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The Right of Access to 'Reliable' Information Under Article 10 ECHR: From Meagre Beginnings to New Frontiers

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Abstract

Recognition of the right of access to information under Article 10 of the European Convention on Human Rights has been marked by fits and starts. This article charts three phases in the jurisprudence – from outright denial (Phase One), through hesitant recognition (Phase Two), to recognition of a limited right in specified circumstances (Phase Three). The Court's recent judgment in *Association Burestop 55 and Others v France* may mark a new frontier (or 'Fourth Phase'), as the Court recognised for the first time that the right necessarily comprises a *qualitative* aspect – that is, it requires that the information disclosed is sincere, accurate, sufficient, and reliable. This could have important ramifications for the quality of the information environment in the current 'post-truth' era. However, several conceptual challenges, practical limitations, and lingering uncertainties will need to be addressed for the promise of the judgment to be fully realised.

Keywords

freedom of expression – right of access to information – freedom of information – access to reliable information – ECHR – disinformation

1 Introduction

The recognition of a right of access to information under Article 10 of the European Convention on Human Rights (ECHR or Convention) has been marked by fits and starts. The European Court of Human Rights (ECtHR or the Court) steadfastly denied that any such right existed under Article 10 in its earliest judgment to consider it and in numerous cases thereafter.[1] It is only in the last two decades that the Court has hesitantly recognised a limited right of access to information – and a duty on states to provide it – in two circumstances: first, where disclosure has been imposed by a judicial order; and second, where access to the information is instrumental for the exercise of the seeker's freedom of expression.[2]

However, in July 2021, the Court breathed further life and meaning into the right of access to information in its judgment in *Association Burestop 55 and Others v France*.[3] The case was brought by environmental associations against the French Government, contesting the accuracy of information released by the public authority tasked with the management and storage of radioactive waste, and the obligation to inform the public in respect of it. The judgment was released to little fanfare or commentary,[4] despite the fact that it represents a milestone in the further development of the right of access to information under Article 10 ECHR. In particular, the Court recognised for the first time that the right comprises a *qualitative* aspect:

> [T]he right of access to information would be deprived of its substance if the information provided by the competent authorities was insincere, inaccurate or even insufficient. Indeed, respect for the right of access to

1 *Leander v Sweden* 9248/81 (ECtHR, 26 March 1987) para 74; *Gaskin v the United Kingdom* [Plenary] 10454/83 (ECtHR, 7 July 1989) para 52; *Guerra and Others v Italy* [GC] 14967/89 (ECtHR, 19 February 1998) para 53.

2 See *Magyar Helsinki Bizottság v Hungary* [GC] 18030/11 (ECtHR, 8 November 2016) (*MHB*) paras 126 and following.

3 *Association Burestop 55 and Others v France* 56176/18 and others (ECtHR, 1 July 2021).

4 It was released only in French, which could partially explain why it has had little uptake in academic scholarship. The exceptions are H Keller and V Gurash, 'Expanding NGOs' Standing: Climate Justice Through Access to the European Court of Human Rights' (2023) 14(2) *Journal of Human Rights and the Environment* 194 (concerning the standing of the association); N Deluggi and C Ashraf, 'Liars, Skeptics, Cheerleaders: Human Rights Implications of Post-Truth Disinformation From State Officials and Politicians' (2023) 24 *Human Rights Review* 365 (with a short mention of the case); T McGonagle, '(Re-)casting Epistemic Rights as Human Rights: Conceptual Conundrums for the Council of Europe', in *Epistemic Rights in the Era of Digital Disruption*, MA Horowitz and others (eds), (Palgrave MacMillan 2024) 74 (with a short mention of the principle).

> information necessarily implies that the information provided must be reliable, in particular where this right results from a legal obligation imposed on the State.[5]

Thus, the *Association Burestop* holding represents a significant further development in the access to information jurisprudence in two key respects. First, in rejecting the French Government's submission that Article 10 ECHR merely requires the provision of information – regardless of its accuracy or reliability – the Court affirmed that the right must be interpreted purposively, rather than formalistically. Second, the Court's approach confirms that where public authorities provide information further to a request or a legal compulsion – that is, where they are required to 'speak' – they have an obligation to provide reliable information. This could be an important protective principle for several reasons, in light of (i) the informational imbalances between the state and members of the public; (ii) the role played by public authorities in imparting information of critical importance, such as COVID-19 statistics, climate change data, public safety information, and electoral results; and (iii) the importance of accurate and reliable information in improving trust in institutions and expertise, and as a counterweight to widespread mis- and disinformation, particularly online.[6] However, while the Court's articulation of the principle is a new and significant frontier, its application of the principle in the case leaves much to be desired, as elaborated below. In addition, several conceptual questions about the formulation, scope, and justifiable limitations of the right remain.

While much has changed in respect of the Court's approach to access to information over the past decade, scholarly attention has not followed suit. This article aims to fill this lacuna by analysing the development of the right and corresponding state obligation, drawing attention to the Court's judgment

5 *Association Burestop 55 and Others* (n 3) para 108 (author's translation). The original provides: 'Selon la Cour, le droit d'accès à l'information se trouverait vidé de sa substance si l'information fournie par les autorités compétentes était insincère, inexacte ou même insuffisante. En effet, le respect du droit d'accès à l'information implique nécessairement que l'information fournie soit fiable, en particulier lorsque ce droit résulte d'une obligation légale mise à la charge de l'État.'

