official documents can be derogated from on the basis of these purposes. The right of access the Court considered in *Gaskin* was deduced from the applicant's right to respect for privacy. Thus, the applicant was in possession of a specific legal interest concerning the information in question. In contrast, the principle of public access to official documents is granted irrespective of the existence of any particular legal interest on the part of the applicant. If derogation for public interests is deemed possible even when the right to access can be based on a specific legal interest, the same has to apply in respect to a right to access not being based on any legal interest.

Thus, the functioning and the efficiency of the administration as well as the interest in the national security, which is expressly named among the legitimate purposes listed in Article 8 (2) of the ECHR, are interests capable of justifying interference with the right of public access to official documents. It has to be borne in mind, however, that they do so only if the balance in question furthermore is in line with the rules of proportionality. In *Gaskin* the Court considered that under a system which makes access to records dependent on the consent of the contributor, the interest of the applicant in seeking access must be secured when a contributor to the records either is not available or improperly refuses consent. It further came to the conclusion that due to a lack of any independent authority deciding in that event, the system was in breach with Article 8 of the ECHR for reasons of lacking proportionality³²⁰. Thus, also here, the Court leaves the so-called margin of appreciation with the states as far as the interpretation and application of the needs and laws in question are concerned, but still makes clear that the final ruling on whether the restrictions are reconcilable with the rights granted under the Convention remains with the Convention Organs.

³¹⁹ *Gaskin v. UK*, 1989, Series A 160, p. 20; The Court nevertheless considered the interference to be in breach with Article 8 of the ECHR due to a lack of proportionality.

³²⁰ *Gaskin v. UK*, 1989, Series A 160, p. 20

3.2 Organization for Security and Cooperation in Europe (OSCE)

In 1975 the Conference on Security and Cooperation in Europe (CSCE) was created by the Helsinki Final Act³²¹, known as the Organization for Security and Cooperation in Europe (OSCE) since a change of name in 1994. It is not strictly a European organization, since its members include by now not only all European nations, but also the United States and Canada, which actually have been members from its very inception. It was originally created to bridge the ideological chasm that divided the Eastern and the Western world in order to establish a system of stability and security in Europe. It did so by establishing a continuing negotiating process that established a linkage between human rights and security concerns. Due to its strong link to the European scene, its influence on today's Europe, and the human right policies of many of its nations it will be discussed in this section.

The Helsinki Final Act consists of four chapters - so-called "baskets". Human Right issues are addressed primarily in the Guiding Principles proclaimed in Basket I and to some extent also in Basket III.

As to the binding character of the commitments of the OSCE, it first of all has to be stressed that the Helsinki Final Act is not an international treaty in the sense of Article 2 (1) (a) of the Vienna Convention on the Law of Treaties, according to which the agreement has to be "governed by international law", i.e. the parties to the agreement need to intend to create legally binding obligations³²². Even though being drafted in a treaty-like language and signed at the highest level by 35 states, neither the text, nor the preparatory works, the circumstances of its adoption, or the subsequent state-practice identify such an intention. On the contrary, several elements indicate the definite intention of the participating states to avoid the latter. A "disclaimer" of legal value specifies that the instrument "*is not eligible for registration under Article 102 of the Charter of the United Nation*", which is commented by the Finnish government with the words "*as would be the case were it a matter of a treaty or international agreement*"³²³. The soft language applied gives evidence to the same effect, using terms of "participating" instead of "contracting" states, of "guiding" instead of "governing" principles, and of "will" instead of the normative "shall"³²⁴. It lacks provisions concerning ratification or entering into force, both of which are characteristic of international treaties, and accordingly, none of the national parliaments was involved with consensus-proceedings³²⁵. Thus, there is mutual consent as to the fact that the Final Act is not legally but

³²¹ text in: CSCE, ILM, Vol. 14, p. 1292

³²² K. Ipsen, Völkerrecht, p. 97

³²³ Letter by the Finnish government to the UN Secretary General, text in: EA 1975, S. D 574

³²⁴ Encyclopaedia of International Law, Helsinki Conference and Final Act on Security and Cooperation in Europe, p. 695

³²⁵ G.-H. Gornig, Äußerungs- und Informationsfreiheit als Menschenrechte, p. 379, 380

indeed politically binding on the signatory states³²⁶. According to the last paragraph of the Final Act, the participating states “*mindful of the high political significance which they attach to the results of the Conference*”, declare “*their determination to act in accordance with the provisions contained in the above texts*”. Besides, the Final Act codifies a number of rules or principles of general international law³²⁷, which remain legally binding regardless of their repetition in a legally non-binding instrument³²⁸.

As regards human rights and fundamental freedoms, the Final Act refers to the purposes and principles of the UN- Charter and the UDHR as well as to international declarations and agreements in this respect, including inter alia the two Covenants in Chapter 8 of Principle VII of Basket I. At the time of its adoption, the significance of this paragraph lay in the fact that until then some of the participating states, including the Soviet Union, had never formally acknowledged an obligation to adhere to the UDHR and thus by then at least were politically bound to comply with the standards set forth by it³²⁹.

As regards communication- freedoms, the respective provisions of the other instruments named have thus become part of the Final Act by means of reference³³⁰. And, what is more, these provisions now have to be interpreted by the signatory states of the Final Act in the light of the provisions set forth by Section two of Basket III. The catalogue of rights of the OSCE does not only proclaim basic individual human rights, but also deals with rule of law issues, democratic values and elections and has therefore become a blueprint for a free and democratic Europe, which could have an impact on the interpretation of the rights granted under the above named human rights instruments. With a view to the task of promoting public participation in the governing of the states as well as of enhancing transparency, control and further democratic legitimacy of the governments the scope of the freedom to receive information within the respective instruments could then be interpreted as to imply a principle of public access to official documents.

Clearly, this is beyond the intention of the OSCE parties. It has to be stressed, that the section entitled “information” in Basket III only aims at increasing a free flow of information across the borders, including printed, filmed or broadcast information, and at improving working conditions for journalists³³¹. Nothing indicates an intention to extend the scope of the communication- freedoms as to entail a right of public access to state held documents. It aims at facilitating the dissemination and reception of information and thus at providing the basis for a realisation of the individual

³²⁶ Th. Buergental, *International Human Rights in a Nutshell*, p. 165

³²⁷ G.-H. Gornig, *Äußerungs- und Informationsfreiheit als Menschenrechte*, p. 381

³²⁸ *Encyclopaedia of International Law, Helsinki Conference and Final Act on Security and Cooperation in Europe*, p. 695

³²⁹ G.-H. Gornig, *Äußerungs- und Informationsfreiheit als Menschenrechte*, p. 384

³³⁰ G.-H. Gornig, *Äußerungs- und Informationsfreiheit als Menschenrechte*, p. 383

³³¹ *Encyclopaedia of Public International Law, Helsinki Conference and Final Act on Security and Cooperation in Europe*

right of an active as well as passive freedom of information. Due to the heterogeneous democratic standards within the signatory states it cannot be concluded that the democratic standards set forth by the OSCE actually comprise modern aspects like public transparency and participation beyond that of parliamentary representation through free and secret elections. Thus, an interpretation of the communication- freedoms in this sense would go beyond the current common sense of the OSCE member states.

The principle of public access to official documents can thus not be derived as a standard within the realm of the OSCE. And neither does the OSCE imply limits as to its scope when granted going beyond what already applies according to the human right instruments the Final Act refers to.

3.3 Organization for Economic Cooperation and Development (OECD)

In order to provide a complete survey of the existing European instruments potentially enhancing or limiting the scope of the principle of public access to official documents also the commitment of the Organization for Economic Cooperation and Development (OECD) has to be mentioned. The OECD is the reconstitution by a treaty in the year 1960 of the Organization for European Economic Cooperation (OEEC) founded in 1948 to administer the Marshall Aid³³².

Since membership is open to “any Government” by unanimous invitation of the Council, it is not merely a European organization, but its links with the OEEC and its predominantly European character justify an analysis within this chapter of the thesis³³³.

The aims of the new organization have necessarily changed. Whereas the OEEC was committed with the restoration of the European economy, the OECD aims at maintaining the economic growth and at promoting economic development both within and without the territories of its members³³⁴.

Only shortly after the Council of Europe had decided to adopt a Convention on Data Protection, the Council of the OECD adopted guidelines on this matter in 1980. They are based on the recognition of the necessity to provide for a free exchange of data across the borders and aim at compromising between respect for the personal sphere as well as a free flow of information and overlap to a great extent with the principles of data protection set forth by the Data Protection Convention of the Council of

³³² D.W. Bowett, *The Law of International Institutions*, p. 189

³³³ D.W. Bowett, *The Law of International Institutions*, p. 190

³³⁴ D.W. Bowett, *The Law of International Institutions*, p. 190

Europe³³⁵. Due to the partly differing aims, these recommendations – even though also aiming at the protection of privacy- are above all marked by a special commitment in the enhancement of a data- flow across the borders in favour of a common market of goods and capital³³⁶.

However, the legal effect of these guidelines is limited. They merely have a status as “recommendations” in the sense of Article 5 (b) of the Statute of the OECD. In contrast to the “decisions” named in Article 5 (a) of the Statute of the OECD, these recommendations are not legally binding in international law. It therefore remains with the member states, whether to implement the recommendation within their national legal systems.

