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The right to freedom of information: ensuring access to historical documents

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Ms Klotilda BUSHKA, Albania, Socialists, Democrats and Greens Group

Summary

The Parliamentary Assembly should unequivocally recognise the right of access to information as a universal human right, particularly when it comes to State-held information. As a general rule, all information held by public authorities should be freely accessible. Member States should uphold the principles that govern access to information and apply them in the context of historical documents. These include "maximum disclosure", the proactive publication of information, a strict guidance on the application of legitimate exceptions, and a reasonable cost of accessing information. Information about serious violations of human rights or crimes occurred in the past under previous regimes should not be withheld on national security grounds.

Access to historical documents should be granted regardless of the reasons for seeking such information. NGOs, journalists, academic researchers, and authors enjoy a high level of protection if they disseminate information of public interest. Denial of access to historical documents should be duly motivated, appealable before an independent national authority and subject to judicial review.

The Assembly should call on member States who have neither signed nor ratified the Council of Europe Convention on Access to Official Documents ("Tromsø Convention") to do so as rapidly as possible. Member States should support civil society groups working on preserving historical memory. Historical documents and archives should be kept in their countries of origin; in cases where they are held in other countries, States should negotiate their return in good faith.

1. Reference to committee: Doc. 15523, Reference 4657 of 20 June 2022.

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A. Draft resolution[2]

1. The Parliamentary Assembly highlights the importance of the principle of transparency, including access to historical information held by public authorities, to foster a common historical heritage and a collective memory of the past, to support reconciliation and rehabilitation processes, to facilitate research and academic activities, as well as to improve public confidence in State institutions, good governance and accountability.

2. The Assembly unequivocally recognises the right of access to information as a universal human right, particularly when it comes to State-held information. As a general rule, all information held by public authorities should be freely accessible.

3. Recalling its Resolution 1954 (2013) "National security and access to information", the Assembly considers that only legitimate, well-defined limitations to the right of access to information may be held to be valid grounds for preventing public access to information. For example, genuine national security interests and appropriate protection of individuals' privacy may be valid grounds for withholding information held by public authorities. Full disclosure must be the rule and limitations for legitimate reasons must be the exception. Exceptions shall be interpreted restrictively; they must be provided for by law, pursue a legitimate purpose and be necessary in a democratic society. Exceptions based on national security and privacy grounds may not be legitimate or necessary after a certain period of time and in any event cannot be applied indefinitely. The burden of demonstrating the legitimacy of withholding information rests on the relevant public authority.

4. Information about serious violations of human rights or humanitarian law and crimes committed by State agents should not be withheld on national security grounds in any circumstances, especially when such violations or crimes occurred in the past under previous authoritarian regimes. In such cases, the right to historical truth of society at large should always prevail.

5. The Assembly recalls that the right of access to State-held information is in constant evolution at the international level. This means that non-compliance with developing jurisprudence of the European Court of Human Rights, the United Nations Human Rights Committee and other human rights bodies may lead to findings of violation of the right to freedom of information and expression. In this respect, the Assembly notes that the Court has developed its case law to further recognise the right of access to State-held information as part of the right to freedom of expression, in particular the freedom to receive and impart information, guaranteed by Article 10 of the European Convention on Human Rights (ETS No. 5). This recognition is based on the circumstantial factors of each case, including the purpose of the request, the nature of the information sought, the role of the person requesting the information and whether the information is readily available to the State. NGOs, journalists, academic researchers and authors enjoy a high level of protection if they disseminate information of public interest.

6. The Assembly calls on member States to uphold the main principles that govern access to information, and to apply them in the context of historical documents. These are: maximum disclosure; proactive publication of information; strict guidance on exceptions; reasonable cost of accessing information.

7. Member States should actively develop policies that advance everyone's right to freedom of information. The public should be duly informed of any changes in the legal framework on access to information or in the archival system, especially those individuals and groups who may be affected by changes. Any changes in access to historical information law and policy should only be approved after extensive consultation with historians, researchers, NGOs and civil society organisations that rely on accessing such information.

8. A request for an explanation of the reasons for asking for specific information, or for an outline of research topics may be useful in identifying the relevant documents to be furnished. However, the provision of detailed reasons should not be a requirement for accessing information that is clearly in the public interest, such as historical documents. Access to historical documents should be granted regardless of the reasons for seeking such information.

9. Specifying reasons for requests for access to classified historical documents may also help the competent authorities in applying limitations of access restrictively, as required. Any denial of access to historical documents should be duly motivated, open to appeal before an independent national authority and ultimately subject to judicial review.

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2. Draft resolution unanimously adopted, by the committee on 9 October 2023.

10. Access to historical documents for researchers, historians, NGOs and all those that obtain them with a view to disseminating them in the public interest should be expeditious and not overly burdensome or involve complicated bureaucratic procedures.

11. The Assembly calls on all member States of the Council of Europe which have not yet signed or ratified the Council of Europe Convention on Access to Official Documents (CETS No. 205, "Tromsø Convention") to do so as rapidly as possible. This includes those whose legislation already complies with the standards therein, as such ratification would strengthen international safeguards for the right of access to State-held information. The Assembly also supports the activities of the Council of Europe Access Info Group in securing signatures and ratifications of the Tromsø Convention through the promotion of best practices of member States regarding laws on access to information, including archives and historical documents. Recalling its Resolution 1954 (2013) "National security and access to information", the Assembly invites member States to consider introducing specific improvements to the Tromsø Convention in the spirit of the "Global Principles on National Security and the Right to Information" ("Tshwane Principles") and other international legal developments on the right of access to information.

12. The Assembly underlines the importance of open archives and public information for transparency, democracy, and the rule of law. It calls on member States to demonstrate the political will to allow the widest possible access to historical documents.

13. Historical documents and archives should be kept in their countries of origin. In cases where they are held in other countries due to State succession and border changes, they should be returned to mitigate the difficulties of physical distance which can hinder the establishment of historical truth. The Assembly calls on member States to negotiate the return of their archives in good faith. Meanwhile, governments and civil society should foster international collaboration in opening archives for public inspection, irrespective of their location.

14. The Assembly further underlines the importance of civil society groups working to preserve historical memory and urges member States to support, including financially, this work.

15. Individuals and civil society organisations working on researching and preserving historical memory must moreover be protected from harassment or persecution. In this respect, the Assembly strongly condemns the dissolution, in the Russian Federation, of "Memorial" and the persecution of numerous members engaged in documenting the crimes committed during the Soviet era and beyond.

16. The Assembly underlines the importance of co-operation with civil society and between States in order to achieve transparency and ensure that different perspectives are taken into account.

17. The Assembly finally urges member States to digitalise their archives and allow as many materials as possible to be accessible online.

B. Draft recommendation[3]

1. The Assembly refers to its Resolution …(2024) "The right to freedom of information: ensuring access to historical documents" and invites the Committee of Ministers to:

1.1. adopt a recommendation to member States of the Council of Europe in order to advance access to historical documents specifically. The recommendation should focus on:

1.1.1. the general principles that underpin access to information and how they affect historical documents in law and practice;

1.1.2. the conditions of access to historical documents by historians, researchers, academics, NGOs, and the public at large;

1.1.3. request to access historical documents procedures and their overall accessibility in practice;

1.1.4. oversight and review mechanisms, and remedies available in case of lack of disclosure of historical documents by State authorities;

1.1.5. the need to support memory projects and initiatives;

1.1.6. the need for greater international collaboration in sharing historical information;

1.2. promote the signature and ratification of the Council of Europe Convention on Access to Official Documents (CETS No. 205) in order to advance access to documents held by public authorities more generally.

3. Draft recommendation unanimously adopted, by the committee on 9 October 2023.

C. Explanatory memorandum by Ms Klotilda Bushka, rapporteur

1. Introduction

1. The present report is based on a motion for a resolution[4] which notes that several Council of Europe member States justify restricting access to historical documents from civil society and researchers by arguments based on national security and the need to protect the right to privacy of individuals concerned. But the right of access to documents may fall within the scope of what is protected by the right to freedom of expression under Article 10 of the European Convention for Human Rights (ETS No. 5). The motion for a resolution recalls that in June 2013, a broad assembly of experts from international organisations, civil society and State institutions adopted, in Tshwane, South Africa, the "Global Principles on National Security and the Right to Information" designed to give guidance to legislators and relevant officials with a view to reaching an appropriate balance between public interests both in national security and in access to information. The Parliamentary Assembly endorsed the "Tshwane Principles" in its Resolution 1954 (2013) and Recommendation 2024 (2013) "National security and access to information". As healing from tragic historical events may require full transparency and open discussion based on well-documented facts allowing to learn from past mistakes, the motion calls for the examination of the situation in Europe with regard to access to historical documents with a view to preparing relevant practical recommendations.