6 'Misinformation' refers to false information that is not intended to cause harm, whereas 'disinformation' refers to false information that is intentionally shared to cause harm: see C Wardle and H Derakhshan, 'Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making' (Council of Europe, 27 September 2017): <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-researc/168076277c>; RÓ Fathaigh, N Helberger, and N Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10(4) *Internet Policy Review* 1.

in *Association Burestop*, and arguing that (while imperfect) the judgment establishes a (new) minimum threshold for the provision of information by public authorities. It could therefore represent a critical new frontier in promoting transparent, reliable, and accountable governance, particularly if taken up and further developed by civil society, the media, and future litigants.

This contribution proceeds as follows. Section 2 charts the three 'phases' in the historical development of the right of access to information under Article 10 ECHR, from outright denial, through hesitant development, to recognition of a limited right. This context is necessary to properly situate the Court's judgment in *Association Burestop*, addressed in section 3, as a continuation of this modern approach (a possible 'Fourth Phase' in the development) and a key milestone in the jurisprudential history. Section 4 analyses the potential import of the protective principle laid down, despite the Court's disappointing application of the principle to the facts of the case, and identifies conceptual challenges and uncertainties with the formulation, scope, and application of the right. The lingering challenges with the formulation and scope of the right arise, in part, because of the historical development of the right of access to information and the edifice upon which the principle in *Association Burestop* is built, such that the right recognised and corresponding duty owed by the state are at once overly broad and unduly narrow. At the same time, some conceptual uncertainties remain following the judgment, such as when restrictions of the right can legitimately be imposed and what (if any) role the 'duties and responsibilities' requirement could play in future cases.

2 A Right in Three Phases: The Hesitant Development of Access to Information

Unlike most other international human rights instruments, Article 10 ECHR does not provide a right to 'seek' information.[7] The omission was not accidental: while the right to 'seek' information had been included in earlier drafts of the

7 *Cf* Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 214 A(III), Article 19 ('Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'); International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171, Article 19 ('Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers…'); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Article 13 ('Everyone has the right to freedom of thought and expression. This right includes freedom

Convention, it was omitted from the final text of Article 10.[8] Thus, the right to freedom of expression under the ECHR was limited to the rights 'to *receive* and *impart* information and ideas without interference', subject to the limitations set out in Article 10(2).[9]

This textual difference has been critical to the development of the right of access to information under Article 10,[10] as applicants have sought to read into the right to *receive* information a right of *access* to information held by the state. The Court's response to this line of argument has shifted. Three phases in the development can be discerned: from outright denial, through hesitant development, to limited recognition.[11]

2.1 *Phase One: Outright Denial (1987 – 2005)*

In its first case to consider the question, the Court was not persuaded that any such right of access to information could be read into Article 10, even where the information at issue was of a personal nature. In *Leander v Sweden*, the applicant was let go from his position on the basis that he was a 'security risk'. His request for access to his personnel file – and the reasons underpinning the decision – was denied. The applicant argued that this constituted a violation of his right of access to information under Article 10. The Court disagreed, construing Article 10 restrictively in the process:

> [T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others

to seek, receive, and impart information and ideas of all kinds, regardless of frontiers…'). Note that Article 9 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 does not provide for a right to seek information either (rather, only the rights to 'receive information' and to 'express and disseminate his opinions within the law' are recognised).

8 See *MHB* (n 2) para 135 for a historical overview. For more developments within the Council of Europe, see D Goldberg, 'From Sweden to the Global Stage: FOI as European Human Right' (2016) 7(1) *Journal of International Media and Entertainment Law* 1, 14–26.

9 Article 10(1) ECHR (emphasis added). Interestingly, the language in the provision is permissive and open (in that it 'shall include' the freedoms enumerated, without otherwise restricting the inclusion of *other* freedoms, like the freedom to 'seek' information). However, this textual feature has not played a role in the interpretation or development of the right of access to information under Article 10 ECHR.

10 I am leaving aside for present purposes the recognition of a right under Article 8 (right to respect for private and family life) to access private information pertaining to an individual held by public authorities: see *Godelli v Italy* 33783/09 (ECtHR, 25 September 2012) paras 68–72; *MHB* (n 2) Dissenting Opinion of Judge Spano, para 24.

11 See generally K Pentney, 'Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era' (2022) 22 *Human Rights Law Review* 1, 10.

> wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual.[12]

This conclusion was upheld in *Gaskin v the United Kingdom*,[13] concerning the applicant's request for access to a local authority's case records about the time he had spent in its care as a child.[14]

While both *Leander* and *Gaskin* were Chamber judgments, the question came before a Grand Chamber for the first time in *Guerra and Others v Italy*. The case concerned the authorities' failure to take steps to ensure that the public was informed of the risks, and procedures to follow, in the event of an accident connected with the operation of a nearby chemical factory.[15] The Grand Chamber held that Article 10 ECHR was not applicable: relying on *Leander*, the Court affirmed that freedom to receive information 'cannot be construed as imposing on a state, in circumstances such as those of the present case, obligations to collect and disseminate information of its own motion.'[16] Accordingly, Article 10 was not applicable in the case. However, like *Gaskin*, the Court went on to find a violation of the right to respect for private and family life under Article 8 ECHR on the basis that the applicants had been made to wait 'for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.'[17] Finally, in *Roche v the United Kingdom*, a Grand Chamber reiterated and affirmed its holdings in *Leander*, *Gaskin*, and *Guerra* that the freedom to receive information did not equate to a right of access to information held by public authorities, nor did it impose upon them a duty to provide it.[18]

2.2 *Phase Two: Hesitant Development (2006 – 2013)*

Nearly two decades after *Leander*, the Court for the first time took steps to broaden its interpretation of the right to receive information under Article 10 in

12 *Leander* (n 1) para 74.
13 *Gaskin* (n 1).
14 Ibid para 52. However, the Court held that there had been a violation of the applicant's right to respect for private and family life under Article 8 ECHR: see *Gaskin* (n 1) para 49.
15 *Guerra* (n 1) paras 47 and 53–54.
16 Ibid para 53.
17 Ibid para 60.
18 *Roche v the United Kingdom* [GC] 32555/96 (ECtHR, 19 October 2005) paras 172–173.