Limits as to the scope of a principle of public access to official documents can therefore not be deduced from the realm of the OECD.

3.4 European Union

When dealing with information- issues in the realm of the European Union (EU), two aspects seem to be worth special mentioning in comparison to so-far discussed standards of international law:

Due to its originally primary aim of creating a common European market, information- issues have for a long time been viewed from the economic rather than from a human rights perspective within the EU.

And secondly, it has to be kept in mind that the EU, more precisely speaking the European Community (EC) as its first pillar, has reached a new type of independent international organization marked by a higher level of integration. It therefore has been described as an entity *sui generis* in the contemporary pattern of international organization of states. In contrast to all other international organizations, which are in essence based on *inter-governmental cooperation* where states have retained their control over the organization and not been submitted to the decisions of independent organs, the member states of the EU have transferred sovereignty to the international level and by this have created a so- called “*supranational organization*”. Community organs dispose of extensive regulative power vis-à-vis member states as well as individuals and companies. Agreements establishing the European Communities as well as “secondary” law created by Community organs on the basis of these treaties form an independent legal order which can no longer be adequately grouped with categories of general international law³³⁷.

³³⁵ H.-H. Schild, Datenschutz in Europa, in: Europäische Zeitschrift für Wirtschaftsrecht, EuZW, Heft 24/ 1991, 745 (747)

³³⁶ H.-H. Schild, Datenschutz in Europa, in: Europäische Zeitschrift für Wirtschaftsrecht, EuZW, Heft 24/ 1991, 745 (747)

³³⁷ P. Malanczuk, Akehurst`s Modern Introduction to International Law, p. 96

Concerning the principle of public access to official documents this has a twofold effect:

On the one hand, the ever- increasing transfer of powers from member states to Community organs has led to what has been called a “democratic deficit” of the law which is created mostly by non- parliamentary Community organs but nevertheless binding on the member states, individuals, and companies. This necessitates the strife for a higher degree of transparency concerning legislative action of the Community itself.

And secondly, considering the fact that European Community law claims absolute priority over any conflicting national law of the member states, it has to be analysed, whether Community law by now implies obligations as well as limits as to the granting of a principle of public access to official documents within the national legal systems of the member states.

3.4.1 The Principle of Public Access to Official Documents as a Standard in Community Law

As mentioned before, two dimensions have to be distinguished when analysing, whether the principle of public access to official documents is a standard in European Community law: Its existence in connection with information held by Community organs on the one hand, as well as the existence of implications on the part of the member states on the other hand. Only the latter would directly entail implications from European Community law concerning the implementation of the principle of public access to official documents in the sense of the topic of this thesis.

In this context, it has to be stressed that no such obligation to implement a *general* principle of public access to official documents within the national legal systems is explicitly set forth by either primary or secondary Community law.

The only exception concerns information on the environment. According to Article 1 of the Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment³³⁸ its objective is “*to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic terms and conditions on which that information should be made available*”. In order to reach these aims, Article 3 (1) stipulates the obligation on the part of the member states to grant access to information on the environment held by its authorities. The directive thus constitutes the principle of public access to official documents as far as information on the *environment* is concerned. Neither treaty nor secondary law, however, imply an obligation on the part

³³⁸ OJ 1990 L 158, p. 56pp

of the member states to grant a principle of *general* public access to official documents, i.e. irrespective of the field the information concerns.

Thus, it has to be analysed, whether the existence of a principle concerning Community organs leads to any obligation of that kind also on the part of member states.

3.4.1.1 The Principle of Public Access to Official Documents as a Standard in Primary and Secondary Community Law: Art. 255 of the Treaty of the European Community and Regulation 1049/2001

The character of the European Union as a supranational organization with increasing power to create law binding both on the member states as well as individuals and companies necessarily demands democratic legitimacy of this legislation. Within the parliamentary model peculiar to national legal systems, the latter is mediated by elected assembly- representatives. In contrast, Community law applied what can best be described as a “regulative” model of democracy³³⁹. Due to the fact that the law- making organs of the European Community, i.e. the Council and the Commission, are not equipped with direct democratic legitimacy, this model requires other means of legitimacy than the ones applied by national legal systems. Indirect democratic legitimacy of Community law is mediated by the fact that legislative power is only transferred by means of limited competences submitted by the government- representatives of the member states (so- called “subsidiarity- principle” as provided for by Articles 5 of both the Treaty of the European Union as well as of the Treaty of the European Community, containing as one element that any action by the Community shall not go beyond what is necessary to achieve the objective of the Treaty of the European Community). This indirect democratic legitimacy has to be accompanied by other procedural rules in order to reach a sufficient level of legitimacy, however³⁴⁰. And this applies even more, considering the increase of legislation by majority- vote.

Against this background, the heads of the member states stated on the Maastricht Conference that transparency of the decision- making process would strengthen the democratic character of the organs as well as the trust of the public in the administration of the European Union³⁴¹. Ever since, transparency has been a value the status and importance of which within EU law has increased considerably.

³³⁹ C. Heitsch, Die Transparenz der Entscheidungsprozesse als Element demokratischer Legitimation der Europäischen Union, in: EuR, Heft 6, 2001, p. 809 (817)

³⁴⁰ C. Heitsch, Die Transparenz der Entscheidungsprozesse als Element demokratischer Legitimation der Europäischen Union, in: EuR, Heft 6, 2001, p. 809 (819)

³⁴¹ Final Act of the Treaty of the European Union from 7 February 1992, Protocol No. 17 concerning the Right to Access to Information, text in: BGBl. 1992 II p. 1321

In 1993 both an Interinstitutional Declaration on Democracy, Transparency and Subsidiarity was jointly adopted by the European Parliament, the Council and the Commission³⁴² as well as a joint Code of Conduct was adopted by the Council and Commission³⁴³, which each of them furthermore immediately implemented into their rules of procedure by decision³⁴⁴. According to the European Court of Justice in *Netherlands v. The Council*, the Code of Conduct does not create legal effects and subjective individual rights to the benefit of third persons, since it only expresses a voluntary coordination between the Council and the Commission³⁴⁵. In contrast, the Court held the above named decisions of the Council and the Commission to implement the Code into their rules of procedure to be legally binding also towards third parties, since both organs create individual rights of access according to the wording as well as the intention of these decisions³⁴⁶.

The notion of transparency in a constitutional context encompasses a number of different features, such as the holding of meetings in public, the provision of information, as well as the right of access to documents and the latter right forms the most developed legal dimension of the principle of transparency in the EU context³⁴⁷. It basically emerged from the 1993 Declaration, which stressed the importance of openness in government as a way of rendering the Community more legitimate to its citizens. The right of access to documentation has been held to be moreover the essence of democracy, since it is crucial for understanding the reasons behind a measure and since it facilitates the construction of a reasoned argument by those opposed to a measure in its present form³⁴⁸.

The Treaty of Amsterdam³⁴⁹ finally enshrined access to documents of Community organs as a treaty right. Article 1 of the Treaty of the European Union as amended by the Treaty of Amsterdam states that decisions should be taken as openly and closely to the citizen as possible. And Article 255 (1) of the Treaty of the European Community, which was introduced by the Treaty of Amsterdam, provides that:

“Any citizen of the Union, and any natural or legal person residing or having their registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined in accordance with paragraphs 2 and 3.”

³⁴² text in: Human Rights Law Journal, Vol. 14, No. 11-12, p. 455 (456pp)

³⁴³ OJ L 340/41

³⁴⁴ Council Dec. 93/731, OJ L340/43; Commission Dec. 94/90, OJ L 46/58

³⁴⁵ *Netherlands v. Council*, 1996, Case C-58/94, ECR I- 2169pp

³⁴⁶ *Netherlands v. Council*, 1996, Case C-58/94, ECR I- 2169pp

³⁴⁷ Craig, De Búrca, EU Law, Text, Cases and Materials, p. 393

³⁴⁸ Craig, De Búrca, EU Law, Text, Cases and Materials, p. 122

³⁴⁹ OJ C 340/1, 10 November 1997

The legislation required by Article 255 of the Treaty of the European Community was eventually adopted in the form of a regulation in 2001³⁵⁰. Regulation 1049/2001 improved the position governing access to documents in several aspects, e.g. by abolishing the authorship rule, softening the nature of some of the exceptions, and requiring a register of documents to be kept, while narrowing it in others³⁵¹. This legislation was again implemented by the three EU institutions into their own rules of procedure.

The question remains: Do Article 255 of the Treaty of the European Community as well as Regulation 1049/2001 comprise implications for an implementation of the principle of public access to official documents in the national legal systems?

First of all, it is important to state that the European Court of First Instance held in the *Petrie* case that Article 255 of the Treaty of the European Community is lacking direct effect, i.e. it does not forward a subjective right to individuals in the sense of being enforceable at Court³⁵². In contrast, Regulation 1049/2001 confers subjective rights of that kind onto the individual.