2. The committee appointed me as rapporteur on 10 October 2022. During the preparation of the report, I attended a seminar on "access to historical documents" organised by the Albanian Parliament in Tirana on 31 March 2023. Several sessions took place, triggering discussions relevant to this report, with Council of Europe member States' parliamentarians such as Mr Taulant Balla, Mr Enkelejd Alibeaj, Ms Blerina Gjylameti, and Ms Jorida Tabaku from Albania, Mr Zbigniew Girzynski from Poland, Mr Boriss Cilevičs, former Chairperson of the Committee on Legal Affairs and Human Rights, and Mr Andrejs Jurdins from Latvia. The Speaker of the Albanian Parliament, Ms Lindita Nikolla, the Vice Speaker of the Albanian Parliament, Ms Ermonela Felaj, and the Head of the Parliamentary Studies Institute in the Albanian Parliament, Mr Elvin Gjevori, also participated. Mr Niels Schwiderski, Head the Office of the Commissioner for the Victims of the East German Communist (SED) Dictatorship at the German Bundestag presented the German perspective. I also received input from authorities and experts on the topic of access to information such as Ms Elvana Thaci, Secretary to the Council of Europe Access Info Group, Mr Flynn Heckert, from the Council of Europe Observatory on History Teaching in Europe, and Ms Gentiana Sula, Chair of the Authority for Access into ex-Sigurimi Records, the political police which operated during the communist dictatorship in Albania. Human right activists, Mr Eldar Zeynalov from Azerbaijan and Ms Erinda Bllaca from Albania, presented their perspective for improving the right of access to information for civil society.

3. At its meeting in Larnaca (Cyprus) on 23 May 2023, the committee held a hearing with the participation of Ms Paige Morrow, Senior Legal Advisor (External) to the UN Special Rapporteur for Freedom of Opinion and Expression, Ms Gentiana Sula, Chair of the Authority for Access into ex-Sigurimi Records, and Mr Denis Shedov, a human rights activist and lawyer who was active at the Russian NGO Memorial, before its liquidation. The committee also held an exchange of views with Mr Boriss Cilevičs, former member of the Assembly and chair of this committee, on 20 June 2023.

4. Article 10 of the European Convention on Human Rights protects freedom of expression, including the freedom to receive and impart information, which may under some circumstances encompass individuals' right to access information. State recognition of the right to access information held by public authorities has dramatically grown, particularly since the fall of the Berlin wall. This is because there has been a wide understanding that it is in the public interest to make public as much information held by institutions as possible – for the sake of transparency, public participation and trust in State activities, thus favouring democratic processes.

5. In this explanatory memorandum I will firstly outline the context and issues at stake when addressing this topic. Secondly, I will highlight the Council of Europe's action in favour of the right of access to information by the Parliamentary Assembly, the European Court of Human Rights, the Convention on Access to Official Documents (CETS No. 205, Tromsø Convention), and the Observatory on History teaching in Europe. Thirdly, I will outline the legal framework and actions of several member States with a view to secure a balance between certain protected interests and the right to access information. Fourthly, I will point out some current challenges in ensuring access to historical documents, and some reflections on how to best tackle them.

4. Doc. 15523.

2. The issues at stake

6. The right to access information may be protected under Article 10 of the European Convention on Human Rights, which guarantees the right to freedom of expression and "the right to… receive and impart information…without interference by public authority". A global commitment to securing access to information is demonstrated through UN Sustainable Development Goal 16 on Peace, Justice and Strong Institutions, which targets public access to information and protection of fundamental freedoms. Its achievement is measured in terms of the number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.[5] As shown by the fact that 138 States worldwide have right to information laws today,[6] compared to 13 in 1989 at the time of the fall of the Berlin Wall,[7] there is an overall consensus that the right to access information is fundamental to the enjoyment of one's liberties, democracy and the rule of law. This is because "by enabling public scrutiny of State action, [access to information] not only safeguards against abuse by public officials but also permits the public to play a role in determining policies of the State", in turn leading to stronger protection of national security interests, democratic participation and sound policy formulation.[8]

7. This is particularly the case in States that have a history of authoritarianism characterised by censorship and State control of media and information, as well as heavy surveillance. For the purpose of reconciliation, justice, and healing from repression, it is important to build an informed collective memory and to remedy misinformation. Past, present, and future generations are owed the truth: survivors must feel heard and be rehabilitated and society must understand their history in order to learn from mistakes of the past.

8. There are three main reasons that support the provision of access to historical documents collected during authoritarian rule.

– Firstly, for justice. Survivors of totalitarian regimes and their families have a right to know who exactly was involved in their repression in order to allow for their rehabilitation and, ultimately, for reconciliation; and appropriate legal action must be taken against those who may be criminally responsible, to avoid impunity. Access to documents is important particularly for survivors to feel believed, and for anyone to access the truth which was warped during totalitarianism.

– Secondly, to build an informed historical record. The accurate teaching of history warrants the full disclosure of information, which is fundamental for shaping one's own perception of their identity, political consciousness and democratic citizenship. Historical research and scholarship should be enabled and promoted, in order to allow the dissemination of historical facts to the public at large.

– Thirdly, to grow transparency, public trust, and accountability of State institutions. Publishing secret historical documents allows society to understand how decisions were made in the past. Those documents which may disclose the identities of persons involved with espionage allow for greater public knowledge of who oversees matters today, uncovering uncomfortable connections. This would firmly establish that the State does not protect or otherwise approve of those that were responsible for oppression, that reconciliation is a priority and that definite, lasting change has occurred.

9. To establish a relationship between Article 10 of the European Convention on Human Rights and the right to access information, it must firstly be considered whether Article 10 is applicable and whether the denial of information constitutes an interference with the individual's exercise of his or her right to freedom of expression. Secondly, it must be determined whether such interference is justified. The right to access information is not absolute and may be restricted under Article 10.2 of the Convention. States often restrict this right by appealing to justifications of national security or protection of the reputation and privacy of others. Yet, any restrictions must be provided by law, necessary in a democratic society and proportionate. Recognising the negative connotations associated with some historical information, such as the collaboration of individuals with secret surveillance authorities, some of the concerns that States may have in granting full access to information relate to the accuracy of the information, and the wish to avoid animosity or even violence in society. Making names of possible perpetrators of human rights violations publicly available may create conflict, division and animosity: finding out that neighbours, family members or friends collaborated in persecution may contribute to polarisation and turn into revenge against perpetrators. Furthermore, the

5. United Nations Sustainable Development Goals (2015), Indicator 16.10.2.
6. Access Info and Centre for Law and Democracy, By Country | Rti Rating (rti-rating.org), 126 States have "comprehensive" right to information laws, according to Article 19, "Infographic: Progress on the right to information around the world" – ARTICLE 19.
7. Open Society Justice Initiative, "Understanding the Global Principles on National Security and the Right to Information" Briefing Paper, 2013.
8. Ibid.

information may not be accurate or complete. For example, the fact that someone appears in secret police files as an informer does not necessarily establish their responsibility. Someone may be listed but may have acted under duress or played a negligible role, yet their involvement will be noted and this will negatively affect them. The mere existence of a card with someone's name in these records does not prove their collaboration. Some information might also have been falsified, destroyed, or transported abroad.[9] It is therefore difficult to establish an accurate picture of events and responsibilities only from historical records. However, I believe that greater overall transparency is achieved when the files of the former secret services are fully open and when the legitimate limitations are applied exceptionally. Maximum disclosure in this context reduces misinformation while it increases transparency. It warns off individuals from spreading information or rumours on someone's involvement with former secret services that could be incendiary, harmful, and false.

10. Nevertheless, in my view, the rule on the right to access information should be "maximum disclosure", and its legitimate limitations the exception.[10] The burden of proof to justify the limitations rests on States, which must explain any restrictions following strict tests of necessity and proportionality, especially when the information sought is of such high public interest as access to historical documents.[11]

3. Developments at the Council of Europe

3.1. Cases and situations already examined by the Parliamentary Assembly

11. The Assembly has previously examined numerous issues of relevance to the present report, including the following, presented in chronological order.