Sdružení Jihočeské Matky v Czech Republic (*Matky*),[19] a case that (like *Association Burestop*) concerned an environmental association and information relating to a nuclear power plant. Despite domestic laws which provided for a right to information, the applicant alleged that the authorities tended to arbitrarily limit this right, particularly with respect to information about nuclear energy.[20] Indeed, the authorities had refused the applicant's request to consult the documents in question.[21] The Court affirmed its prior jurisprudence to the effect that the freedom to receive information relates to a state's negative obligation not to interfere in the exchange of information between willing participants. However, in the circumstances of the case, it accepted that the rejection of the request constituted an interference with the applicant's right to receive information. It did so on the basis of several factors: first, that the documents were available to the authorities; second, that domestic legislation required the authorities to have in place a process to consult the documents; and third, that the applicant needed the documents (and could not otherwise obtain them) in order to assess the implications of a regulatory procedure and assert its rights as a party to the proceedings.[22] Ultimately, however, the Court held that the state had not violated the applicant's right to receive information, taking into account the state's margin of appreciation; thus, the claim was rejected as manifestly unfounded.[23] A series of judgments followed this approach in cases where the applicant had an established right to seek information in domestic law, but the authorities had failed to give effect to it.[24]

19 *Sdružení Jihočeské Matky v Czech Republic* 19101/03 (ECtHR, dec, 10 July 2006). See also W Hins and D Voorhoof, 'Access to State-Held Information as a Fundamental Right Under the European Convention on Human Rights' (2007) 3(1) *European Constitutional Law Review* 114, 123–126.

20 *Sdružení Jihočeské Matky* (n 19) para 1.1.

21 Ibid para 1.1.

22 Ibid para 1.1. Note that the Court referred to *Grupo Interpres JE v Spain* 32849/96 (ECmHR, dec, 7 April 1997) in support of its conclusion – a surprising citation as no such right was held to exist in that case.

23 *Sdružení Jihočeské Matky* (n 19) para 1.1.

24 *MHB* (n 2) para 131, citing *Kenedi v Hungary* 31475/05 (ECtHR, 26 May 2009) para 43; *Youth Initiative for Human Rights v Serbia* 48135/06 (ECtHR, 25 June 2013) para 24; *Roşiianu v Romania* 27329/06 (ECtHR, 24 June 2014) para 64; *Guseva v Bulgaria* 6987/07 (ECtHR, 17 February 2015) para 55. See also *Gillberg v Sweden* 41723/06 [GC] (ECtHR, 3 April 2012) para 93. The majority in *MHB* (n 2) held: 'With hindsight the Court considers that this line of case-law did not represent a departure from, but rather an extension of, the *Leander* principles, in that it referred to situations where […] one arm of the State had recognized a right to receive information but another arm of the State had frustrated or failed to give effect to that right' (para 131).

Several years later, in *Társaság a Szabadságjogokért v Hungary* (*Társaság*),[25] the Court relied on this precedent to find that, notwithstanding its case law to the effect that Article 10 neither confers a general right of access to personal information, nor imposes a duty on governments to impart it, 'the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" […] and thereby towards the recognition of a right of access to information.'[26] The case was brought by the Hungarian Civil Liberties Union, which had requested access to a parliamentarian's complaint to the Constitutional Court, concerning amendments to the Criminal Code for drug-related offences. The request was denied, and the applicant alleged that the denial amounted to a breach of its right to have access to information of public interest. The Court held that there had been an interference with Article 10 on the basis that the public has a right to receive information of general interest, and the press as 'watchdog' has a right to *impart* it.[27] Thus, the most 'careful scrutiny' was called for where measures taken by the national authority could discourage the participation of the press in public debate and create obstacles to its news gathering function, 'even measures which merely make access to information more cumbersome.'[28] The public's right to receive information, and the press' right to impart it, were relevant to the Court's analysis.

The Court's discussion of the right of access to information arose during its consideration of the final prong of Article 10(2) – that is, whether the interference was necessary in a democratic society. After noting its progression towards a broader understanding of the right to receive information, the Court once again quoted *Leander* before couching and qualifying its recognition of a right of access as follows:

> [The Court] considers that the present case essentially concerns an interference – by virtue of the censorial power of an information monopoly – with the exercise of the functions of a *social watchdog*, like the press, *rather than a denial of a general right of access to official documents*. In this connection, a comparison can be drawn with the Court's previous concerns that preliminary obstacles created by the authorities in the way of press functions call for the most careful scrutiny […].[29]

25 *Társaság a Szabadságjogokért v Hungary* 37374/05 (ECtHR, 14 April 2009).

26 Ibid para 35 (citing *Sdružení Jihočeské Matky* (n 19)). See P Tiilikka, 'Access to Information as a Human Right in the Case Law of the European Court of Human Rights' (2013) 5(1) *Journal of Media Law* 79, 93–97.

27 *Társaság a Szabadságjogokért* (n 25) para 26.