Secondly, it has to be pointed out that Article 255 of the Treaty of the European Community only applies to three of the Community's organs: The Council, Commission, and Parliament. The fact that Article 1 of the Treaty of the European Union states that all EU decisions are to be taken as openly as possible as well the fact that Article 21 of the Treaty of the European Union provides for a right of all citizens to address all organs and institutions have always been argued as giving evidence to the existence of a *comprehensive* right of access to documents, applying to *all* Community organs, though³⁵³. Equally, the Ombudsman undertook an own- initiative inquiry into public access to documents addressed to 15 Community institutions other than the Council and Commission and subsequently concluded that a failure to adopt rules governing public access to documents and to make those rules easily available to the public constituted maladministration³⁵⁴. Since the adoption of Regulation 1049/2001 this struggle has been solved, however: its preamble declares that all agencies established by the institutions should apply the same principles.

The reason why the wording of Article 255 of the Treaty of the European Community has not been extended also on the member states is a lack of competence. Due to the principle of limited competences, the Community only has authority to create laws necessary for the realization of the economic objectives of the European Community, comprising the four fundamental community rights. In this respect, competence to create a right of access to information exists to an extent comprised by the so called

³⁵⁰ Reg. 1049/2001, OJ L 145/43

³⁵¹ Craig, De Búrca, EU Law, Text, Cases and Materials, p. 395

³⁵² *Petrie v. Commission*, Case T- 191/99, ECR I- nyr

³⁵³ J. Schwarze, EU Kommentar, p. 2128

³⁵⁴ OJ C 44/9

freedom to receive services as provided for under Article 49 (I) of the Treaty of the European Community. The scope of this provision is limited to services disposing about an economic value, however. This does not apply to information held by state- authorities concerning administrative activities: Information of that kind does not possess economic value as such. Thus, even though Community organs do possess competence to enhance a free flow of information given the pieces of information in question have economic value, they lack authority concerning the implementation of a principle of public access to official documents which only serves to strengthen the democratic systems or fundamental rights within the member states³⁵⁵.

Even though national authorities do not fall under the scope of Article 255 of the Treaty of the European Community, two cases nevertheless are imaginable where the principle of public access to official documents can be deduced from that provision as a standard within the realm of national legal systems.

The first case concerns the event of national authorities carrying out Community law. In that case, national authorities *de-facto* act as Community organs. Whenever national authorities only apply Community law, the same lack of democratic legitimacy which originally necessitated Article 255 of the Treaty of the European Community applies also in respect to them. Even though transparency and participation is particularly crucial within the legislative activity of the organs in question³⁵⁶, it has to be kept in mind that Article 255 of the Treaty of the European Community is not limited to this kind of activity. The standard of public access to official documents in Community law does not differentiate between legislative and executive activity of the organs in question. Consequently, nothing else can be true to national authorities carrying out Community law. The fact that access to documents is particularly important when an organ is acting in its legislative capacity might have an impact on the balancing of interests in the particular case, however. Consequently, the weight awarded to the interest of the individual to be granted access to official documents might be reduced in cases not concerning legislative activity so that the chances on part of conflicting rights to be estimated as being of higher importance actually grow.

And secondly, Article 255 of the Treaty of the European Community comprises a principle of public access to official documents held by national authorities in an indirect respect: If national authorities have forwarded information to Community organs, these pieces of information can become

³⁵⁵ This explains the differing findings of the European Court of Human Rights and the European Court of Justice in one and the same case, namely *Open Door and Dublin Well Women*, and Case C- 159/90 *Society for the Protection of Unborn Children Ireland v. Stephen Grogan and others*.

³⁵⁶ I.a. this can be seen from Article 207 (3) of the Treaty of the European Community.

available for individuals making use of their right of access to documents provided for under Article 255 of the Treaty of the European Community³⁵⁷.

According to Article 2 (3) of Regulation 1049/2001 all documents held by Community organs fall within the scope of the regulation, irrespective of whether they derive from the organ itself or anyone else and only have been received or stored by the organ in question³⁵⁸.

As one of the few member states which had not yet implemented a principle of public access to official documents at the time of the adoption of the Amsterdam Treaty, Germany succeeded in limiting these implications deriving from Article 255 of the Treaty of the European Community. It added a declaration to the Final Act which stipulates that a member state is allowed to seek the Commission or the Council not to grant access to a document deriving from that member state to the benefit of third persons without preceding consent of that member state³⁵⁹. The same option has been provided for by Article 4 (5) of Regulation 10049/2001. Considering the obligation created by Article 10 of the Treaty of the European Community on the part of member states to cooperate with Community organs in meeting the standards deriving from Community law, the actual effect of this option has to be considered limited in scope, however. If the balancing of the interests concerned as carried out by the Community organ is in line with Community law, there does not remain room for denying consent from the part of the member state.

To sum it up, Article 255 of the Treaty of the European Community as well as Regulation 1049/2001 in two cases set forth the principle of public access to official documents as regards information held by national authorities irrespective of whether also the national legal system does so:

Access to information held by national authorities has to be granted in cases in which they only carry out Community law as well as in cases in which they have forwarded this information to Community organs.

3.4.1.2 The Principle of Public Access to Official Documents as a Standard of the Fundamental Rights in Community Law

Due to the fact that neither the Treaty of the European Union nor the Treaty of the European Community contain a catalogue of fundamental rights, the European Court of Justice originally dismissed all claims concerning a breach of fundamental rights. Since the Union institutions are supranational in character and hence not bound by domestic constitutional law of any of the member states, there is a risk, however, that these institutions deprive individuals and companies subject to their jurisdiction of human rights

³⁵⁷ J. Angelov, Grundlagen und Grenzen eines staatsbürgerlichen Informationszugangsanspruchs, p. 97

³⁵⁸ The so-called "authorship-rule" has thus been abolished.

³⁵⁹ Declaration No. 35 of the Treaty of Amsterdam

which are granted to them in domestic law or the European Convention on Human Rights without there being a remedy against such action. Consequently, constitutional courts of some member states suggested that the Union's failure to abide by basic human rights principles might force them to declare Community acts unconstitutional and hence null and void in their territories³⁶⁰. This threat was gradually averted as the European Court of Justice declared in a series of decisions starting in 1969 that respect for fundamental rights formed an integral part of the general principles of law which the Court was required to apply in interpreting the Community treaties, and that in ascertaining these rights it would look to the European Convention on Human Rights as well as the constitutional traditions common to the member states³⁶¹. Since Maastricht, this obligation of the European Union and the European Community to respect the fundamental rights as general principles of law was implemented into Treaty law. According to Article 6 (II) and Article 46 (d) of the Treaty of the European Union both the European Union as well as the Community shall respect fundamental rights, as guaranteed by the ECHR and as they result from constitutional traditions common to the member states, as general principles of Community law.

Just like in the realm of Article 255 of the Treaty of the European Community as well as Regulation 1049/2001, it has to be kept in mind that the fundamental rights existing in Community law are generally only legally binding on Union and Community organs. Member states are only bound by them when acting under the scope of Community law³⁶². Besides, they constitute the minimum standard as regards national enforcement of Community law³⁶³. Consequently, even if the principle of public access comes within the fundamental rights of the Community, it can only be regarded as a standard binding on the member states in this limited respect.

Whether or not transparency can be counted as a general principle of European Community law has been a matter for debate for some time.

Obviously, the majority of member states has by now implemented the principle of public access to official documents. Still, these national laws in question differ as to the scope of the rights guaranteed. Besides, as has been analysed above, not even the European Court of Human Rights has so far confirmed the existence of a right of that kind as being provided for by the ECHR, even though its findings leave room for doing so in the future.

This explains the reluctance of the European Court of Justice to confirm a general principle of Community law of that kind. So far, transparency in itself has not been accorded the legal status of a general principle of Community law by the Court. Rather, it only referred to the above named

³⁶⁰ see e.g. the German Bunderverfassungsgericht in its "Solange I- Beschluß", BVerfGE 27, 271

³⁶¹ Th. Burgental, *International Human Rights in a Nutshell*, p. 149

³⁶² R. Streinz, *Europarecht*, p. 136

³⁶³ R. Streinz, *Europarecht*, p. 137

Rules of Procedure the Council earlier had implemented by means of decision. In this context, in *Carvel* an action of the Council was held to be in breach of the guarantees on access to documents it had made in the decision implementing its own Rules of Procedure³⁶⁴. Besides, in *The Netherlands* the Court, although supporting the values of transparency and access, did not require the adoption of secondary legislation by the Council, declaring instead that Council decisions on access to documents could properly be based on its Rules of Procedure³⁶⁵. In the latter case, the Dutch government had argued that the principle of openness of the legislative process was an essential requirement of democracy, and that the right of access to information was an internationally recognized fundamental human right. Yet, the European Court of Justice abstained from articulating a general principle of transparency or a general right of access to information. Even though it confirmed the importance of the right of public access to information as well as its relationship to the democratic nature of the institutions, it rejected the argument that such a fundamental right should not be dealt with purely as a matter of the Council's own internal rules of procedure. Subsequent cases were decided in the same manner: In a series of cases the two European Courts annulled decisions of the Council and Commission refusing access to their documents *not* on the ground that the institutions had breached a "general principle of transparency" but on other grounds, such as the automatic application of non- mandatory exceptions, the inappropriate use of the authorship- rule, the refusal to consider partial access, or the inadequacy of the reasons given for refusal³⁶⁶.

