

IN THE MATTER OF THE APPEAL TO THE FIRST-TIER TRIBUNAL
Appeal No: EA/2011/0268

Mrs. Pamela Bartlett Quintanilla v. The Information Commissioner and the Foreign and Commonwealth Office

Witness Statement

Toby Mendel
Executive Director
Centre for Law and Democracy

- [1] I am the Executive Director of the Centre for Law and Democracy, an international human rights organisation based in Halifax, Canada, which promotes foundational rights for democracy, including freedom of expression, the right to information, the freedoms of assembly and association, and the right to participate. More information on the Centre for Law and Democracy can be found at www.law-democracy.org. This case involves issues which relate closely to the core work of the Centre for Law and Democracy, namely the right to access information held by public bodies.
- [2] I am an internationally recognised expert on the right to information. Among other things, I have published widely on the subject,¹ I regularly provide technical assistance to all of the main inter-governmental bodies working on this issue - including the World Bank, UNESCO, the UN Special Rapporteur on Freedom of Expression, the UNDP and the OSCE - as well as numerous civil society organisations working in this area, and I am engaged in many projects around the world to promote both the adoption and implementation of freedom of information legislation through the Centre for Law and Democracy. It is in my capacity as an expert that I am providing this Witness Statement.
- [3] The right to access information held by public bodies has been recognised as a fundamental human right under international

¹ See, for example, *Amending Access to Information Legislation: Legal and Political Issues* (2011, Washington, World Bank Working Paper), available at: http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Mendel%20-%20Amending%20ATI%20Legislation,%20legal%20and%20political%20issues_0.pdf, and *Freedom of Information: A Comparative Legal Survey, 2nd Edition* (2008, Paris, UNESCO) (available in Chinese, English, French, Nepalese, Portuguese, Russian and Spanish), available at: http://portal.unesco.org/ci/en/ev.php-URL_ID=26159&URL_DO=DO_TOPIC&URL_SECTION=201.html.

law, as part of the wider right to freedom of expression. At the global level, the United Nations Human Rights Committee has specifically recognised the right to information, stating: “Article 19, paragraph 2 [of the ICCPR] embraces a right of access to information held by public bodies.”²

- [4] Within the Organization of American States (OAS), the right to information has been recognised by the Inter-American Court of Human Rights, in the case of *Claude Reyes and Others v. Chile*, decided on 19 September 2006.³ Specifically, the Court stated:

In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to “seek” and “receive” “information”, protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention.⁴

- [5] The right to information has also been recognised by the African Commission on Human and Peoples’ Rights, in Principle IV(1) of the *Declaration of Principles on Freedom of Expression in Africa*, adopted in September 2002,⁵ which states:

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

- [6] Finally, the European Court of Human Rights has recognised a right to information as part of the guarantee of freedom of expression in Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁶ The European cases have particular relevance for courts and tribunals in the United Kingdom, since these standards are specifically incorporated into the law of the United Kingdom through the Human Rights Act.⁷ Of particular relevance here is section 3 of that Act, which states:

² General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

³ *Claude Reyes and Others v. Chile*, 19 September 2006, Series C No. 151 (Inter-American Court of Human Rights). Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.doc.

⁴ *Ibid.*, para. 77.

⁵ 32nd Ordinary Session of the African Commission on Human and Peoples’ Rights, 17-23 October 2002, Banjul, The Gambia. Available at: http://www.achpr.org/english/declarations/declaration_freedom_exp_en.html.

⁶ Adopted 4 November 1950, E.T.S. No. 5, entered into force 3 September 1953. The cases are *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application No. 37374/05. See also a second case along the same lines, *Kenedi v. Hungary*, 26 May 2009, Application No. 31475/05.

⁷ 1988, c. 42.