28 Ibid paras 26–27.

29 Ibid para 36 (emphasis added).

On this basis, the Court accepted that there had been a violation of Article 10.[30] Foreshadowing its more recent judgments, the Court held that:

> obstacles created in order to hinder access to information of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as "public watchdogs" and *their ability to provide accurate and reliable information may be adversely affected*.[31]

The Court drew a parallel between the press as 'public watchdog' and other 'social watchdogs' fulfilling democratic functions by imparting information of public importance.[32]

Thus, in *Társaság* and cases following it, the Court seemingly accepted that there may be a right of access to information (or, at least, a duty on the state not to withhold it) for members of the press and non-governmental organisations (NGOs) fulfilling the role of 'watchdog' and imparting information or contributing to public debate.[33] In *Matky* and cases following it, the Court accepted that there may be a right of access to information where such a right existed domestically or had been recognised by the domestic courts, but was not given effect by another arm of the state.

2.3 *Phase Three: Recognising a Limited Right of Access (2016 – Present)*

In 2016, the Court course corrected once again in *Magyar Helsinki Bizottság v Hungary*. While recognising that 'it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases,'[34] that is precisely

30 Ibid para 39. See F Lehne and P Weismann, 'The European Court of Human Rights and Access to Information' (2014) 3 *International Human Rights Law Review* 303, 306.

31 *Társaság a Szabadságjogokért* (n 25) para 38 (emphasis added).

32 Lehne and Wesimann (n 30) 308–310.

33 See also *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v Austria* 39534/07 (ECtHR, 28 November 2013) paras 41–48 (finding that the denial of the applicant's request for access to court records violated Article 10 as the reasons provided were 'relevant' but not 'sufficient' and the complete refusal to give access to any decisions was not proportionate in the circumstances).

34 *MHB* (n 2) para 150. The Court framed this as a 'clarification', rather than a departure from precedent. It noted: 'In the light of these developments and in response to the evolving convergence as to the standards of human rights protection to be achieved, the Court considers that a clarification of the *Leander* principles in circumstances such as those at issue in the present case is appropriate' (para 154). This was a point of criticism from the dissent, which noted: '[I]t is, quite frankly, impossible to accept that the majority are

what the Court did. The case concerned a request by the applicant NGO for the names of public defenders and the number of their assignments. Unlike *Matky*, no right to the information existed under domestic law. Seventeen police departments complied with the request, and a further five disclosed the information following a successful legal challenge. However, the applicant was unsuccessful in respect of refusals by two police departments to disclose the information. The NGO therefore complained under Article 10 that the domestic court's refusal to order disclosure of the information amounted to a breach of its right of access to information.

A Grand Chamber of the Court, in a 15–2 split decision, held that there had been a violation of Article 10 ECHR.[35] The majority took the opportunity to 'embark on a more general analysis of [Article 10] in order to establish whether and to what extent it embodies a right of access to State-held information'.[36] In a lengthy judgment charting the jurisprudence, consulting the *travaux préparatoires* and analysing comparative and international law, the majority ultimately concluded that the Court was not 'prevented' from interpreting Article 10 as encompassing a right of access to information.[37] Moreover, the majority held that 'the time ha[d] come to clarify the classic principles.'[38] It did so as follows. First, it confirmed the holding in *Leander* that the freedom to receive information prohibits governments from restricting the willing exchange of information between participants, as well as the holding in *Guerra* that the right to receive information does not impose a positive obligation on states to collect and disseminate information. Second, it confirmed that Article 10 does not confer a general right of access to information held by the authorities, nor impose an obligation on states to impart it. The majority found that such a right or obligation *may* arise in two circumstances:

> firstly, *where disclosure of the information has been imposed by a judicial order which has gained legal force* [...] and, secondly, in circumstances *where access to the information is instrumental for the individual's exercise*

merely engaged in "clarification" of the *Leander* principles. On the contrary, let it be clear, today the Court's settled Plenary and Grand Chamber case-law in *Leander*, *Gaskin*, *Guerra and Others* and *Roche* has, in fact, been overruled' (Dissenting Opinion of Judge Spano joined by Judge Kjølbro, para 29).

35 In total, four sets of reasons were provided: the Majority Opinion, a Concurring Opinion of Judges Nussberger and Keller, a Concurring Opinion of Judge Sicilianos, joined by Judge Raimondi, and a Dissenting Opinion of Judge Spano, joined by Judge Kjølbro.

36 *MHB* (n 2) para 117.

37 Ibid para 149.

38 Ibid para 156.

> *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.[39]

The majority then established the legal test (or 'threshold criteria') for a right of access to state-held information, comprised of four elements: (i) the purpose of the information request; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) the readiness and availability of the information. Applying the criteria to the case, the majority held that there had been an interference with the NGO's right of access to information:

> In sum, the information sought by the applicant NGO from the relevant police departments was necessary for the completion of the survey on the functioning of the public defenders' scheme being conducted by it in its capacity as a non-governmental human-rights organisation, in order to contribute to discussion on an issue of obvious public interest. By denying it access to the requested information, which was ready and available, the domestic authorities impaired the applicant NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights.[40]

Several years later, in *Centre for Democracy and the Rule of Law v Ukraine* (*CDRL*),[41] the Court affirmed the limited right of access to information and the criteria it had laid down in *MHB*. The case concerned a request by the applicant NGO to the Central Election Commission of Ukraine for copies of the *curricula vitae* (CVs) of candidates in a parliamentary election. The request was made pursuant to domestic access to information legislation and on the basis that the CVs constituted public information. The request was ultimately refused by

39 Ibid (emphasis added).

40 Ibid para 180. The majority ultimately concluded that the interference could not be justified under Article 10(2), and therefore there had been a violation of Article 10 (para 200). The Dissenting Opinion of Judge Spano, joined by Judge Kjølbro, held that Article 10(1) did not provide for a right of access to information held by public authorities, on the basis of (i) the ordinary meaning of Article 10 and the relevant *travaux préparatoires*; (ii) the object and purpose of the right to freedom of expression; (iii) the Court's prior case law, the fundamental principle of legal certainty and the interpretive authority of the Grand Chamber; (iv) the living instrument doctrine and other principles of interpretation; and (v) the practical consequences of recognising such a right.