Thus, the two European Courts have played a significant role in elaborating on the nature and content of the right of access to information contained in the procedural rules and legislative decisions of the institutions. Nevertheless, no evidence to the fact that the principle of public access to official documents has already obtained the status of a general principle of Community law can be drawn from their findings.

3.4.1.3 The Principle of Public Access to Official Documents as a Standard of the Charta of Fundamental Rights of the European Union

Whereas Article 41 (2) of the Charter of Fundamental Rights explicitly only refers to information concerning the applicant and thus does not refer to a principle of *public* access to official documents, the latter is enshrined in Article 42³⁶⁷, which reads as follows:

³⁶⁴ *Carvel v. Council*, Case T- 194/94, ECR II – 2765

³⁶⁵ *Netherlands v. Council*, Case C – 58/94, ECR I- 2169

³⁶⁶ see, e.g.: *Worldwide Fund for Nature v. Commission*, Case T- 105/95, ECR II- 314; *Interporc In- und Export GmbH v. Commission*, Case T- 124/96, ECR II- 231; *Interporc v. Commission*, Case T- 92/98, ECR II- 3521; *Rothmans International v. Commission*, Case T- 188/97, ECR II- 2463; *Svenska Journalistförbundet v. Council*, Case T- 174/95, ECR II- 2289; *Hautala v. Council*, Case C- 353/99P, ECR I- nyr; *JT's Corporation v. Commission*, Case T- 123/99, ECR II – 3269; *Kuijer v. Council*, Case T- 188/98, ECR II- 1959

„Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.”

It is significant that the wording is almost identical with that of Article 255 (1) of the Treaty of the European Community. Still, it is not yet clear what added status this provision may give the legal entitlement provided for by Article 255 of the Treaty of the European Community. Even though the Charter of Fundamental Rights was “welcomed” by the European Council on the Nice Summit, it is lacking legally binding effect, which could only have been reached by applying the formal procedure of amending the treaties according to Article 48 of the Treaty of the European Union³⁶⁸.

Though not being legally binding, the European Court of Justice could apply the Charter of Fundamental Rights as a source of defining the scope of the general principles of Community law. As long as the legal status of the Charter of Fundamental Rights is not settled, its contribution to the creation and strengthening of justiciable general principles of Community Law remains speculative, however. And according to Article 51 (1) of the Charter of Fundamental Rights its implications on the member states would again be limited to cases in which the member states enforce Community law.

3.4.1.4 The Principle of Public Access to Official Documents as a Standard due to the Persuasive Effect of Community law

Even though the findings of this thesis have so far come to the conclusion that Community law only implies a legally binding standard concerning a right to public access to official documents held by national authorities when they carry out Community law, it still is worth asking, whether the development of Community law has had an impact on national legal systems in a manner, that even if they do not provide for a principle of public access to official documents the latter can be deduced *de lege lata*.

Georg Nolte did so concerning the German legal system in an article published in 1999³⁶⁹, i.e. more than six years before the principle of public access to official documents was implemented into German law. He came to the conclusion that despite the lack of positive legislation concerning the principle of public access to official documents, also the German system under the influence of the development of Community law provides anybody *de lege lata* with a subjective “right to correct balancing” of his general interest in public access to official documents against the conflicting rights of the case in question (“*Recht auf fehlerfreie Ermessensausübung*”).

³⁶⁸ R. Streinz, *Europarecht*, p. 133

³⁶⁹ G. Nolte, *Die Herausforderung für das deutsche Recht auf Akteneinsicht durch europäisches Verwaltungsrecht*, in: *DÖV* 1999, Heft 9, p. 363pp

Taking pattern from his line of argumentation I will analyse in the following, whether his conclusions can be generalized and therefore applied also to other member states of the European Union not having implemented a principle of public access to official documents so far.

His analysis is based on two thoughts:

First of all, he argues that within the European context, national legal systems have gained the chance of obtaining „persuasive authority“, i.e. the widespread and homogeneous existence of a particular right in a number of member states makes it harder for others not to accept an interpretation of their legal provisions in favour of deducing that particular right³⁷⁰.

And as a second argument, he refers to the findings of the European Court of Justice in *Netherlands v. Council*³⁷¹. As already mentioned above, the Court here did not agree with the Dutch argumentation that the Council and Commission actually had not been allowed to enact the principle of public access to official documents by means of their rules of procedure since they aimed at creating enforceable subjective rights. Instead, the Court held that access- rights had not first been created by these rules of procedure, but rather had applied also before, due to its existence in most of the member states as well as its confirmation in the Maastricht Treaty. With a view to the fact that the latter only contains a recommendation to report on measures improving the granting of access to information held by Community institutions, *Nolte* concludes that the derivation of the existence of the principle by the Court is thus based on the character which the principle of democracy has developed in the member states³⁷². According to the Court in the *Netherlands* case, the organs may provide for access rights within their rules of procedure as long as Community legislation has not implemented provisions of that kind itself. Besides, the Court of First Instance ruled in *Carvel* that the institutions' rules of procedure are not a purely internal matter, but give rise to expectations and rights on the part of individuals who seek access to documents³⁷³. The European Court of Justice confirmed this in *WWF v. Commission*³⁷⁴.

Starting from these two thoughts, *Nolte* argues that a *de lege lata* deduction of the right to access must then generally also be possible within the legal systems of member states³⁷⁵.

Nolte first analyses, whether a right to access can be derived from the democracy principle. He points out that the latter comprises a principle of

³⁷⁰ G. Nolte, Die Herausforderung für das deutsche Recht auf Akteneinsicht durch europäisches Verwaltungsrecht, in: DÖV 1999, Heft 9, p. 363 (366)

³⁷¹ *Netherlands v. Council*, 1996, Case C- 58/94, ECR I- 2169pp

³⁷² G. Nolte, Die Herausforderung für das deutsche Recht auf Akteneinsicht durch europäisches Verwaltungsrecht, in: DÖV 1999, Heft 9, p. 363pp (366)

³⁷³ *Carvel v. Council*, Case T- 194/94, ECR II- 2765

³⁷⁴ *Worldwide Fund for Nature v. Commission*, Case T- 105/95, ECR II- 314

³⁷⁵ G. Nolte, Die Herausforderung für das deutsche Recht auf Akteneinsicht durch europäisches Verwaltungsrecht, in: DÖV 1999, Heft 9, p. 363 (366)

general publicity, which –even though not providing for a concrete scope of publicity of state activity- is open to development, i.e. it can obtain the status of concrete constitutional forms or rights created by other categories of law as well as by concrete deductions by the judiciary. The creation of subjective rights such as the principle of public access to official documents can thus be seen as a completion and further development of the principle of democracy though not being at its core like e.g. the right to vote.

He then considers a derivation from the fundamental right to freedom of information. He argues that the development towards an information-society entails a requirement for transparency of the administration in the sense of an elementary supply and –what is more- a requirement of interpreting the notion of “generally accessible sources of information” in the light of the status the principle of democracy has obtained in contemporary society. Whereas the elementary supply only refers to broader groups of persons and the guarantee of a general informational-infrastructure, he argues that with a view to the status of the principle of democracy, the notion of “generally accessible sources of information” can no longer solely be determined by what the administration in the particular case actually determines to be generally accessible. He points out that this would not conflict with the traditional status of fundamental rights as safeguards against state- interference, if understood as a safeguard against interference in the sense of state authorities withholding information. Besides, a right to access normally does not entail a diminution of state assets, since it can be granted without considerable expense. Nonetheless, he concludes that due to a lack of a schedule of fees, freedom to information can contemporarily ultimately be interpreted as a requirement on the part of the national legislator to implement a principle of public access to official documents.

Nolte's most interesting point, however, is the “right to a correct balancing” as a means of adding subjective effect to the principle of publicity. In order to safeguard the prohibition of a so- called “Popularklage” such a right had so far only been accepted in German law on behalf of an applicant possessing a legal personal interest in the access to documents. According to the German judiciary, a right to correct balancing requires that the objective principle of publicity also serves the benefit of the individual and equips him with the power to follow his interest in access to the information in question with the help of the law. *Nolte* argues that whether the interest of a member of the public in access can as such be qualified as a legal personal interest in a correctly balanced decision concerning his application has to be answered with a view to the respective level the principle of democracy has reached. He substantiates this by referring to the fact that the German judiciary earlier had applied the same method when developing the right of the individual to a correct balancing of his application in access to debates of the German Bundestag.

A legal personal interest comprises all interests which are worth to be protected after due consideration of the particular case. The interest does not

necessarily have to be of a legal nature, but can also be economical, social, or immaterial in character. Whereas the German courts have so far required the existence of a concrete legal relationship between the authority and the applicant at the time of application, *Nolte* argues that it could also be considered sufficient that the establishment of such a concrete legal relationship between the applicant and the authority seems possible for the future as a consequence to the granting of access. In this case, the political interest in participation would consequently have to be accepted as a legal personal interest in being granted access, because the withholding of information without reason cannot serve a legitimate aim and therefore according to the rules of proportionality is lacking a proper treatment of the individual in his role of an at least potential participant in public discourse.