12. In her 2009 report on "State of human rights in Europe: the need to eradicate impunity", Ms Herta Däubler-Gmelin (Germany, SOC) alluded to the need to place reasonable limits on the invocation of national security as grounds to restrict access to information.[12]

13. In 2011, Mr Dick Marty (Switzerland, ALDE), rapporteur on "Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations", pointed out the crucial importance of judicial and parliamentary scrutiny of secret services and established the importance of granting access to State-held information, even when it is protected by national security limitations, in order to create more effective accountability systems and enable the development of justice and democratic processes.[13]

14. Mr Arcado Diaz Tejera (Spain, SOC) presented a report on "National security and access to information" in 2013 where he outlined many issues of relevance to this report. The resolution welcomed the adoption in June 2013 of the "Global Principles on National Security and the Right to Information" (Tshwane Principles) as a guide for legislators and relevant officials worldwide to reach an appropriate balance between public interests both in national security and in access to information. It supported the "Tshwane Principles" and called on the competent authorities of all member States of the Council of Europe to take them into account in modernising their legislation and practice concerning access to information.[14] The report stressed a number of particularly important principles, including the need for robust oversight over the activities of secret services and the availability of a "public interest override" as a safeguard against overly broad exceptions from the general rule of free accessibility of all information held by public authorities, reminding all member States that the starting point or default setting of any access to information approach is maximum disclosure. Information concerning human rights violations and particularly the responsibility of State agents who have committed serious human rights violations such as murder, enforced disappearance, torture or abduction, does not deserve to be protected as secret. The Assembly found that the Court's approach to the right of access to information was too restrictive and gave States too wide a margin of appreciation. It also noted that the Tromsø Convention did not go far enough in recognising access to official documents as the rule and the refusal as the exception. Yet, vigorously promoting the ratification of the Tromsø Convention remained the most realistic way for the Assembly to contribute to any real progress on the issue. Resolution 1954 (2013) strongly recommended States to follow the Tshwane principles in drafting or amending their right to information laws accordingly.

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9. As was the case in Latvia in the 1990s, where some information held in KGB records was transported to Russia.
10. See more generally on freedom of expression, General Comment 34, (2011), CCPR/C/GC/34, paragraph 21.
11. Reiterated throughout Assembly Doc. 13293.
12. See Doc. 11934 and Resolution 1675 (2009).
13. See Doc. 12714 and Resolution 1838 (2011).
14. Resolution 1954 (2013); see also Doc. 13293.

15. The legal arguments and explanations that define the Assembly's perspective on the right to access information, as found in the 2013 report and resolution, accurately represent my perspective on the issue today. To this end, the scope of this and the following sections of the report will be limited to updating the legal developments on the right to access information since 2013 at European and international levels, as well as assessing in a preliminary way the approach of some member States in providing public access to historical documents and striking a balance between freedom of information and protected legitimate interests.

16. Other committees of the Assembly, most notably the Committee on Culture, Science and Education, also work on the issue of access to information and maintain the stance that communication policies must be open, transparent and pluralistic, and must build on unhindered access to information of public interest and the responsibility of those disseminating information to society. Online communication is part of the everyday flow of information and should be used as a tool to ensure public access to such information.[15]

3.2. The Council of Europe Convention on Access to Official Documents

17. The Tromsø Convention remains the only international instrument to guarantee a general right to access information. It applies in principle without requiring any public interest and without discrimination, regardless of the status and standing of the requester, the nature of the information sought, and the purpose of seeking that information. Persons seeking publicly held information need not give any reasons.[16]

18. The 2013 report underlined the narrow scope of the Tromsø Convention and recalled the 2008 Assembly's request to the Committee of Ministers to reopen negotiations in order to broaden the definition of "public authorities", to include a time limit on the handling of requests and to clarify and strengthen the review process in case of rejection of information requests within the Tromsø Convention.[17] Nonetheless, it recommended ratification by as many States as possible as a first step, before negotiations could be reopened, taking advantage of the Convention's implementation and follow-up system and its mechanism for proposing amendments.

19. The Convention entered into force on 1 December 2020 after it reached its first ten signatures. Today it counts 15 parties (Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Hungary, Iceland, Lithuania, the Republic of Moldova, Montenegro, Norway, Slovenia, Spain, Sweden and Ukraine) of which seven are EU member States. Compared to the 8 signatures and 6 ratifications counted in 2013, there has been an increase by one signature (San Marino) and nine ratifications (Albania, Armenia, Estonia, Finland, Iceland, Republic of Moldova, Slovenia, Spain, Ukraine). Hence, there has been an increase in membership to the Convention, particularly by post-communist States. Nonetheless, it is disappointing to see that several central and western European States have not yet signed the Convention; that some have signed it in 2009 shortly after its inception but have not yet ratified it; and that some of those States have a history of authoritarianism, such as Germany and Italy. Looking at the ratification and signature dates, it is difficult to say whether the Assembly played any relevant part in the promotion of the Convention. This also shows that States may prefer to approach the right to access to information domestically rather than through international instruments.

20. In the context of the preparation of this report, I asked member States (through their national parliaments) what their reasons for not having signed and/or ratified the Tromsø Convention were.[18] Unfortunately, many member States did not provide any reasons, and as a result I am not able to draw any conclusions regarding the effectiveness of this Council of Europe convention. Nevertheless, the main responses outlined reasons of conflict with constitutional provisions or pre-existing legal standards. In **Austria**, the Tromsø Convention is in conflict with constitutional provisions on official secrecy. In the case of **France**, the Commission on Access to Administrative Documents (CADA) noted in 2021 that ratification of the Tromsø Convention would profoundly modify the philosophy of the right of access to information. This is because the Tromsø Convention's standard test assessing public interest in accessing information against legitimate limitations is "proportionality" and the test under French law is different.[19] **Cyprus** noted that there were significant economic costs and regretted that certain provisions of the Convention did not allow opting out. **Luxembourg**'s progress is promising. In 2022, the Ministry of State conducted a survey on the application of the law on transparent administration. After analysing the results, the Ministry met with the Luxembourgian

15. Resolution 2454 (2022) "The control of online communication: a threat to media pluralism, freedom of information and human dignity".
16. CETS 205, art. 4(1).
17. Assembly Opinion 270 (2008).
18. Questionnaire on Access to historical document, request No. 5493 of 15 June 2023, European Centre for Parliamentary Research and Documentation (ECPRD).
19. Commission d'accès aux documents administratives (CADA), «Rapport d'Activité 2021», p. 67.

Commission on Access to Documents and the Press Council. I am pleased to have received information that the Ministry is working on a draft legislation to make access to information laws more effective, taking into account any adjustments needed to be made to sign and ratify the Tromsø Convention in the near future. According to the **Polish** Ministry of Administration and Digitalisation, since 2015, the standards for access to official documents provided for in Polish law[20] guarantee the implementation of the civil right to information to a wider extent than provided by the Tromsø Convention. Similarly, according to a statement of the **German** Federal Government, the Act on Freedom of Information of 2006 already fulfils the general requirements of the Tromsø Convention, which justified abstaining from signing the Convention. The Conference of Commissioners on the Freedom of Information of the Federal and Länder governments (Konferenz der Informationsfreiheitsbeaufragten aus Bund und Ländern (IFK)) has nonetheless invited the Federal Government to sign and ratify the Tromsø Convention. The **Portuguese** Commission on Access to Administrative Documents, underlined the clarity and transparency of the existing laws that regulate access to information in Portugal. It nevertheless found that Portugal should consider joining the Tromsø Convention as it could usefully strengthen the general climate in favour of access and counterbalance opposing currents.[21]

21. It is also undesirable that member States which have signed but not ratified the Tromsø Convention have not provided reasons for their delay in ratification. By signing, member States undertook to be bound by the Tromsø Convention.They may of course take a reasonable amount of time to make the necessary adjustments to their legal order. But **Belgium**, **Georgia**, **North Macedonia** and **Serbia** signed the Tromsø Convention in 2009 and have not ratified it to this day. In their answers to the questionnaire, these countries did not explain the reasons for this delay of 14 years. This makes it difficult for the Assembly and the Council of Europe as a whole to suggest ways and means to support this process.