41 *Centre for Democracy and the Rule of Law v Ukraine* 10090/16 (ECtHR, 26 March 2020) (*CDRL*). See also *Studio Monitori and Others v Georgia* 44920/09 and 8942/10 (ECtHR, 30 January 2020) paras 32 and 39 (where no violation was found).

the Election Commission, *inter alia* on the basis that the information sought contained personal information.[42] Subsequent appeals were not successful,[43] and the applicant lodged an application with the ECtHR alleging that the denial of access to information needed for the effective exercise of its freedom of expression constituted a violation of Article 10.[44]

Before the ECtHR, the Government of Ukraine did not raise any objection regarding the applicability of Article 10.[45] However, the Court nonetheless considered the applicability of Article 10 *proprio motu*:

> The present case also raises a novel issue at the domestic level and is one of the first cases following the judgment of the Grand Chamber in [*MHB*] to examine the questions of applicability of Article 10 of the Convention in the context of access to information and the circumstances in which refusal of access to certain information may be considered an interference with the right to freedom of expression guaranteed by that provision.[46]

The Court reiterated the fourfold criteria relevant to the assessment set down by the Grand Chamber in *MHB*, and held that a threshold question to be ascertained in each case was, 'whether the information sought was in fact necessary for the exercise of freedom of expression'.[47] This requires that the information, data, or documents sought meets a public-interest test to prompt a need for disclosure under the ECHR, for instance where such disclosure would provide transparency on the conduct of public affairs and on matters of interest for society, thereby allowing participation in public governance.[48] On the facts of the case, the Court held that the failure to disclose (or to order disclosed) the information about the education and work history of the political leaders contained in their official CVs filed with the Electoral Commission interfered with the applicant's exercise of its freedom to receive and impart information.[49] The Court ultimately concluded that the decision

42 *CDRL* (n 41) paras 11–12.
43 Ibid paras 21, 27, and 29.
44 Ibid para 54.
45 Ibid para 55.
46 Ibid.
47 Ibid paras 82–83.
48 Ibid para 84.
49 Ibid para 102.

to deny access was not necessary in a democratic society, and thus there had been a violation of Article 10.[50]

In numerous judgments since, the Court has affirmed and applied the *MHB* holding and criteria to determine whether the (limited) right of access to information has been violated in the circumstances of the particular case.[51] This includes the judgment of *Association Burestop*, which further builds on these foundations and represents a new frontier in the access to information jurisprudence. It is to this judgment that we now turn.

3 A New Milestone, or 'Fourth Phase': A Right of Access to 'Reliable' Information

It is against this backdrop and development that the Court's judgment in *Association Burestop* must be viewed. As noted above, the case was brought by environmental protection associations which opposed a project for an industrial geological storage centre (known as 'Cigéo') in the north-east of France. The case was highly technical in nature and concerned the results of studies undertaken by the public authority and disseminated to the public about the long-term geothermal storage of radioactive waste. In the midst of the energy transition, the issue of how to safely store generated waste became an important question. Responsibility for the long-term storage and management of radioactive waste, for undertaking research related to it, and for advising the public about information relating to the storage of radioactive waste, was vested in a national agency (ANDRA) by legislation.[52] Three options in particular were studied, including geological storage (research which

50 Ibid paras 120–121. Note that there were broader initiatives within the Council of Europe that were taking shape in parallel, in particular the Council of Europe Convention on Access to Official Documents (adopted 18 June 2009, entered into force 1 December 2020) CETS No 205 (known as the 'Tromsø Convention'). The Tromsø Convention entered into force in 2020. To date, it has 15 parties. See Council of Europe, 'Tromsø Convention': <coe.int/en/web/access-to-official-documents>.

51 See, for example, *Eastern Ukrainian Centre for Public Initiatives v Ukraine* 18036/13 and others (ECtHR, 5 October 2023) paras 19–36; *Rovshan Hajiyev v Azerbaijan* 19925/12 and 47532/13 (ECtHR, 9 December 2021) paras 41–45; *Association Burestop 55 and Others* (n 3) paras 76–83; *Zöldi v Hungary* 49049/18 (ECtHR, 4 April 2024) paras 29–40.

52 *Association Burestop 55 and Others* (n 3) paras 5–6. Article L 542–12 7 of the Environmental Code required ANDRA to make available to the public information relating to the management of radioactive waste and participate in the dissemination of scientific and technological culture in this field. The law of 30 December 1991 'concerning research on the storage of radioactive waste' conferred on ANDRA responsibility for researching geological storage options (*Association Burestop 55 and Others* (n 3) paras 6–7).

was conducted by ANDRA).[53] The results of this research were the subject of significant public debate in 2005, and in 2006, the French Government determined that deep geological storage was the preferred solution.[54] In 2009, ANDRA proposed that the Government obtain the rights to a site near Bure to become the centre for subterranean storage of the waste, a proposition the Government accepted in 2010.[55]

In 2008, the nuclear safety authority released a safety guide for the final storage of radioactive waste in deep geological formations. The safety guide provided as a 'fundamental objective' that:

> the geological environment is chosen and the disposal facility is designed in such a way that its safety after closure is ensured passively, in order to protect people and the environment from the radioactive substances and chemical toxins contained in the radioactive waste, without the need for intervention.[56]

In the section outlining the 'essential criteria' for site selection, the guide indicated that the site should be chosen so as to avoid areas of '*exceptional* interest in terms of underground resources'.[57] Finally, in an appendix it stated that the risk of unintentional human intrusion must be taken into account, such that 'the sites selected *should not be of particular interest* [from the point of view of geothermal energy and heat storage]'[58] as such sites are likely to be drilled for geothermal purposes in future.