Nolte admits that such a supplement to the principle of democracy is reaching the border of what the definition of the personal legal interest allows for, but concludes that it is on the other hand not going beyond. Subjective rights can also arise from the general legal relationship between state and citizen, without only becoming an instrument for general legal control and hence losing their nature of being a legal instrument for the enforcement of individual interests. The crucial point is that the individual's interest in a correct balancing when deciding about his application is referring to the gaining of a better reasoned formation of *his* public will and that no further legal consequences are effected, because the individual does not obtain a share in the *state-* formation of the *public* will.

Even though the issue is of relevance for fundamental rights if one interprets the freedom of information as to comprise a requirement on the part of the legislator to implement the principle of public access to official documents, anticipation by rules of procedure does only promise benefits for the applicant as long as the protection of conflicting rights is safeguarded by the actual balancing with risks for third persons. It has to be kept in mind that the right to a correct balancing of an application to access to documents is based on one of the most fundamental norms of the contemporary constitutions of the member states of the European Union which have actually attributed it with much farther reaching concrete forms and also on a central provision of the European Union and Community itself.

To my mind, three aspects have to be taken into account when analysing, whether this line of argumentation can be applied also to other national legal systems within the European Union:

First of all, it has to be considered that the persuasive effect of the implementation of the principle of public access to official documents within Community law and many national legal systems is not higher on Germany than on any other member state. Secondly, one of the foremost aims of the member states of the European Union, which all are also bound by the ECHR, is the struggle for obtaining common democratic standards, and all of their constitutions actually comprise the principle of democracy. And lastly, the standards for a right to correct balancing derive from the rule

of proportionality, which has been applied both by the European Court of Human Rights as well as the European Court of Justice.

Consequently, there seems to be no reason, why a right to correct balancing when deciding about an application to be granted access to official documents should not be considered existing in all member states of the European Union – be it explicitly or *de lege lata*.

What does such a right to correct balancing virtually imply, however? Does it entail any measurable effect for the individual?

It clearly has to be stated that a right to a correct balancing when deciding about an application only provides for a minimum standard of protection. It only guarantees that the interest of the individual to be granted access will not be categorized irrelevant. Even though conflicting private and public interests thus remain manifold, the right to a correct balancing leads to the effect that whether these conflicting interests are relevant and adequate in respect to a denial of access in the particular case becomes subject to judicial review. It has been objected that due to the fact that a refusal thus can be justified by any reason *sounding* plausible, this would lead to a rather fruitless amount of extra work and expenses both within the administration as well as the courts. Misuse can however be counter-measured by equipping authorities with a wide margin of appreciation, which may take into account also their proper functioning.

This wide margin of appreciation would not deprive the right to a correct balancing of its virtual effect. An administration which is obligated to justify its decisions will adjust its means of conduct. At least as far as concerns areas in which a refusal of an application to be granted access cannot be made plausible, state-activity will become transparent and less susceptible for lobbies.

It has to be kept in mind, however, that as soon as conflicting fundamental rights of others are concerned, the implementation of a right to access is with the legislator.

3.4.2 Limits concerning the Principle of Public Access to Official Documents by Community Law

Two dimensions have to be distinguished, when analysing limits concerning the principle of public access to official documents deriving from Community law. On the one hand it has to be analysed, in how far the member states are limited in granting access to official documents when carrying out Community law. And secondly, the question has to be answered, whether Community law implies limits as to the scope of the

granting of a principle of public access to official documents in the national legal system.

3.4.2.1 Limits binding on Member States concerning the granting of Public Access to Official Documents when carrying out Community Law

The European Court of Justice has interpreted Article 10 of the Treaty of the European Community as to stipulate that national authorities apply national law when carrying out their duty of enforcing Community law, if the latter including its general principles do not imply common standards concerning the particular case in question. Thus, standards deriving from secondary law have priority over national law. Besides, even in the case of absence of a particular provision of Community law, the application of national law is limited by Article 10 of the Treaty of the European Community: The so-called “efficiency requirement” deriving from this provision requires that modalities implied by national law may not lead to the effect that the attainment of provisions of Community law virtually becomes impossible³⁷⁶.

Concerning the granting of public access to official documents, this principle of Community law has not always been accepted by the member states, however.

Sweden for example argued that Community organs were lacking legal authority as to implement provisions concerning the national authorities’ handling of documents deriving from third member states or Community organs³⁷⁷. Consequently, they were of the opinion that just like documents received by Community organs from a member state become documents according to Article 255 of the Treaty of the European Community – which is confirmed by the 35th declaration to the Treaty of Amsterdam- this would *vice-versa* also apply to documents deriving from Community organs received by national authorities: According to Sweden, these documents become “documents of the member state” by means of an analogy to the abolishment of the authorship- rule, so that consequently *only* national law applies³⁷⁸.

The same attitude becomes obvious already within the unilateral Declaration announced by Sweden when joining the European Union in 1994, according to which “*Sweden welcomes the development now taking place in the European Union towards greater openness and transparency*” and in which it states that “*Open Government and, in particular, public access to official records as well as the constitutional protection afforded to those who give information to the media are and remain fundamental principles which form part of Sweden’s constitutional, political and cultural heritage.*”³⁷⁹ In

³⁷⁶ R. Streinz, *Europarecht*, p. 199

³⁷⁷ C. Haellmigk, *Schweden und das Europäische Gemeinschaftsrecht*, p. 169

³⁷⁸ C. Haellmigk, *Schweden und das Europäische Gemeinschaftsrecht*, p. 169

³⁷⁹ OJ C 241, p. 397

contrast to Finland, which adopted a similar declaration, Sweden did not explicitly point out its will to continue to apply the principle of public access to official documents in accordance with its rights and obligations as a member of the European Union³⁸⁰. The absence of a comparable rectification by Sweden was answered by the European Union stating that “*The present Member States of the European Union take note of the unilateral Declaration of Sweden concerning openness and transparency*” and that “*They take it for granted that, as a member of the European Union Sweden will fully comply with Community law in this respect*”³⁸¹. Thus, neither the wording of the Swedish declaration nor the answer of the member states of the European Union allows for an interpretation of the Swedish Declaration in the sense of a reservation according to Article 2 (1) (d) and Article 19 pp. of the Vienna Convention on the Law of Treaties³⁸². Sweden only addresses the status of the rights concerned as fundamental principles within their national heritage. It does not, however, purport to exclude or modify the legal effect of certain provisions of the Treaty of the European Union and that of the European Community. The response of the member states serves to ascertain this very interpretation and obviously does not allow for an interpretation as an acceptance in the sense of Article 20 (3) of the Vienna Convention on the Law of Treaties. The unilateral Declaration thus does not possess legal effect³⁸³.

Nevertheless, Sweden in the following denied any need for an adjustment of its national laws concerning the principle of public access to official documents. Whereas the government’s draft amendment of the constitution due to the joining of the European Union simply ignored the issue³⁸⁴, the constitutional committee only stated that according to its view, legal acts which were not within the competence of Community organs, could not gain a scope as to shatter the principles on which the Swedish legal system concerning freedom of the press and opinion as well concerning publicity is based³⁸⁵. For long, this led towards doubts as to the Swedish acceptance of the priority of Community law.

The question, whether Community law indeed has priority over national legal systems also as far as a granting of the principle of public access to official documents is concerned, was at issue also in *Svenska Journalistförbundet v. Council*³⁸⁶. In that case, the Swedish Ministry of Justice had disclosed documents originally deriving from the Council

³⁸⁰ Finland applied this very wording: OJ C 241 p. 397

³⁸¹ OJ C 241, p. 397

³⁸² text in I. Brownlie, Basic Documents in International Law, p. 388pp

³⁸³ Rather, the Declaration has to be seen in the context of a political signal before the plebiscite about Sweden joining the EU, ensuring that the loss of publicity in consequence of the transfer of legislative powers would be compensated by a soon implementation of the principle of public access to official documents in the sense of the Swedish model in Community law, C. Haellmigk, Schweden und das Europäische Gemeinschaftsrecht, p. 159, 160

³⁸⁴ Prop. 1993/94:114

³⁸⁵ KU 1993/94:21

³⁸⁶ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289

without consulting the latter for authorization. At the same time, the applicant had likewise addressed the Council itself with his request for access to the documents in question, which to a great part was denied. Before the Court of First Instance he then aimed at annulling this latter decision of the Council. The Council argued, that the release of the documents in question by the Swedish authorities to the applicant constituted a breach of Community law, since no decision had been taken to authorise such a disclosure. It further stated that it was contrary to the system of legal remedies provided for by Community law to take advantage of a breach of Community law and then to ask the Court to annul a decision whose effects have been circumvented as a consequence of such a breach. The Council concluded that the fact that the documents in question were brought into the public domain following an act contrary to Community law should preclude the applicant from bringing an action in this case³⁸⁷. The Swedish government replied that it did not share the Council's view that the release of the documents in Sweden constituted a breach of Community law, because there was no implied Community rule based on a common legal tradition, whereby only the author of a document may decide whether a document is released or not³⁸⁸. The Court of First Instance unfortunately did not refer to the issue of whether Sweden acted in breach with Community law. It held that a person who is refused access to a document has, by virtue of that very fact, established an interest in the annulment of the decision³⁸⁹ and that thus the fact that the requested documents were already in the public domain was irrelevant in connection with the admissibility of the application³⁹⁰.