22. The Convention sets out 11 main grounds for possible limitations on the right of access to information,[22] which must be set out in law. Some of these may be applied absolutely, meaning that the State need not evaluate the existence of an overriding public interest in disclosure. Others can be applied after their evaluation by the institution following a “harm test” and a “public interest test”. Firstly, it must be assessed whether the disclosure of information harms the protected interest in actual fact and secondly whether the harm can be justified by the strong public interest in disclosing the information. Factors such as public curiosity, embarrassment for the government or loss of confidence in it, the technical character of the information, etc. may be irrelevant to the necessity of disclosing information. Hence, States may protect their national security interests or privacy rights of individuals, yet these criteria must not be applied arbitrarily. The Council of Europe Access Info Group is one of the two bodies established by the Convention responsible for monitoring the implementation of the Tromsø Convention by the parties.[23]

3.3. The Observatory on History Teaching in Europe

23. The Observatory on History Teaching in Europe is an Enlarged Partial Agreement of the Council of Europe that tracks curricula, textbooks, methods, and everything related to history teaching in 16 member States. It reports on the state of history teaching in Council of Europe member States every three years, with the first report published in 2023.[24] Its Scientific Advisory Council may assess the degree of freedom of historians to conduct research, which will be included in the 2026 report. The Observatory does not have monitoring or decision-making power, yet it provides information for debates on history teaching practices, the ability to develop critical thinking in students, the production of reliable information, and access to historical documents.

24. Knowing one’s own history is of utmost importance for the perception of identity, culture, and current affairs and for the development of one’s own perspective and political opinions. Historians, researchers, NGOs, and individuals must therefore disseminate information of public interest and assess it critically. To do so, they must be able to access State-held historical documents. This includes recent or sensitive histories, those that reveal authoritarian rule, violence, human rights abuses and victims seeking justice. Lack of access to historical information hinders informed and democratic debate. The Assembly should support the Observatory’s work.

20. “The Act of September 6, 2001 on access to public information” (Journal of Laws 2022.902).
21. Comissão de Acesso aos Documentos Administrativos (CADA), «28.º Relatório Anual de Atividades 2022», p. 10.
22. Article 3(1), Tromsø Convention.
23. See the Council of Europe Convention on Access to Official Documents (CETS No. 205) (coe.int).
24. https://rm.coe.int/ohte-general-report-full-web/1680ad80c2.

3.4. The European Court of Human Rights jurisprudence on the right of access to information

25. As the 2013 report of this committee signalled, until 2006 the European Court of Human Rights had been reluctant to interpret Article 10 of the European Convention on Human Rights as conferring an individual's general right of access to State-held information.[25] The right of access to information was explicitly recognised in *Társaság A Szabadságjogokért (Hungarian Civil Liberties Union) v. Hungary*.[26] The explicit recognition of this right does not, however, automatically confer on the individual the right of access to State-held information nor oblige the public authorities to impart information to the individual. Such a right or obligation may arise, firstly, where disclosure of the information has been imposed by a judicial order with legal force and, secondly, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right.[27]

26. The Court applies a test whereby depending on the purpose of the request for information, the nature of the information sought, the role of the person requesting the information and whether it is readily available to the State, withholding access may interfere with Article 10 rights. Relevant factors that the Court will consider are whether dissemination by the requesters will be in the public interest, perhaps because the applicant is writing a book or conducting research that will ultimately be made public and whether the provision of information does not entail too much research and collection work for the public entity.[28]

27. Firstly, the purpose of the information sought must be to enable one's exercise of the freedom to receive and impart information and ideas to others.[29] The information must be essential to exercise freedom of expression, for example, in the preparation for journalistic activities or other activities creating a forum for public debate.[30]

28. Secondly, the Court has recognised that, to consider providing access to State-held information, the information sought must meet a public interest test. Information is in the public interest when it relates to matters which legitimately affect the public, attract its attention or concern it to a significant degree, especially when it affects the well-being of citizens or the life of the community. This applies also to matters that may cause considerable controversy.[31] For the purposes of this report, "original documentary sources for legitimate historical research",[32] information regarding the number of formal employees and informal collaborators of the German Foreign Intelligence Service, and how many of those were formerly members of Nazi organisations,[33] and classified documents from the archives of the Office of the President of the Republic of Croatia needed by the applicant to write a book on the creation of the Croatian State[34] are categories of information considered to be in the public interest. Therefore, it is quite likely that access to historical documents will be found to be in the public interest.

29. Thirdly, the role of the person requesting the information is of special importance if that person will be "receiving and imparting" it.[35] Therefore, NGOs,[36] journalists[37] as well as academic researchers[38] and literary authors[39] enjoy an especially high level of protection if they disseminate information of public concern.

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25. *Leander v. Sweden*, Application No. 9248/81, judgment of 26 March 1987;
Gaskin v. United Kingdom, Application No. 10454/83, judgment of 7 July 1989;
Guerra v. Italy, Application No. 14967/89, judgment of 19 February 1998;
McGinley and Egan v. United Kingdom, Applications Nos. 21825/93 and 23414/94, judgment of 9 June 1998;
Roche v. United Kingdom, Application No. 32555/96, judgment of 19 October 2005.
26. Application No. 37374/05, judgment of 14 April 2009.
27. *Magyar Helsinki Bizottság v. Hungary*, Grand Chamber, no. 18030/11, 8 November 2016.
28. *Magyar Helsinki Bizottság v. Hungary*, op.cit.
Kenedi v. Hungary, No. 31475/05, 26 May 2009;
Seks v. Croatia, 3 February 2022.
29. *Magyar Helsinki Bizottság v. Hungary*, op.cit.
30. *Tarsasag v. Hungary*, no. 37384/05, 14 April 2009.
31. European Court of Human Rights, "Guide to Article 10 of the Convention – Freedom of Expression", updated 31 August 2022, https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf.
32. *Kenedi v. Hungary*, op.cit.
33. *Saure v. Germany (dec.)*, no. 6106/16, 19 October 2021.
34. *Seks v. Croatia*, op.cit.
35. *Magyar Helsinki Bizottság v. Hungary,* op.cit.
36. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,* no. 39534/07, 28 November 2013;
Association BURESTOP 55 and Others v. France, no. 56176/18, 1 July 2021.
37. *Rosiianu v. Romania*, no. 27329/06, 24 June 2014.
Saure v. Germany (dec.), op.cit.
38. *Seks v. Croatia*, op.cit.

30. Fourthly, if the information requested is ready and available to the authority in question, their refusal to provide it could qualify as an interference with the freedom to receive and impart information. If the authorities already hold the information and its collection would not pose practical difficulties or an unreasonable burden, the information sought can cover an extensive period of time.[40] Further, the fact that declassifying information may be a laborious process does not justify interferences with the freedom to receive and impart information.[41] This may well be the case for information sought from State archives.

31. Once the Court concludes that the State has interfered with a person's freedom of expression, it will consider whether said interference is justified. The applicable justifications are found in Article 10.2 of the Convention, as the right to freedom of expression is not absolute and may be limited. The Court will assess the necessity of State interference with the individual's freedom to receive and impart information. The Court tends not to counter State justifications or ask to clarify legitimate limitations for national security concerns, even in contexts of access to historical content, such as classified documents on the creation of the Croatian State.[42] Nonetheless, if the matter is of particular public concern[43] and the Court regards the State not to have carried out a meaningful necessity assessment or provided sufficient explanations, it may reiterate that the decision not to disclose must be detailed and well-reasoned. When the limitation is based on the protection of the privacy of others, the Court may be more exigent. This happened in *Saure v. Germany* (No. 2), where the Court found a violation of the applicant's rights under Article 10 because the State party refused to disclose additional information on the former involvement of 13 judges and a public prosecutor with the German Democratic Republic Ministry of State Security. The State did not sufficiently justify why the refusal to provide anonymised information was "necessary in a democratic society" when compared to the applicant's inability to contribute to debate on a matter of general interest.

32. As can be clearly seen, since 2013 the Court has tackled access to information in the context of State-held historical documents a number of times. Although its approach remains restrictive, the Court has made progress to further recognise the necessity for researchers, NGOs, journalists, authors disseminating information of public interest to access State-held information.