On the basis of this safety guide, the applicant associations raised concerns about the appropriateness of the Bure site for the Cigéo project. They based their concerns on an engineering report from December 2002, which had indicated that the Bure site was situated on a 'non-negligible' geothermal resource (the Triassic acquifer). The applicant associations sent several requests to the local information and monitoring committee for the Bure laboratory, asking that experimental drilling be undertaken to confirm the presence of this resource.[59] In 2008, ANDRA carried out the requested drilling. In a synthesis report dated July 2009, ANDRA summarised the results of its drilling which indicated that

53 *Association Burestop 55 and Others* (n 3) para 7.
54 Ibid para 9; Law of 28 June 2006 'relating to the sustainable management of radioactive materials and waste'.
55 *Association Burestop 55 and Others* (n 3) para 10 (author's translation).
56 Ibid para 18 (author's translation).
57 Ibid (author's translation) (emphasis added).
58 Ibid (author's translation) (emphasis added).
59 Ibid para 19.

'the geothermal resource at the scale of the transposition was *low*',[60] signalling that there was no risk of untimely drilling once the radioactive waste had been stored in the planned site. The report was published in October 2009 pursuant to ANDRA's statutory informational obligation.[61]

The case centred on the accuracy of this report and its consistency with the safety guide and engineer's report. By letter of 17 December 2012, the associations requested that ANDRA acknowledge that in indicating in its synthesis report of July 2009 that the geothermal resource in the transposition zone was 'low', it had disseminated incorrect and insincere scientific and technological information and in consequence had committed a fault.[62] ANDRA responded by letter of 18 January 2013, indicating that while the appendix to the safety guide mandated that the sites selected should not present 'any *particular* interest', the technical selection criterion in the safety guide stipulated that the site be chosen to avoid areas of '*exceptional* interest in terms of underground resources'.[63] Thus, its exploration had focused on whether there was an 'exceptional geothermal resource' in the Bure site. On the basis of its studies, ANDRA considered that there were 'no thermal resources of exceptional interest'.[64] According to the associations, ANDRA substituted the less demanding condition of absence of 'particular [geothermal] interest' of the site for that of absence of 'exceptional interest'.[65]

In May 2013, the associations brought a claim against ANDRA before the Nanterre Regional Court seeking compensation for damages resulting from violations of ANDRA's obligation to inform the public under Article L 542–12 of the Environmental Code. They underlined that ANDRA's conclusion on the geothermal potential of the Bure site was wrong and based on a deliberately biased assessment of the data. They alleged that ANDRA had breached its obligation to provide information in three respects, namely by: (i) misrepresenting the requirements for assessing the risk of geothermal drilling; (ii) giving an inaccurate and fluctuating assessment of the geothermal resource in the Bure site (describing it first as 'weak', then as 'commonplace', and finally conceding that the qualifier initially chosen 'was indeed confusing'); and (iii) providing false information about the consequences of disrupting the nuclear waste by future drilling.[66] By decision in March 2015, the Regional Court held

60 Ibid para 21 (author's translation) (emphasis added).
61 Ibid paras 20–21.
62 Ibid para 22.
63 Ibid.
64 Ibid para 23.
65 Ibid para 24.
66 Ibid para 25.

that the claims were inadmissible, in part on the basis that the action was not aimed at the withholding of information by ANDRA but rather at the technical execution and conclusions of the study. In addition, the Regional Court held that only the public authorities that commissioned or received the study (that is, the nuclear safety authority) could hold ANDRA liable for the faulty execution of its mission.[67] Further appeals to the Court of Appeal of Versailles and the Court of Cassation were similarly unsuccessful.[68]

Before the ECtHR, the applicants alleged a violation of Article 10.[69] The Article 10 claim had two components. First, the applicants asserted that the right to receive information was voided of its substance by the French courts in that they had failed to check the accuracy of the information communicated to the public by ANDRA.[70] Second, they argued that ANDRA was obliged by law to inform the public, but had provided inaccurate information on environmental risks and dangers, which therefore amounted to 'non-communication'.[71] Though the applicants alleged violations of other Convention provisions (including fair trial rights and right to an effective remedy), the Court determined that as all of the allegations concerned the right to information about environmental risks, it was more appropriate to examine them solely from the perspective of Article 10.[72]

The French Government argued that the claim was inadmissible, as *MHB* established only a right to receive information as a corollary of the exercise of the right to communicate it – a violation only occurred where access to information had been *refused* by the authorities. This was not the case here, as ANDRA had itself disseminated information in accordance with its legal obligation to inform the public. Thus, the obligation set out in *MHB* had been met. By contrast, the applicants argued that the state had imposed on itself an obligation to inform, which had as its goals informing the public and protecting the public's right to access accurate information (that is, 'protection against misinformation on the part of the public').[73] The refusal to communicate

67 Ibid paras 25–28.

68 Ibid paras 29–25.

69 They also alleged violations of their rights to a fair trial, to respect for private and family life, and to an effective remedy under Articles 6, 8, and 13 ECHR, respectively. Only the Article 10 claim is addressed here, except insofar as the Court addressed the rights in combination.

70 *Association Burestop 55 and Others* (n 3) para 74. The associations relied on Articles 6 and 10 ECHR in support of this argument.

71 Ibid. The associations relied on Articles 8 and 10 ECHR in support of this argument.

72 *Association Burestop 55 and Others* (n 3) para 75.