This denial of explicitly accepting the principle of loyalty set forth by Article 10 of the Treaty of the European Community according to which a consultation of and authorisation by the Community organ from which the document originally derives is required, induced Community organs to implement a provision of that kind. Article 5 of Regulation 1049/2001 thus requires a consultation of the institution concerned by the member state before disclosure of documents originating from that institution in order to take a decision that does not jeopardise the attainment of the objectives of the Regulation³⁹¹.

Not least due to the fact that Regulation 1049/2001 thus generally abolished the existence of the authorship- rule as regards documents deriving from Community institutions, which otherwise would have shattered the Swedish principle of public access to official documents in its bottom pillars, also Sweden finally confirmed the self- evident priority of Community law. It stated in a government draft concerning amendments of the constitution in 2003 that national courts and authorities have to apply legal acts the European Community has enacted within the legislative competence

³⁸⁷ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, No. 56

³⁸⁸ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, No. 61

³⁸⁹ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, No. 67

³⁹⁰ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, No. 69

³⁹¹ OJ L 145/43 (45)

transferred onto it, even if the legal act in question e.g. is limiting a fundamental principle implied by the Swedish freedom of the press³⁹².

Thus, the limits concerning Article 255 of the Treaty of the European Community deriving from primary and secondary Community law, especially those incorporated by Regulation 1049/2001 but also those that had been established by the European Court of Justice concerning the granting of a right to access before the entering into force of that provision, have priority over the national legal systems. Hence, they have to be applied by member states when carrying out Community law, i.e. in the case of granting access to documents originating from Community institutions. To safeguard this, consultation of the Community organ in question is obligatory according to the Regulation.

In substance, these limits can be found in Article 4 of Regulation 1049/2001. The exceptions there listed as well as their respective standards of protection reflect what had earlier been established by the European Court of Justice.

Generally, two categories of exceptions can be distinguished, each providing for a different standard of protection:

According to Article 4 (1) of Regulation 1049/2001, the first category of exceptions is drafted in *mandatory terms* and provides that access to a document shall be refused where disclosure would undermine either the protection of a public interest, i.e. public security, defence, and military matters, international relations, as well as the financial, monetary or economic policy of the Community or a member state, or where disclosure would undermine the protection of privacy and the integrity of the individual. Accordingly, authorities are *obliged* to refuse access to documents which come within any of the exceptions in this category once the relevant circumstances are shown to exist³⁹³. Nevertheless, it has been held by the Court that the use of the verb “*would*” in the present conditional indicates, that the authority in question is obliged to consider in respect of each requested document, whether -in the light of the information available to it- disclosure is in fact likely to undermine one of the facets of public interest protected by this first category of exceptions. If that is the case, it is obliged to refuse access to the documents in question³⁹⁴.

By way of contrast, according to Article 4 (2) and (3) of Regulation 1049/2001, the wording of the second category is drafted in *enabling terms* and provides that the institutions shall refuse access to a document where disclosure would undermine the protection of commercial interests, court proceedings, and legal advice, the purpose of inspections, investigations,

³⁹² Prop. 2001/02:72, p. 35

³⁹³ Carvel and Guardian Newspapers v. Council, Case T- 194/94, ECR II – 2765, para. 64

³⁹⁴ Interporc In- und Export GmbH v. Commission, Case T- 124/96, ECR II- 231, para. 52; Van der Wal v. Commission, Case T- 83/96, para. 43; Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, para. 112

and audits, or the institution's decision-making process in case of only being drawn up for internal use *unless* there is an overriding public interest in disclosure. It follows that the authorities in question enjoy a margin of discretion which enables them -if need be- to refuse access to documents which touch upon its deliberations³⁹⁵. It must, nevertheless, exercise this discretion by striking a genuine balance between -on the one hand- the interest of the applicant in obtaining access to the documents, and -on the other hand- any interest of its own in maintaining the confidentiality of its deliberations³⁹⁶.

Due to their status as exceptions to the principle of public access to official documents provided for by Article 255 of the Treaty of the European Community both categories must be applied restrictively³⁹⁷.

According to Article 4 (6) of Regulation 1049/2001, partial release of the requested documents has to be provided, if only parts of the requested documents are covered by any of the exceptions³⁹⁸.

3.4.2.2 Limits concerning the Principle of Public Access to Official Documents within National Legal Systems deriving from Community Law

As mentioned before, the second question is whether Community law implies limits as to the granting of a principle of public access to official documents within the national legal systems, i.e. concerning access to data originating from and in possession of national authorities.

Due to the fact that both the fundamental rights existing in the European Community as general principles of law as well as Regulation 1049/2001 are only binding on national authorities when carrying out Community law, they do not have an impact on the granting of a right to access within the national legal systems.

In contrast, such effect could be caused by Directive 95/46/EC On the Protection of Individuals with regard to Personal Data and on the Free Movement of such Data, which was adopted by the European Parliament and the Council in 1995³⁹⁹. The creation of the European single market brought about a tremendous increase of an exchange of information across the borders. The highly differing standards of data-protection within the member states, however, endangered this free flow of information, which is of indispensable importance for a common market⁴⁰⁰. To meet this need as

³⁹⁵ Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, para. 113

³⁹⁶ Carvel and Guardian Newspapers v. Council, Case T- 194/94, ECR II- 2765, para. 64, 65; Svenska Journalistförbundet v. Council, Case T- 174/95, ECR II- 2289, para. 113

³⁹⁷ Worldwide Fund for Nature v. Commission, Case T- 105/95, ECR II- 314, para. 56

³⁹⁸ see also Hautala v. Council, Case T- 14/98

³⁹⁹ OJ L 281 p. 31pp

⁴⁰⁰ H.-H. Schild, Datenschutz in Europa, in: Europäische Zeitschrift für Wirtschaftsrecht, EuZW, Heft 24/ 1991, p. 745 (748)

well as the necessity of safeguarding the affected fundamental rights and freedoms of the citizens -notably the right to privacy- was the main objective for the adoption of Directive 95/56/EC, the so-called “Directive on Data- Protection”.

First of all, it has to be pointed out that according to Article 249 of the Treaty of the European Community, only regulations are directly applicable in all member states by their very nature, whereas directives generally need to be transposed into national laws in order to obtain legally binding force. The European Court of Justice nevertheless held that the fact that only Regulations are described as directly applicable does not mean that other binding acts are incapable of such effects⁴⁰¹. It argued that the effectiveness of Directives would be weakened if nationals of a state which has failed to implement the provisions set forth by a Directive could not invoke the latter in the courts and if the national courts could not take it into consideration as part of Community law⁴⁰². It held that after the time- limit for implementation has expired, the obligations implied by a Directive can generally become directly applicable⁴⁰³. Whether a Directive will in fact become directly effective depends on whether the obligation in question is unconditional and sufficiently clear and precise⁴⁰⁴. The latter is the case if the particular provision is as such justiciable, i.e. leaving no room for discretion as to the contents of implementation⁴⁰⁵.

The question therefore is: Does Directive 95/46/EC imply obligations of that kind? If so, this would effect its direct applicability and legal effect in member states having failed to implement it, as well as in those member states which have insufficiently implemented it into their national legal systems, i.e. in member states which have not kept within the limits of their discretion⁴⁰⁶.

An effect of this kind would lead to interesting results in member states tending towards attributing priority to the right of access in relation to the right to privacy. This is especially true to the Swedish national legal system, which has been criticised by some for intentionally implementing Directive 95/46/EC in breach with Community law⁴⁰⁷.

According to Article 1 (1) of Directive 95/46/EC, the latter aims at the protection of the right of natural persons to privacy with respect to the processing of personal data. According to the definition implied by Article 2 (b) of Directive 95/46/EC, processing of personal data also comprises its “disclosure by transmission, dissemination or otherwise making available”.

⁴⁰¹ Grad v. Finanzamt Traunstein („Leberpfennig“), Case 9/70, para. 5

⁴⁰² Pubblico Ministerio v. Ratti, Case C148/78, para.. 20, 21

⁴⁰³ Pubblico Ministerio v. Ratti, Case C 148/78, para. 22

⁴⁰⁴ Pubblico Ministerio v. Ratti, Case C 148/78, para. 23

⁴⁰⁵ Becker v. Finanzamt Münster- Innenstadt, Case 8/81, para. 29

⁴⁰⁶ Commission v. Kingdom of Belgium, Case 102/79

⁴⁰⁷ C. Haellmigk, Schweden und das Europäische Gemeinschaftsrecht, p. 164

Thus, the scope of the Directive on Data Protection comprises also the disclosure of personal data by means of granting public access.

Nevertheless, Sweden partly interpreted the Directive in a manner obviously opposed to its objectives⁴⁰⁸:

According to Article 7 (c) of Directive 95/46/EC, personal data may be processed only if processing is necessary for compliance with a legal obligation to which the controller is subject. Sweden argued that such a legal obligation existed with the Swedish authorities due to the principle of publicity granted by the constitution.

Article 8 (4) of Directive 96/46/EC envisages the possibility to lay down exemptions from the prohibition of processing personal data for reasons of substantial public interest. Sweden argued that the possibility of granting access on the basis of the Swedish principle of publicity was such a substantial public interest.