4. Other international organisations' approach to the right to access State-held historical information

4.1. The United Nations Human Rights Committee

33. The International Covenant on Civil and Political Rights (ICCPR) protects the right of access to information in Article 19(2) ("freedom to seek, receive and impart information and ideas…"). General Comment 34 on freedom of expression elaborates on the state of the right at the international level.[44]

34. This right extends to any information held by public bodies regardless of the form in which the information is stored, the source or date of production.[45] The Human Rights Committee also clarified that States parties should proactively put in the public domain any government information of public interest and make every effort to ensure "easy, prompt, effective and practical access" to such information. States parties should also enact the necessary procedures, including by enacting freedom of information legislation. The procedures should provide for the timely processing of requests for information. Authorities should provide reasons for any refusal to give access to information. States should put in place domestic appeal mechanisms against negative or unreasonably delayed decisions.

35. Crucially, "any restriction of freedom of expression constitutes a serious curtailment of human rights".[46] Therefore, legitimate limitations to the right as provided for in ICCPR Article 19(3) must not put the right itself in jeopardy: the relationship between the right and limitation is one of norm and exception.[47] Particularly, a law may not confer on a public body unfettered discretion to curtail access to information and all invocations for a legitimate ground of restriction must be demonstrated as prescribed by law, necessary and proportional

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39. *Chauvy and Others v. France*;
Lindon, Otchakovsky-Laurens and July v. France [GC].
40. For example, 11 years as was the case in *Yuriy Chumak v. Ukraine*.
41. *Seks v. Croatia*, op.cit.
42. Ibid.
43. Such as the management of radioactive waste, *Association BURESTOP 55 and Others v. France*, op.cit.
44. (2011), General comment No.34 on Article 19: Freedoms of opinion and expression | OHCHR.
45. Ibid, para. 18.
46. Ibid, para. 24.
47. Ibid, para. 21.

in a specific and individualised fashion. The precise nature of the direct connection between the threat and the provision of information must be established. Further, the specific action taken to avoid unwarranted harm must be stated.[48]

36. This shows that, even when a limitation on grounds of national security or protection of privacy is invoked by States, public bodies have a duty to give thorough and precise reasons for withholding information. This is of utmost importance as the ICCPR places a high value on uninhibited expression in public debate in a democratic society concerning figures in the public and political domain.[49] Contrary to the European Court of Human Rights' perspective, the UN Human Rights Committee is of the view that the scope of freedom to access information is not subject to "margin of appreciation" assessments.[50] Following the UN Human Rights Committee, therefore, free and open access to historical documents is of the highest importance.

37. The UN Human Rights Committee regularly assesses access to information policy and practice in member States during its periodic reports. On 11 September 2023, for example, it welcomed the entry into force of the Cypriot Law on Right of Access to Public Sector Information (No. 184(I)/2017) in 2020.[51] The Committee also examines individual communications, hence, it can evaluate whether there have been violations of one's right to access information under Article 19 of the ICCPR.

4.2. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

38. The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression - currently Ms Irene Kahn - regularly reports to the United Nations on the right to access information. Their mandate encompasses advocating for the right to freedom of expression, including the right to information, and to provide advice to governments and other stakeholders about how to promote these rights. The UN Special Rapporteur tends to focus on contemporary examples on access to information, rather than on historical documents specifically. Nevertheless, the representative of the UN Special Rapporteur confirmed during the hearing of the committee in Larnaca, in May 2023, that the UN Special Rapporteur advocates the same guiding principles as the ones outlined above, namely: maximum disclosure, proactive publication of information, strict guidance on exceptions, and a reasonable cost for access to information. Promoting online access is also important in the digital age. This implies digitalising archives, investment in infrastructures, promotion of access for different groups (including historically marginalised groups), collaboration and partnerships between competent authorities and civil society.

39. The UN expert also noted that within the Council of Europe space, Germany, the successor countries of the former Yugoslavia and Cyprus stressed the importance of transparency. Contemporary examples outside of Europe include South Africa, where the Truth and Reconciliation Commission was established in 1995, which was followed by a very extensive law providing for the right of access to information. This showed that access to historical records can provide a basis for transparency and good governance going forward.

40. The UN expert also stressed the importance of an open multi-stakeholder adoption process of relevant legislation; clear rules about what information can be withheld, including strict guidelines defining legitimate exceptions; effective complaint and appeal processes, oversight, and whistleblower protection.

41. In addition to providing policy analyses for member States, in 2017, former United Nations Special Rapporteur on freedom of opinion and expression, Mr David Kaye, presented a report to the United Nations Human Rights Council on access to information in international organisations. He regretted that the United Nations, along with other international organisations, did not have an access-to-information policy that applies to their own department and specialised agencies. Despite not explicitly pointing out deficiencies in access to information policy at the Council of Europe, the report makes a series of recommendations that are also relevant to the Council of Europe and the Assembly specifically, namely, that:

– *International organisations* should begin the process of adopting rigorous access-to-information policies. At a minimum, organisations should identify and appoint access-to-information focal points to coordinate the adoption process. They should develop a multi-stakeholder process to engage civil

48. Communication No. 926/2000, *Shin v. Republic of Korea*.
49. Communication No. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005.
50. Communication No. 511/1992, Ilmari Länsman. Et al. v. Finland, Views adopted on 14 October 1993.
51. UN Human Rights Committee, "Concluding observations on the fifth periodic report of Cyprus", CAT/C/CYP/CO/5, p. 9.

society, including the media, and member States in identifying the key elements of an access policy; as well as learn from other organisations that already have access to information policies (such as the United Nations Development Programme (UNDP)).

– *The political bodies of [international organisations]* should promote the adoption of access to information policies through resolutions and other governance mechanisms; ensure the development of monitoring and oversight functions; provide comprehensive information concerning organisational governance mechanisms, promote knowledge of access to information policies, including through the provision of clear information on websites and active dissemination and promotion of those policies to staff and stakeholders.

– *Member States* should encourage intergovernmental organisations to adopt access-to-information policies that meet the (requisite international standards); participate actively in the development of policies that advance everyone's right to freedom of information; focus on ensuring the broadest possible access to information, only seeking to protect from disclosure State-generated information that could be withheld under international human rights law.

– *Civil society organisations, the media and members of the public* should engage directly and seek a formal role with intergovernmental organisations in the process of development of access to information policies, including by identifying for them the key areas of interest in information; and should make requests for information from intergovernmental organisations as soon as possible, even before the development of access policies, in order to determine the way in which they currently handle such formal requests.[52]

4.3. The United Nations Special Rapporteur on the situation of human rights defenders

42. The UN Special Rapporteur on the situation of human rights defenders - currently Ms Mary Lawlor - also often tackles access to information issues faced by civil society. Their mandate is to promote the effective implementation of the United Nations Declaration on Human Rights Defenders. Its Article 6(a) provides that "everyone has the right, individually and in association with others … to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems".[53]

43. The Special Rapporteur deals with access to information policies and the right to access information as it is applied for human rights defenders, particularly within the context of country reports. So far, the Special Rapporteur has held country visits to Hungary and the Republic of Moldova, among the Council of Europe member States. Further information on the reported findings of 2017 and 2019 respectively will be mentioned below in section 5.

5. Member States' approaches to the right to access State-held historical information

44. All Council of Europe member States presently have right to information laws. This does not mean, however, that all laws are compliant with relevant international instruments or that they adequately protect the right to access information for all individuals. Several civil society organisations have assessed and ranked the right to information laws of Council of Europe member States as well as the openness of their archives. The countries holding the best access to information laws within this group are Serbia, Slovenia, Albania and Croatia.[54] Some of the least positively ranked laws are found in Germany, Monaco, Liechtenstein, and Austria.[55] The most accessible archives among Council of Europe member States studied by the Open Archives Organisation are Lithuania, Estonia, Latvia and Bulgaria. Some of the least open are Bosnia and Herzegovina, Moldova, Azerbaijan and Armenia.[56] Effective right to information laws must be applied within a human rights compliant system and practice that allows historians, researchers, civil society and the general public to easily access historical documents. Through the European Centre for Parliamentary Research and Documentation (ECPRD) questionnaire, I tried to gain a picture of the practice of member States.[57] Through

52. Selected suggestions from the United Nations Special Rapporteur on freedom of opinion and expression, Report on access to information in international organizations, 18 August 2017, OHCHR, pps. 19-21.
53. United Nations General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms", A/RES/53/144, 8 March 1999, OHCHR.
54. Respectively, 3rd, 5th, 6th, and 9th place worldwide according to Access Info and Centre for Law and Democracy, https://www.rti-rating.org/.
55. Respectively, 125th, 132nd, 134th, 135th (penultimate).
56. Open Archives Organisation, Rating (open-archives.org).

the information below, I do not attempt to advise on a system that should be followed by all Council of Europe member States, as that would not necessarily reflect the diversity of contexts and financial possibilities of different States. However, I highlight some good practices that could best achieve compliance with access to information and the right to freedom of expression.