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Thus, the Tribunal is required to interpret the Freedom of Information Act⁸ in the manner that best gives effect to the idea of a right to information and, specifically, the idea that exceptions to the right of access are only permitted where “necessary in a democratic society” for the protection of the various interests listed in Article 10(2) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

- [7] The above is of particular importance in relation to what may be called the public interest override, set out in section 2(2)(b) of the Freedom of Information Act, which provides, in effect, that certain exemptions only apply where, “in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”. The fact that exemptions represent a restriction on the human right to information, as guaranteed by Article 10 of the European Convention, obliges the Tribunal to interpret this provision in a manner that aligns with the permissible scope of restrictions on freedom of expression under Article 10(2) of the European Convention. It may be noted that section 2(2)(b) of the Freedom of Information Act applies to the exemption claimed by the Government of the United Kingdom in this case, namely protection of the United Kingdom’s international relations, found at section 27 of the Act.
- [8] This case raises several important public interest considerations. The information sought is needed to facilitate the appellant’s ability to participate in a debate about an ongoing matter, namely reform of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.⁹ It is submitted that it is obvious that, as an exercise in democracy, this is an activity of high public interest. This is only enhanced by the fact that the subject matter of this democratic exercise is specifically the right to information which, as noted above, is itself a fundamental human right. In other words, the information under consideration in this case relates to the public interest activity of democratic participation in debate

⁸ 2000, c. 36.

⁹ Official Journal of the European Communities, 31 May 2001, L 145/43.

about the protection of a human right.

- [9] It is accepted that the United Kingdom needs to maintain good relations with other States and that, in appropriate cases, this might justify the withholding of information, even where access to that information was a matter of public interest. It is, however, submitted that a number of factors enhance the public interest considerations in favour of access in this case, and diminish the claims of the Government of the United Kingdom regarding the sensitivity of this information vis-à-vis relations with other States.
- [10] First, the difficulty of citizens engaging in democratic debate at the level of the European Union is widely acknowledged and this has led to what is commonly termed a 'democratic deficit' at the level of European Union governance. Exemptions to the right of access which inhibit such engagement should, therefore, be treated as bearing a special burden of justification. This factor must be understood in light of the very significant, and increasingly important, role the European Union plays in relation to a large number of matters affecting the lives of citizens of European Union Member States.
- [11] Second, and closely related, debates at the level of the European Union inevitably involve relations among States. A decision that such debates fall within the scope of the exemption found at section 27 of the Freedom of Information, and that this is not overcome by section 2(2)(b), will have the effect of preventing European Union citizens from accessing a vast range of information which they need to participate in extremely important decision-making processes. This may be contrasted with information about national level debates which, although analogous in terms of democratic importance, may only be withheld from citizens where specific countervailing democratic criteria, such as the need to enable free and frank debate within government, apply.
- [12] Third, there is universal recognition within the European Union of the importance of the right to information. All but three countries in the European Union – namely Cyprus, Luxembourg, and Spain – have adopted national level freedom of information laws (Malta has adopted a law but it is not yet in force). The European Union itself has adopted openness rules which, as noted above, are the very subject of the request for information under consideration in this appeal. This can, therefore, be expected to bear on the reaction of other States if the information under consideration in this case is provided to the appellant pursuant to the Freedom of

Information Act of the United Kingdom. In other words, it is unlikely that the disclosure of this information would undermine good relations between the United Kingdom and other European Union Member States, because they will understand that such disclosures may be expected in the democratic environment that prevails at both the national and European Union levels.

[13] Fourth, this information is held not only by the Government of the United Kingdom but also by other European Union Member States governments. The information sought, in particular the attribution of comments to individual States, could not be denied to the appellant by the States making those comments under analogous international relations exceptions in their own legislation. It is thus open to the appellant to make requests for this information in each European Union Member State and, in this way, piece together all of the information sought. It is submitted that relying on this exception, and thereby forcing the appellant to proceed in this way, would be to place a perverse interpretation on the Freedom of Information Act, particularly in light of the recognition of the right to information as a human right.

[14] Fifth, the application of the public interest override should take into account the wider public interest implications of disclosure of this information. It is possible, notwithstanding the argument presented in paragraph [12], that some European Union Member States would harbour some negative sentiment towards the United Kingdom for releasing this information. However, a decision that such information must be disclosed would put those States on clear notice that they can expect such information to be disclosed in future. It would, therefore, alter their expectations in this regard, so that no harm to international relations would flow from future releases of similar information. It is submitted that the proper public interest balancing should weigh the mild irritation some States may feel over this particular release of information against the democratic contribution of enabling the regular future release of this sort of information.



Toby Mendel