As regards the obligation on the part of the member states to safeguard that the controller provides the subject from which the personal data has been collected with the minimum of information set forth in Article 10 and 11 (1) of Directive 95/46/EC (e.g. information about the person of the recipient), Sweden refers to the fact that according to its principle of publicity, the applicant has a right to remain anonymous. Hence, information concerning the recipient of the data cannot be forwarded to the person concerned for constitutional reasons. Due to the long tradition of the publicity- principle in the Swedish constitution, however, it could be taken for granted that the public –and thus also the person concerned- are aware of the fact that disclosure may take place. Additional information thus is considered unnecessary.

And finally, also the Swedish interpretation of Article 13 (1) (g) which provides for exemptions and restrictions of the rights and obligations comprised among others by Articles 6 (1), 10 and 11 (1) when such a restriction constitutes a necessary measure to safeguard rights and freedoms of others, is in breach with Community law. Sweden argues that the right of access to documents comprised by the principle of publicity is such a right or freedom of another person.

Sweden justifies this interpretation of the Directive on Data Protection by reference to No. 72 of the preceding statements, which had been included on its initiative and which states that the Directive allows the principle of public access to official documents to be taken into account when implementing the principles set out in the Directive.

In order to prevent an interpretation of the Swedish Law on Personal Data (Personuppgiftslag) in conformity with the Directive on Data Protection,

⁴⁰⁸ For an overview of the following see: C. Haellmigk, Schweden und das Europäische Gemeinschaftsrecht, p. 164,165

Article 8 (1) of that Swedish law provides that “*The provisions of this law may not be applied in a manner, which might be limiting the obligation on part of national authorities to disclose personal data according to chapter 2 of the law of the freedom of the press.*”⁴⁰⁹.

It has been clearly held in literature that this latter provision openly is in breach with Community law, since it refuses to accept the supremacy of secondary Community law also in relation to Swedish constitutional law⁴¹⁰. Even the report of the legislative council in Sweden had clearly opposed to its implementation⁴¹¹.

Whereas No. 72 of the preceding statements to Directive 95/46/EC allows the principle of public access to official documents *to be taken into account* when implementing the principles set out in the Directive on Data Protection, Article 8 (1) of the Swedish Law on Personal Data prohibits any application, which would *limit* the principle of public access to official documents. Thus, the Swedish legislator did not restrict itself to implementing the Directive on Data Protection in a manner *taking into account* the principle of public access to official documents by *balancing* it with conflicting rights, but rather solved any conflict by a complete denial of a protection of the right to privacy to the benefit of a full granting of access rights. If this had been the objective of the drafters of the Directive on Data Protection, they would not have included the disclosure of personal data by transmission, dissemination or otherwise making available among the explicit scope of activity of the Directive. And the same argument applies concerning the rest of the above named Swedish interpretations of Directive 95/46/EC, which all aim at attributing full supremacy to the principle of public access to official documents in relation to the protection of personal data. This deprives the Directive of all *effet-utile* as far as the protection of personal data in relation to access rights is concerned.

If the obligations comprised by Directive 95/46/EC were found to be sufficiently clear and precise and hence possessing direct effect, this would thus have effect on the Swedish national legal system.

Unfortunately, the findings of the European Court of Justice itself seem to make such a categorization impossible.

In a preliminary ruling procedure on the conformity of the protection of personal data under Swedish national law with Directive 95/46/EC, the European Court of Justice held that the obligations comprised by the latter necessarily were comparably general in order to be applicable to many differing situations⁴¹². It found that its provisions are marked by flexibility, leaving it with the member states to provide for the details⁴¹³. The Court

⁴⁰⁹ SFS 1998:204

⁴¹⁰ Th. Bull, Constitutional Issues in Sweden, in. EPL 1999, p. 212

⁴¹¹ Attachment No. 7 to prop. 1997/98:44, p. 231pp

⁴¹² Lindqvist, Case C- 101/01, para. 83

⁴¹³ Lindqvist, Case C- 101/01, para. 83

argued that in implementing Directive 95/46/EC member states thus possess discretion as to the adequate balancing of the interests involved, i.e. the existence of a free flow of data between member states, the freedom of opinion, and the right to privacy, which have to be safeguarded by the national authorities and courts when applying the national provisions implementing Directive 95/46/EC⁴¹⁴.

As a matter of fact, it has to be concluded from this decision that the European Court of Justice does not consider the provisions of the Directive on Data Protection to be sufficiently clear and precise, leaving no room for discretion in implementation, as to create obligations possessing direct effect. This is at least true to the provisions entailing a balancing between the conflicting rights.

Concerning the more procedural provisions as well as those not entailing a balancing of different interests, the decision nevertheless leaves room for arguing that they do indeed evolve direct effect. Since no such effect so far has been confirmed by the European Court of Justice, such an argumentation remains speculative, however.

On the other hand, it has to be stressed that these findings of the Court at least verify an obligation on the part of the member states to safeguard the actual existence of such balancing within their national legal systems. Even though a failure to implement laws of that kind would not lead to directly applicable rights of that kind deriving from Directive 95/46/EC, it still has to be taken into account, whether a state would then at least be obliged to compensate individuals for damage suffered as a result of its failure. For this purpose, the European Court of Justice has developed the principle of state-liability. In cases where a state is faced with situations involving choices comparable to those made by Community institutions when they adopt measures pursuant to a Community policy, it will only be held liable if three conditions are met:

The rule of law infringed must intend to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties⁴¹⁵.

According to the so-called “decisive test” a breach is sufficiently serious if the institution concerned has manifestly and gravely exceeded the limits of its discretion⁴¹⁶. The factors to be taken into account in assessing this question include the clarity and precision of the rule breached, the measure of discretion left by that rule to national or Community authorities, the fact whether the infringement and the damage caused were intentional or

⁴¹⁴ Lindqvist, Case C- 101/01, para. 84, 85, 86, 90

⁴¹⁵ Brasserie du Pêcheur v. Germany, Case C- 46/93 and C- 48/93; Factortame, Case C- 213/89

⁴¹⁶ Brasserie du Pêcheur v. Germany, Case C- 46/93 and C- 48/93; Factortame, Case C- 213/89

voluntary, as well as whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law⁴¹⁷.

The existence of a right to compensation for a failure of a member state to implement provisions safeguarding an adequate balancing between the principle of public access to official documents and the right to privacy including a protection of personal data thus encounters two main problems: For the first, compensation only is possible if the person concerned actually suffers an injury directly linked to the described failure of the state. As far as the disclosure of personal data is concerned, it is hardly thinkable what injury this could cause. And secondly, due to the attested wide discretion provided by Directive 95/46/EC as to the implementation of safeguards for an adequate balancing, it seems impossible to contest a sufficiently serious breach in the sense that the member state has manifestly and gravely exceeded the limits of its discretion.

As far as the Swedish national legal system is concerned, the Swedish Secrecy Act (Sekretesslag) provides for a balancing of the interests in question. Since the concrete form of balancing is explicitly left to the member states by the above cited decision of the European Court of Justice, compensation on the basis of state liability thus is not imaginable.

To sum it up, in attributing such a high amount of discretion onto member states concerning the implementation of Directive 95/46/EC, the European Court of Justice has unfortunately made out a *carte blanche* for the degree of protection of the rights concerned. The only limit deriving from Directive 95/46/EC for the scope of the granting of a principle of public access to official documents within the national legal systems thus is the implementation of a provision entailing a balancing of the rights concerned on the whole. It does not, however, provide for a certain substance of that balancing.

⁴¹⁷ *Brasserie du Pêcheur v. Germany*, Case C- 46/93 and C- 48/93; *Factortame*, Case C-213/89

4 Conclusions

Having analysed the principle of public access to official documents from the perspective of international law, the following results can be summarized.

4.1 The Principle of Public Access to Official Documents as a Standard in International Law

4.1.1 Universal Instruments of International Law

Universal instruments of international law do not imply obligations on the part of states to provide for the granting of a principle of public access to official documents within national legal systems:

The principle of public access to official documents is not a standard implied by the Charter of the United Nations, the obligatory effect of which only provides for a minimum standard of human rights. This does not entail communication- freedoms. References to the principle of self- determination do not participate either in its binding effect.

The same applies to the UDHR. From the original intention to prevent indoctrinating state- propaganda in the future, it can be concluded that the freedom to seek information as provided for by Article 19 of the UDHR was meant to be a political right in the classical sense of freedom from state- interference. And so far, no general practice of a majority of states world- wide gives evidence of a changed understanding of the scope of the provision on a universal level. Considering that among the concept of democratic participation as stipulated in Article 21 (3) of the UDHR, only the right to elections has reached the status of an individual right, whereas the provision otherwise has to be categorized as an institutional guarantee, the principle of public access to official documents cannot be deduced from the concept of democracy applied by the UDHR, either.