5.1. Oversight on decision making

45. Historical documents are usually held in archives, under the authority of the executive, through specialised government Ministries and/or agencies. Some archives are kept by regional or local authorities, and as such they are not centrally regulated.[58] Executive authorities whether they be national, federal, regional or local, make decisions on how public access to their documents is granted in practice. In access to information systems compliant with international legal standards, the decision-making executive authorities are subject to an independent oversight and judicial appeal system, in order to allow transparency and prevent abuse of secrecy.

46. A majority of member States specified that decisions of the executive not to allow access to documents can be appealed to administrative courts, which may overturn the decisions.[59] Some member States highlighted that lower administrative courts' decisions may be appealed to the highest administrative courts.[60]

47. Several member States have independent authorities, which can be individual officers or a commission, with varying degrees of competence and powers on the issue of access to information. The most common role of these authorities is that of intermediary or mediator between the executive power holding the documents and the requester in cases of denial of access to the said documents. In the best systems, the independent authority may provide its opinion on individual complaints, as well as advice to relevant government departments, or may make proposals to the legislature on policy changes.[61] Such authorities collaborate with the executive, legislative and judicial powers and may be the first appeal system for refusal decisions before resorting to litigation before courts. However, in some States, the only review system is the independent authority, without the possibility to appeal to a court. Other systems have parliamentary ombudspersons, responsible for overseeing decisions of the executive.[62]

5.2. Accessibility

48. Historical documents must be accessible and the bureaucratic processes to use such documents shall not overburden the interested person. Asking requesters to register their interest in specific documents does not necessarily weaken open access, especially if registration, explanations of the types of documents needed or of the research topic are used to expedite the process. Several member States, however, adopted a series of bureaucratic measures that do not comply with the principles of maximum disclosure and openness of archives. Such measures can include requiring the payment of high fees for archival services such as submitting a query, photocopying[63] or requiring to specify in detail the purpose of the research for which information is needed. Bureaucratic processes, however strict they may be, should be accompanied by detailed and clear information materials (such as information sheets, step-by-step guides) that explain the process, for each relevant authority.[64] The most effective access is provided by public archives that allow physical entry or the filing of requests without prior registration[65] or the need for explanation of the purpose of accessing information.[66]

49. The processing of requests shall not take an unreasonable time. The majority of responses point to reasonable time-limits in law, but they are not always respected in practice. In general, appeal mechanisms such as the independent authorities mentioned above should have the power to review complaints on

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57. Questionnaire on Access to historical document, request No.5493 of 15 June 2023.
58. Austria and Ireland, for example.
59. For example in Poland, Estonia, Hungary, Sweden.
60. Belgium and Finland.
61. For example Belgium, Ireland, France, Spain.
62. Hungary before legal amendments (circa 2015) and Sweden.
63. "In December 2015, the Budapest Chamber of Commerce told the television channel RTL Klub that the implementation of its freedom of information request into the expenses and finances of the Chamber would cost between Ft 3 and 5 million", as reported by the United Nations Special Rapporteur on the situation of human rights defenders, "Report of the Special Rapporteur on the situation of human rights defenders on his mission to Hungary", A/HRC/34/52/Add.2., p. 9.
64. This practice is employed by France's CADA.
65. Some archives in Austria and Ireland.
66. Such as Albania.

excessive time taken to process requests by the executive authorities. In the best systems, requests are processed within a few working days,[67] and there are procedures for expedited requests to access information in urgent situations.[68]

50. The research topic and/or an explanation of the purpose to access information may be useful to support an application to access restricted or secret documents and may guide the authorities in redacting information that could otherwise present data protection or national security concerns. Member States should be encouraged to make an objective assessment of the sensitivity of the information requested and to consider attentively any potential threats to the right to privacy, national security, or even, in some extreme cases, the protection of the right to life of persons featured in the information, who might become targets for retaliation. In the event that a request for access to restricted or secret documents has been denied, the executive authorities should always provide detailed reasons as to why that is the case. The majority of responses did not however expressly outline the type of reasoning the executive would commonly provide when denying a request.

51. In-person access to archives should be granted as a matter of course. Reading rooms should be provided on-site. It is acceptable that for the preservation of originals, access to certain historical documents is only granted on-site.[69] Online processing of requests should allow requesters to receive summaries of information or scanned copies of historical documents via email, or paper copies, if they so prefer. The foundational principles on access to information require the relevant authority to provide information to requesters in the desired format to the extent possible.[70] Some services, such as photocopying, may come with a fee;[71] however, such fees should be reasonable.

52. In order to achieve the greatest possible level of accessibility, digitalisation is necessary to respond to the technological advances of today and provide the access to historical documents to the widest possible extent. To this end, it is strongly advised that authorities provide online archives of documents, especially with scanned copies of historical documents.[72] All relevant authorities are encouraged to publicise and organise information events on the historical documents they collect. Expositions, public events, workshops, and group visits are some ways in which greater access to historical documents may be achieved.[73] Compiling official lists and bibliographies of newly declassified documents is also a good way to let the public know what historical information is freely accessible.[74] Once these are compiled, they should be publicised on official websites. Some responding States have highlighted their practices of promotion of this information through press releases, newspaper articles, statements, newsletters, social media, parliamentary debates and many other means.

5.3. Council of Europe member States: selected practices

53. The parliamentary seminar on “Access to historical documents” held in Tirana on 31 March 2023, as well as the hearings held on 23 May and 20 June, provided us with very valuable information on selected practices of member States.

5.3.1. Albania

54. Albania was subject to Hoxha’s harsh communist dictatorship between 1944 and 1985. Albania’s right to information laws are fairly recent. The Sigurimi was the secret service which collected information on thousands of Albanian individuals and their families, and a significant number of Albanians collaborated with the Sigurimi during the dictatorship. Albania has been moving towards ex-Sigurimi files’ declassification since 2015, with the approval of Law 45/2015 “On the right to access to information about the documents of ex-secret State services in the Socialist Republic of Albania”. Following recent amendments to this law and the adoption of Law 10/2023 “On classified information”, the documents of the former secret State service are all considered declassified, unless there are risks to national security and to the relations with other States.

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67. See Finland, where many requests for information held in archives are processed within 90 minutes. Or, like in Ireland in addition to many other responding States, where the processing of requests may take up to 4 weeks.
68. See Serbia.
69. See Germany.
70. See Finland.
71. See Hungary, Germany, Spain, Poland.
72. See the Netherlands, the Slovak Republic, Germany, Romania, Latvia, especially with regards to former secret service records.
73. In Albania and The Netherlands, these are common.
74. See Albania and Montenegro, and legal provisions in Romania.

55. The Albanian system sees the Government, the Albanian Authority for Access to Information on ex-Sigurimi Files (the Authority), created in 2017, and the Institute on the Effects of Communism as working in synergy to allow access to the historical truth. The Authority is a special collegial non-political body elected by the parliament to ensure the collection, organisation, and publication of the documents. Its work has been crucial in assessing candidates for important public positions, including in academia, justice governing bodies, local and central governments and parliament with regard to their involvement with the Sigurimi and communist persecution. The most recent legal changes to Albania's access to ex-Sigurimi files happened in 2023; it is predicted that they will permit to quintuple declassification request rate by the relevant Authority. Efforts are made to collect all ex-Sigurimi files in the Authority's archives. Individuals may request to access files relating to them personally or to their immediate family. They must explain their reasons for requesting information and establish their personal tie to the information. The media and anyone who has a research interest may also be granted access, provided there are no data protection and privacy concerns. The Authority processes the request and collaborates with other State entities. Albania may avoid granting access on national security grounds. The digitalisation process has also begun, with a public website soon to be available for free access to certain documents. The Authority is evolving into a memory institution which additionally works to document as much evidence as possible to expedite the justice process for the victims. Its activities may include searching for those that have gone missing during the communist era and collaborating with the Ministry of Education on civic education activities, especially targeted at the youth. There are also efforts to ensure the mapping and commemoration of mass graves and areas where particularly troubling human rights abuses took place.