73 Ibid paras 76–77.

information and the communication of inaccurate information represented 'two sides of the same coin',[74] and the Government's approach amounted to an overly formalistic and ineffective conception of the right to information.

The Court, for its part, recalled its holding in *MHB* that the ECHR only guarantees 'to a certain extent and under certain conditions, a right of access to such information and an obligation on the part of the public authorities to communicate it'.[75] However, it rejected the French Government's restrictive and narrow reading of the right:

> [T]he Court rejects the Government's contention that the principles set out in *Magyar Helsinki Bizottság* apply only where the administration has refused a request for information, so that they are not relevant in the present case.
> Admittedly, since the right to receive information guaranteed by Article 10 does not impose positive obligations on States to collect and disseminate information, *proprio motu*, it is mainly in the event that a request for access to information is refused by the authorities of a State that a problem is likely to arise under this provision. A State may, however, prescribe for itself an obligation to collect or disseminate information *proprio motu*.[76]

This was the case here, as domestic law imposed on ANDRA the obligation to make information relating to the management of radioactive waste available to the public. However, despite the legal requirement in place, the Court held that the circumstances in the case fell within the second branch of *MHB* (that is, where access to the information is decisive for the exercise of freedom of expression and a refusal of access constitutes an interference with the exercise of this right).[77] The Court went on to stipulate that the fourfold test set out in *MHB* applies where the alleged interference 'does not result from a refusal to provide access to information but, as in the present case, *from the allegedly insincere, inaccurate or inadequate nature of information provided by a public authority under an obligation to inform prescribed by domestic law*'.[78] Thus, according to the Court, 'the provision of insincere, inaccurate or inadequate information in such circumstances is tantamount to a refusal to inform.'[79]

74 Ibid para 77.
75 Ibid para 79 (author's translation).
76 Ibid paras 80–81 (author's translation).
77 Ibid paras 82–83.
78 Ibid para 85 (author's translation) (emphasis added).
79 Ibid.

Applying the criteria to the facts of the case, the Court held that Article 10 ECHR was applicable, as the information was necessary for the applicants to carry out their purpose of informing the public about environmental risks presented by the Cigéo project; the information in dispute was part of an ongoing public debate and was of public interest; the applicants played the role of 'watchdog'; and the information was readily available.[80]

In considering the merits of the Article 10 claim, the Court again reiterated its broad reading of the right of access to information, and its practical and effective requirements:

> [T]he right of access to information would be deprived of its substance if the information provided by the competent authorities was insincere, inaccurate or even insufficient. Indeed, respect for the right of access to information necessarily implies that the information provided must be *reliable,* in particular where this right results from a legal obligation imposed on the State. The effectiveness of this right therefore requires that, in the event of a dispute in this respect, the interested parties have a remedy enabling them to check the content and quality of the information provided, within the framework of an adversarial proceeding. On this point, the Court reiterates that the object and purpose of the Convention, an instrument for the protection of human rights, calls for its provisions to be understood and applied in a way that makes their requirements practical and effective, not theoretical and illusory.[81]

The Court further noted that access to such 'control' is 'particularly important' where the information at issue relates to a project posing a major environmental risk.[82] However, as the applicant associations had been able to put forward their arguments in full in adversarial proceedings before the appellate courts, the Court was satisfied that they had been afforded the 'exercise of effective control over ANDRA's compliance with its legal obligation to provide the public with information on radioactive waste management and, in this particular case, over the content and quality of the information disseminated.'[83] As the

80 Ibid paras 86–90.

81 Ibid para 108, citing *MHB* (n 2) para 121 and *Soering v the United Kingdom* 14038/88 (ECtHR, 7 July 1989) para 87 (author's translation) (emphasis added).

82 *Association Burestop 55 and Others* (n 3) para 109 (author's translation).

83 Ibid para 115 (author's translation). Interestingly, the Court noted that the Versailles Court of Appeal's ruling was 'not without criticism' but held that in the circumstances, that alone was 'not sufficient to call into question the finding that the five aforementioned associations had access to a remedy meeting the requirements of Article 10 of the Convention.'

associations had 'access to a remedy meeting the requirements of Article 10,' no violation of Article 10 was found.[84]

4 Analysis: One Step Forward, One Step Back?

The *Association Burestop* decision is an important benchmark in the evolution of the Court's access to information jurisprudence. The recognition that the right of access to information under the ECHR has a *qualitative* aspect – that is, that it requires the provision of sincere, accurate, and reliable information by public authorities – is a significant milestone in the jurisprudential trajectory.[85] Viewed in the historical context of the meagre beginnings and hesitant recognition of the right of access, the judgment illustrates how far the Court has come from its initial judgments which construed Article 10 narrowly and formalistically, such that it did not include *any* right of access to state-held information, nor impose any obligations on the state to provide it. In addition, in rejecting France's argument that the obligation imposed on states was simply an instrumental one – that is, to provide information, without any requirements as to its veracity, sincerity, completeness, and the like – the Court affirmed that such an approach would deprive the right of any meaning,