And neither is the principle of public access to official documents a standard implied by the ICCPR. General agreement seems to exist as to the fact that the freedom to seek information as provided for under Article 19 (2) of the ICCPR only refers to generally accessible information. Whereas the socialist approach to human rights otherwise stressed the participatory dimension of human rights, there was a common liberal understanding of the freedom to seek information during the drafting of Article 19 of the ICCPR. Fearing political pluralism, also the socialist world objected to the

existence of positive obligations on the part of the states in the realm of the freedom to seek information. Nothing else can be concluded from the subsequent findings of the Human Rights Committee: When dealing with the freedom of press in *Gauthier*, no positive obligations were deduced. As regards implications by the right to take part in the conduct of public affairs provided for by Article 25 (a) of the ICCPR, the Human Rights Committee held that due to the explicit reference to the concept of a *representative* democracy, no individual rights as to *direct* participation are entailed by this provision. And even though the Human Rights Committee categorized the right of self-determination as provided for under common Article 1 of the two Covenants as not merely a political principle but a collective right the internal aspect of which entails continuous implications for democratic participation, the standards implied cannot go beyond the implications of the other rights granted by the ICCPR.

Considering this interpretation of the scope of the rights entailed by universal instruments of international human rights law as well as the fact that not even among democratic states consider universal international law to imply an obligation on their behalf to implement the principle of public access to official documents within their national legal systems, the principle is not a binding standard deriving from international customary law, either.

4.1.2 Regional Instruments of International Law binding on the Member States of the European Union

Whereas the principle of public access to documents plays an indeed minor role in the discussion of universal instruments of international law, it enjoys a much higher degree of attention within the realm of regional standards of international law binding on the member states of the European Union. As regards the ECHR, the particularity of an evolutive interpretation definitely contributed to this effect.

Despite the lack of an explicit reference of the ECHR to the freedom to *seek* information, both Convention organs as well as the majority of literature agree to the fact that the latter is implied by the freedom to *receive* information as provided for under Article 10 of the ECHR. Concerning the question, whether this also implies a principle of public access to official documents, the answers seem less homogeneous, however. In this respect, the Court confirmed a so-called “right to be adequately informed” as such beside the right to receive information. This implies an obligation to guarantee a system, in which it is possible to in fact inform oneself about essential questions. Still, the Court’s reasoning indicates clearly that the latter has to be understood in the sense of a constitutional obligation, the enforcement of which is left to parliament, and that it does not on the other hand give rise to corresponding individual rights. Besides, the vast majority of the cases dealt with the freedom to receive information only in the

context of some other person's right to freedom of expression, i.e. in respect to information of a generally accessible kind. The remaining cases referring to a right to receive information held by state- authorities leave room for speculation. The Commission and the Court refused a right to be granted access to state- held information with explicit reference to the particularities of the cases in question. On the one hand, this can be interpreted as proving the general existence of the principle of public access to official documents as a standard implied by the freedom to receive information as provided for by Article 10 of the ECHR. On the other hand, a refusal only on the basis of the particularities of the cases would have necessitated argumentation by the Convention organs of a much more detailed kind than actually provided for by the findings. Besides, up to now, all statements made by member states or Convention organs on conferences as well as in resolutions and declarations are too ambiguous as to give evidence to an evolutive interpretation of Article 10 of the ECHR in the sense of implying a principle of public access to official documents. And neither does Article 3 of the First Protocol to the Convention, which provides for free elections as being the basis for the composition of the legislature, give rise to an individual right of that kind: Even though the Court confirmed the status of the right entailed as being of subjective nature, it is restricted in scope and does not imply rights to direct participation in the legislative process. Consequently, no direct participation in the aftermath of administrative actions is entailed, either.

Apart from the field of environmental information, Community Law of the EU does not imply an obligation on the part of the member states to grant a principle of public access to official documents. As regards Community organs, however, the principle of public access to official documents is provided for by Article 255 of the Treaty of the European Community. This provision touches upon information held by national authorities in two ways: On the one hand, the principle of public access to official documents applies to national authorities when they carry out Community Law, and on the other hand, it makes information forwarded to Community organs by national authorities accessible for individuals. Besides, considering the persuasive effect of Community law on the national legal systems, it can be argued that a right to correct balancing of the applicant's interest in public access to official documents with the conflicting rights of the case in question can already today *de lege lata* be deduced within the national legal systems of the EU. Even though only providing for a minimum standard of protection, this right to a correct balancing would submit the question, whether denying or granting access in the particular case meets the requirements of proportionality, subject to judicial review.

4.2 Limits concerning the Principle of Public Access to Official Documents deriving from International Law

4.2.1 Universal Instruments of International Law

The granting of the principle of public access to official documents within national legal systems is not limited by the UN- Charter, since none of the conflicting rights is comprised by the legally binding minimum standard of human rights protection it provides.

The UDHR sets forth the right to privacy in Article 12. The fact that only the protection of honour and reputation are explicitly referred to *beside* the right to privacy by this provision suggests that no other aspects of the sphere of self- presentation -including the protection of personal data- are comprised by its scope. And even if that was the case, it has to be concluded from the fact that only *arbitrary* interference is prohibited by Article 12 of the UDHR that interference only is considered in breach with the latter if lacking *any* legal basis and justification. The implementation of the principle of public access to official documents by national legal systems thus is not violating Article 12 of the UDHR. Besides, the UDHR does not imply limits on the granting of the principle of public access to official documents for the protection of trade and business secrets: Even though Article 17 of the UDHR provides for the right to property, no consensus as to its binding contents exists: Apart from the obligation to grant for the existence of private property on the whole, the definition of the scope of the concrete rights entailed is left to the states. Lastly, the UDHR does not imply limits for the protection of conflicting interests from the public sphere: Neither do these interests possess a status as individual rights, nor does the UDHR contain constitutional standards like e.g. that of a separation of powers, which then could encompass a protection of public interests as a maxim as such.

As regards the ICCPR, Article 17 (1) provides for the right to privacy and implies a protection of that kind of private personal data which is belonging to the sphere of intimacy. This comprises confidential personal data disclosed e.g. to physicians or priests as well data from the intimacy sphere the disclosure of which would be embarrassing for the person in question. Even as far as this kind of data is concerned, interference only is in breach with Article 17 (1) of the ICCPR, if committed arbitrarily or unlawfully or if the laws in question leave room for unreasonably broad discretion, i.e. if they do not meet the rules of proportionality in relation to the legitimate purposes of national security, public safety, public order, public health or morals and the rights and freedoms of others. On the contrary, the ICCPR does not entail limits for the protection of trade- and business secrets: The latter do not come under the scope of the right to privacy, and a right to

property is not provided for under the ICCPR. The protection of public interests is only provided for by the ICCPR in connection with the individual rights granted and not as a standard as such with a binding status of its own.

4.2.2 Regional Instruments of International Law binding on the Member States of the European Union

As regards limits concerning the granting of a principle of public access to official documents for the protection of privacy of a third party, the European Court of Human Rights confirmed that with a view to the Council of Europe's Data Protection Convention, the protection of all personal data falls within the application of the right to respect for private life as provided for under Article 8 (1) of the ECHR. According to Article 8 (2) of the ECHR, a the granting of public access to official documents thus necessitates respective legislation as well as the pursuance of a legitimate aim for the achievement of which its granting can be considered necessary in a democratic society. Even though the Court has attributed the member states a wide margin of appreciation when meeting these requirements, it has not considered the existence of the constitutional principle of public access to official documents in Swedish law as a right justifying interference with the right to privacy as such. Rather, according to the findings of the Court, additional legitimate aims are needed for this purpose. Clearly, this strengthens the right to privacy of third persons in relation to the interest of another person in being granted access without denying the legitimate aims adhered by the latter. As regards the protection of trade and business secrets, they do not meet the requirements needed to come under the scope of the right to property as provided for by Article 1 of Protocol No. 1 to the ECHR. Concerning conflicting interests from the public sphere, the ECHR does not imply limits to be adhered to when implementing the principle of public access to official documents in national law, because none of these interests can be categorized as individual rights. Still, the Court has explicitly confirmed the possibility of balancing these interests of the community against a right to access to information deriving from the right to respect for privacy. Considering that access- rights based on the right to respect for privacy are based on a special legal interest of the applicant in being granted access, it has to be concluded that interference concerning the principle of public access to official documents can be all the more justified by these interests.

As regards the realm of Community law, limits concerning Article 255 of the Treaty of the European Community are also binding on the member states when carrying out Community law. Thus, limits deriving from primary and secondary Community law, i.e. limits incorporated by Regulation 1049/2001 as well as limits established by the European Court of Justice before the entering into force of Regulation 1049/2001, have priority

over national legal systems. This priority is safeguarded by an obligation on the part of national authorities to consult the Community organ in question before disclosing documents. As regards limits concerning the granting of the principle of public access to official documents within national legal systems deriving from Community law, however, the so-called Directive on Data- Protection (Directive 95/46/EC) has to be mentioned. Unfortunately, the European Court of Justice held that the provisions contained by the latter are marked by flexibility, leaving it with the member states to provide for the details as to the concrete balancing of the interests involved. Thus, at least as far as the provisions entailing a balancing between conflicting rights are concerned, the Directive on Data Protection does not imply direct effect. Likewise, this attested wide discretion hinders the existence of individual compensation on the basis of the rules of state- liability. The only limit implied by Community law concerning the granting of a principle of public access to official documents within the national legal systems of the member states therefore is the implementation of provisions entailing a balancing of the interests concerned on the whole. No implications as to the substance of that balancing can be verified in Community law, however.

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