5.3.2. Azerbaijan

56. Azerbaijan was under communist rule until 1992. Azerbaijan swiftly adopted access to information laws after the fall of the regime. Nonetheless, access to historical documents is limited and poorly rated as subsequent amendments led to a closing of State and KGB files. During the Perestroika period, some USSR surveillance service documents were declassified for a short time. In 1996, the files were closed again to researchers through a series of laws.

57. The Law "On State Secrets" classified a wide range of topics. The law "On the Rehabilitation of Victims of Political Repressions" limited access to investigative and judicial documents only to already rehabilitated persons and their heirs. Access to information for the public is not allowed without a power of attorney ordered by victims of the repression. In 2001, Azerbaijan passed 40 laws that limited access to State-held information for historians, researchers, and others. The 2004 Law "On State Secrets" provided that human rights violations by public officials cannot be classified. Yet, under other laws on intelligence and counterintelligence, under the pretext of protection of privacy and secrecy of the methods of the secret services, authorities may continue to lawfully classify documents even after the expiration of secrecy period.

58. As a general rule, the secrecy period should not exceed 30 years. However, an executive authority can extend it. Access to documents on someone's personal life is only possible with permission from the heirs. During the repression, however, entire families were often killed, so there would be no heirs to permit declassification. In this case, the documents are not declassified.

59. Azerbaijan stores 3.7 million files in State archives.[75] Documents from the Central Committee of the Azerbaijan Communist Party and former communist governmental organisations are held in the Archive of Political Documents under the Administration of the President of the Republic of Azerbaijan. Despite its archival laws, Azerbaijan lacks practical protection and promotion of the right of access to information. It is not simple to access archives, and the State is reportedly slow in making historical documents accessible online.

5.3.3. Germany

60. Eastern Germany was under communist rule between 1945 and 1990. During the period of the German Democratic Republic, the Ministry of State Security (Stasi) kept close surveillance on millions of citizens. It had 91 000 full-time employees and 180 000 unofficial collaborators. 111km of filing shelves were left behind after the Stasi offices were stormed by citizens. In many locations, Stasi employees anonymously joined in the rioting and destroyed the most compromising materials. The political elites that benefited from the Stasi no longer held onto power in 1989, hence, opening the archives was easier than in other countries.

75. As of 1 January 2018, as reported by Open Archives Organisation, Azerbaijan 56.91 % (open-archives.org).

61. The Stasi Records Act facilitates individual access to one's own data held by the Stasi. The individual can clarify how the Stasi influenced their lives and with whose collaboration (for instance family members). This data is protected from general public access, but researchers and the media may consult it for dissemination purposes. The names of those who worked officially or unofficially for the Stasi are disclosed. Yet, information about the people surveilled is not disclosed unless they or their surviving relatives have given consent. Public and private institutions may access these records, they must simply file a request. They may do so for the purpose of vetting people for public office by exposing their past activities. For the recruitment to a number of governmental or judicial positions, checks of involvement with the Stasi are obligatory.

62. Very few files have been withdrawn from public access. The Federal Ministry of Interior may withdraw documents if they pose a threat to national security. The procedure requires approval by a parliamentary body. The Stasi document administration institution itself is independent. There is a high demand for disclosure, and no violence or revenge seems to have occurred against exposed perpetrators.

5.3.4. Latvia

63. Latvia became independent from the USSR in 1991. Lustration laws and other laws govern the document declassification in Latvia in relation to KGB and other archival files. The Archives Law of 1991 as modified in 2010 recognises the need to preserve national documentary heritage and to respect the right of public access to historical documents. It provides that the State must "ensure… accessibility and use of the national documentary heritage".

64. Restrictions may be applied to some personal data.[76] The Law "On Preservation and Use of the Documents of the Former Committee for State Security (KGB) and Establishing the Fact of Cooperation of Persons with the KGB" of 1994 ensures access to KGB and Latvian Soviet Socialist Republic documents, except if the information sought is about "third parties" or victims of repression. The law also established the Centre for the Documentation of the Consequences of Totalitarianism in 1992. This Centre is a unit of the Constitution Protection Bureau, which is a security service. It is tasked with storing the files, preparing documents establishing someone's collaboration with the KGB for submission to the prosecutor's office, providing this information to public authorities, ordinary institutions and security institutions, and collecting documents that ensure political, legal, moral rehabilitation of persons whose rights were violated by the KGB.

65. All documents have been handed to the National Archives and are accessible to researchers. All KGB documents have been digitalised and a large number are easily accessible online since 2018. Anyone can access these documents through a general procedure.

5.3.5. Poland

66. Poland was under communist totalitarian rule for 45 years after the Second World War. The regime had a Security Service, which surveilled all of society and ensured the quashing of any opposition. Several millions worked for or were agents of the Security Service. In 1990 the service was dismantled. It had produced nearly 100 000 meters of shelves of historical files, which remained inaccessible until 2000.The Institute of National Remembrance collects, organises and archives all documents related to the Polish Communist security apparatus. The have granted public access to almost all documents, regardless of who requests information and for what purpose.

5.4. Draft model law on right to access to information

67. The International non-governmental organisation "Article 19", which works to protect freedoms of opinion and information globally, has drafted a model law on the right to access information.[77] Council of Europe member States could take inspiration from the draft law to ensure their compliance with international right to information standards.

68. The draft law highlights that a State must communicate to individuals and entities that it holds information relevant to them. Further, if a request for information has been filed, the relevant authority must respond within 48 hours on whether the information exists in the records. The model law also specifies that "a body may refuse to indicate whether or not it holds a record, or refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to the defence or national security" of the State.[78]

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76. For example, on the sexual orientation of the person or personal health issues.
77. Article 19, www.article19.org/data/files/medialibrary/1796/model-freedom-of-information-law.pdf.
78. Article 19, Model Freedom of Information Law, Art. 30.

Hence, the model law presents a high threshold of harm for the non-disclosure of information, in line with relevant international standards. In addition to defining the limits of non-disclosure, the draft law provides for the necessary structures and entities within a State that would enable effective protection and promotion of the right to information in terms of oversight and effective handling of requests. In particular, it suggests the establishment of an Information Officer or Commissioner tasked with ensuring public access to State-held documents and archives and reporting on public bodies' compliance, and with accepting and investigating complaints. The model law further underlines the necessity to train public officials on the importance of free access to public interest information.

6. Pressing challenges in accessing information

6.1. Deterioration in access to information

69. In some member States the right of access to information (including historical documents) is regressing. Several countries have introduced burdensome requirements to provide reasons for accessing certain documents, even when these are already in the public domain.

70. The observed regression may also be found in structural reforms to the system of accessing information. The former United Nations Special Rapporteur on the situation of human rights defenders, Mr Michel Forst, reported in 2017 that **Hungary** was once renowned for its Act on Freedom of Information, which used to guarantee access to public interest information and was supported by strong oversight institutions, headed by a parliamentary ombudsperson. However, repeated amendments to the regulatory framework attracted criticism from journalists and watchdog organisations for restricting the accessibility of public interest data and creating the conditions for frequent denials of requests for such information. The 2015 amendment to the Act, adopted within days of its introduction and without public consultation, allows government agencies that possess public interest data to charge the requesting party the "labour costs" related to the request, an amount to be determined by the agency concerned. Besides, the law allows public bodies to reject requests on questionable grounds.[79] Moreover, the mandate of the former Data Protection Ombudperson was terminated before the end of his term of office, which was ruled unlawful by the European Court of Justice in April 2014. The Office was transformed into the National Authority for Data Protection and Freedom of Information, which was not recognised by the European Commission as meeting the requirement of complete independence.[80] In his 2019 report on the Republic of **Moldova**, the UN Special Rapporteur on human rights defenders noted the Moldovan authorities' lack of compliance with their own legal framework for access to information. Despite the obligation to provide information of public interest not including personal data no later than 15 days after the submission of a request, journalists have noted delays of several weeks before receiving a reply, some of which even failing to provide the requested information. Fees and bureaucratic obstacles have also been imposed.[81]

71. A similar regression was noted in the ECPRD questionnaire response of **Romania**. On 26 May 2022, a communiqué was posted on the website of the National Archives of Romania announcing that all documents requested from the study rooms of the archives would pass through a censorship filter. The aim was to prevent access to classified information, regardless of the creator, content, and year of creation. It also mentioned that some documents could no longer be accessed by researchers. As a result, historians and researchers drafted an open letter, calling for a response from the management of the National Archives of Romania. They pointed out that archivists had informed them about the destruction of classified documents held by some institutions as well as the occurrence of cases where researchers were detained and interrogated by the Directorate for the investigation of Organised Crime and Terrorism (DIICOT) after publishing documents similar to those found in the National Council of the Study of security Archives (CNSAS). They also allegedly had their laptops, hard drives and USB sticks confiscated.

72. In light of the above, I recall that access to information that is clearly in the public interest, such as historical documents, should be granted regardless of the reason as to why one is looking for such information. The public should be duly informed of any changes in the legal framework on access to information or in the archival system, especially if it has such drastic effects. A communiqué on a website, as in the Romanian example, will not be sufficient. Access to information for researchers, historians, NGOs and

79. See note 63.
80. "Report of the UN Special Rapporteur on the situation of human rights defenders on his mission to Hungary", A/HRC/34/52/Add.2, pp. 9-10.
81. "Report of the UN Special Rapporteur on the situation of human rights defenders on his visit to the Republic of Moldova", A/HRC/40/60/Add.3, p.10.

all others who intend to disseminate it in the public interest should not be overly burdensome or restricted by censorship filters. Policy decisions should only be taken after extensive consultation with civil society and all groups most affected by such changes, such as researchers, authors, and historians.

6.2. Preventing the erasure of memory through international collaboration

73. Access to historical information is crucial for building cultural heritage, establishing historical truth and a collective memory of the past. This is particularly the case for countries that have experienced censorship under authoritarian regimes. In cases such as in the Soviet Union and during colonial times, invaluable historical documents and sometimes entire archives have been transferred to countries far away from where the information originated, creating physical distance and obstacles to establishing the historical truth.[82] During the exchanges held for the preparation of this report, we pointed out that several former Soviet countries' archives continue to be held in Moscow to this day, and that wars in regions such as the former Yugoslavia have displaced important historical files to unknown locations. These issues affect the right to truth to this day.

74. Given that the Russian Federation can now be described as a *de facto* dictatorship,[83] the Federation's approach to preventing access to information should be addressed. A stark example is how Memorial, a highly respected Russian NGO focussed on creating a collective memory via access to historical information, was liquidated in 2021. In the years preceding liquidation its work was made more difficult in multiple ways. The organisation has been fighting for the establishment of the historical truth for many years. They achieved some small successes in their fight to get access to archives, yet they lost almost all cases relating to the crimes under Stalin's terror and their perpetrators. A case is still pending before the European Court of Human Rights.[84] Organisations such as Memorial deserve the utmost protection and I condemn any attack on civil society actors that work towards establishing the historical truth and preserving its memory.

75. I urge member States to negotiate in good faith to bring information on their history back home. In the meantime, the best path forward is co-operation with civil society, financing of memory projects, and international collaboration, such as the joint Polish and Ukrainian initiative to publish abundant archival materials relating to the period of the Holodomor, the famine artificially created by Stalin in Soviet Ukraine in order to break the backbone of the Ukrainian national consciousness.

76. There exist a number of international historians' and research networks devoted to the sharing of public interest information related to history. Examples include The Netherlands' International Heritage Cooperation Programme, where archives and information of the Ministry of Culture, Education and many other State entities are shared with partner countries such as Belgium, China, Germany, Egypt, France, Hungary, Italy, Morocco, Poland, Spain, Türkiye, the United Kingdom, South Korea and many others.[85] The International Council on Archives believes that effective records and archives management is an essential precondition for good governance, the rule of law, administrative transparency, the preservation of mankind's collective memory, and access to information by citizens. It is an international institution with regional branches, such as the European Branch of the International Council on Archives (EURBICA), which connects archival authorities and advocates for effective knowledge management. Further, the European Network for Remembrance and Solidarity (ENRS) promotes the study of 20th century history and remembrance. Partnering with over 500 institutions in Europe, the ENRS organises conferences, workshops, symposia, seminars. They also publish and translate work for academic and general audiences, and deliver research, cultural and educational processes.[86] Lastly, the Council of Europe and the European Union co-funded a project called HISTOLAB, which encourages the exchange of knowledge, experiences, and expertise across professions in the field of history education, including practitioners (such as teachers, museologists), academics, junior researchers, and policymakers. HISTOLAB also focuses on the exchange of expertise and good practices between professionals from different countries.[87] Such organisations and projects deserve to be supported by member States of the Council of Europe.

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82. Mark Kramer, "The Final Years of the USSR: Research Opportunities and Obstacles in the Moscow Archives", Wilson Center, www.wilsoncenter.org/blog-post/final-years-ussr-research-opportunities-and-obstacles-moscow-archives;
Ian Cobain, "Foreign Office hoarding 1m historic files in secret archive", *The Guardian*, 18 October 2013, www.theguardian.com/politics/2013/oct/18/foreign-office-historic-files-secret-archive.
83. Resolution 2519 (2023) "Examining the legitimacy and legality of the ad hominem term-lit waiver for the incumbent President of the Russian Federation".
84. Memorial application to the European Court of Human Rights on behalf of Sergei Prudovsky (Application No. 16318/22, 26 March 2022, Registration: 4 April 2022, Communication pending).
85. International Heritage Cooperation (dutchculture.nl).
86. European Network for Remembrance and Solidarity, European Network Remembrance and Solidarity | ENRS.
87. Council of Europe, HISTOLAB, Who are we? – HISTOLAB (coe.int).

7. Conclusions

77. The Assembly must unequivocally recognise the right of access to information as a universal human right, particularly when it comes to State-held information. As a general rule, all information held by public authorities should be freely accessible.

78. Full disclosure must be the rule and limitations for reasons of national security or privacy must be the exception, in all Council of Europe member States. Exceptions to the rule of free access to information shall be interpreted restrictively. The burden of demonstrating the legitimacy of any restriction rests on the public authority.

79. Information about serious violations of human rights or humanitarian law should not be withheld on national security grounds in any circumstances.

80. The Assembly must call on member States to uphold the main principles that govern access to information. These are: maximum disclosure, proactive publication of information, strict guidance on exceptions, and a reasonable cost to access information. Member States should participate actively in the development of policies that advance everyone's right to freedom of information. They should focus on ensuring the broadest possible access to information, only seeking to protect from disclosure State-generated information that could be withheld under international human rights law.

81. The Assembly must remind all member States of the Council of Europe that the right to access State-held information is in constant development at the international level. This means that non-compliance with the developing jurisprudence of the European Court of Human Rights and the UN Human Rights Committee may lead to more and more findings of violations of the right to freedom of expression.

82. The Assembly must call on all member states of the Council of Europe which have not yet ratified the Council of Europe Convention on Access to Official Documents (Tromsø Convention) to do so urgently. The Assembly should highlight the value of the Tromsø Convention for all member States, including those that have already established a compliant legislative framework. Their accession to the Convention would strengthen the international safeguards for the right to access information. The Assembly should also support the activities of the Council of Europe Access Info Group in securing signatures and ratifications of the related Convention by promoting best practices of member States. It should recommend specific improvements to the Convention in the spirit of the Global Principles on National Security and the Right to Information (Tshwane Principles) and other international legal developments on the right to access information.

83. Access to information that is clearly in the public interest, such as historical documents, should be granted regardless of the reason as to why one is looking for such information. The public should be duly informed of any changes in the legal framework on access to information or in the archival system, especially if they affect it drastically.

84. The Assembly should foster the political will of member States to allow the widest possible access to historical documents by underlining the importance of open archives and public information for transparency, democracy, and the rule of law.

85. Political will and diplomatic means are essential to ensure historical documents reach their countries of origin, and the Assembly should therefore urge member States to initiate diplomatic negotiations and show a strong political will to have information on their history brought back home. In case these fail or in the meantime while these negotiations take place, the best way forward is co-operation with civil society, financing of memory projects, and inter-State collaboration.

86. Access to information for researchers, historians, NGOs and all those that obtain it to then disseminate it in the public interest should not be overly burdensome or restricted by censorship filters. Policy decisions should only be taken after extensive consultation with civil society and all groups affected by such changes, such as researchers, authors, and historians.

87. The Assembly should underline the importance of co-operation with civil society and inter-State collaboration for multi-perspectivity and transparency. Civil society organisations, the media and members of the public should engage directly with the Assembly and the Council of Europe as a whole in the process of development of access to information policies, including by identifying for them the key areas of interest in information.

88. Last but not least, the Assembly should urge member States to digitalise their archives and allow as many materials as possible to be accessible online.