84 Ibid paras 115–116 (author's translation).

85 Notably, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention) places certain qualitative requirements on states in collecting and disseminating environmental information: for instance, Article 5(1)(b) requires that states put in place systems to provide an '*adequate* flow of information'; Article 5(2) requires that the way public authorities make environmental information available to the public is '*transparent*' and '*effectively accessible*' (which includes provision of '*sufficient* information'; and Article 5(7) requires that states publish the facts and analyses which they consider '*relevant* and *important* in framing major environmental policy proposals'. However, none of these requirements goes as far as the judgment in *Association Burestop 55 and Others* (n 3) in requiring sincere, accurate, and reliable information – indeed, the Court did not refer to the Aarhus Convention in its Article 10 analysis (although it was raised in the 'relevant legal framework' section of its analysis: see *Association Burestop 55 and Others* (n 3) paras 42–45). Moreover, though France is a party to the Aarhus Convention, the Government's argument in respect of its limited obligations under Article 10 ECHR reveals that it did not believe that it was bound by any such (qualitative) obligations. Finally, the Aarhus Convention is only applicable to environmental information, whereas the judgment in *Association Burestop 55 and Others* (n 3) has broader implications for the provision of state-held information outside of the environmental context. It thus goes further in both content and scope than pre-existing administrative legal obligations on public authorities.

and rights-bearers of meaningful and effective protection. Instead, the Court recognised that access to government-held information operates as a 'rights multiplier' – an essential precondition for individuals to hold governments accountable and to give effect to other rights.[86] However, while the Court's recognition of a new minimum threshold for the provision of (quality) information holds promise, there remains significant room for improvement to ensure that the right of access to reliable information is meaningful and more widely applicable.

This section proceeds in two parts. First, the protective benefits which may be afforded by virtue of the recognition of a right of access to *reliable* information from the state, and the broader ramifications which may stem from it, are analysed. Second, the conceptual challenges, practical shortcomings, and lingering uncertainties which may limit the protection afforded are outlined.

4.1 *Protective Benefits and Broader Ramifications*

The Court's recognition of a right of access to *reliable* information – and a duty on states to provide it – is an important protective principle with broader ramifications for several reasons. Firstly, significant informational imbalances exist between the state and members of the public which may create a democratic deficit where states refuse to provide information, or fail to provide information that is sincere, accurate, sufficient, and reliable. Indeed, the Court recognised in *Társaság* the 'censorial power of an information monopoly' where public bodies refuse to disclose information necessary for public 'watchdogs' like the media and civil society organisations to perform this function.[87] As Joseph Stiglitz explained:

> Secrecy gives those in government exclusive control over certain areas of knowledge, and thereby increases their power, making it more difficult

86 V Rossi, 'Government Transparency and the Right of Access to Information: Evolving International and European Standards and Their Implementation in the Italian Legal System' (2022) 28 *Italian Yearbook of International Law* 181, 182, citing United Nations General Assembly, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (4 September 2013) A/68/362, para 19, and United Nations Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue' (16 May 2011) A/HRC/17/27, para 22. *Cf* M McDonagh, 'The Right to Information in International Human Rights Law' (2013) 13(1) *Human Rights Law Review* 25 (which argues that 'basing the recognition of a right to information on the furtherance of other rights may operate to limit the development of the right to information and may even have negative connotations in terms of the enjoyment of such other rights' (26)).

87 *Társaság a Szabadságjogokért* (n 25) para 36.

> for even a free press to check that power. In short, a free press is necessary for a democratic society to work effectively, but without access to information, its ability to perform its central role is eviscerated.[88]

However, the judgment in *Association Burestop* takes this analysis a step further, and clarifies that withholding truthful information is not the end of the rights inquiry: to the contrary, a public authority's disclosure of insincere, inaccurate, insufficient, or unreliable information represents the other side of the coin, and may equally run afoul of Article 10.[89]

Secondly, the Court's holding properly accounts for the varying roles played by public authorities in communicative processes, and the differing ways that states may interfere with freedom of expression in the exercise and fulfilment of these roles. States and their constituent parts are not only regulators of information, but also *facilitators of* and *participants in* communicative processes.[90] Though the ECtHR has long recognised that freedom of expression encompasses the public's right to be informed,[91] this is the closest it has come to addressing whether the right protects the public from being *mis*informed by public authorities. Freedom of expression jurisprudence has traditionally focused on safeguarding the means of expression and protecting against an *uninformed* electorate. This decision may bridge the gap by clarifying that states are also under a positive obligation not to *misinform* the populace.[92]

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88 JE Stiglitz, 'On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life' (Oxford Amnesty Lecture, 27 January 1999): <https://internationalbudget.org/wp-content/uploads/On-Liberty-the-Right-to-Know-and-Public-Discourse-The-Role-of-Transparency-in-Public-Life.pdf>.

89 In the American context, Mark Yudof noted in his seminal work that 'government expression and secrecy can sometimes serve the same functions as direct government censorship' (M Yudof, *When Government Speaks: Politics, Law and Government Expression in America* (University of California Press 1983) 158).

90 TI Emerson, *The System of Freedom of Expression* (Random House 1970) 697–716; Yudof (n 89); H Norton, *The Government's Speech and the Constitution* (Cambridge University Press 2019); Pentney (n 11).

91 *Sunday Times v the United Kingdom* (*No 1*) [Plenary] 6538/74 (ECtHR, 26 April 1979) para 66. In fact, the judgment stipulates that the public has a right to be 'properly' informed, although the qualifier disappeared in subsequent cases.

92 S Baume, 'Why Informed Opinions Matter for Democracy and Why Misinformation Should Not be Underestimated in Referendum Processes', in *Misinformation in Referenda*, S Baume and others (eds), (Routledge 2021) 42. Baume remarks that in recent decades, 'Survey research has shown that a growing part of the population was not actually uninformed but rather disinformed or misinformed. That is, they hold inaccurate factual beliefs and use incorrect information to form their preferences,' citing J Kulinski and others, 'Misinformation and the Currency of Democratic Citizenship' (2014) 62 *Journal of Politics* 790.

This is a critical development, because the state is an incredibly powerful 'speaker', particularly in the realm of environmental risks and dangers but in others as well – including public health, foreign policy, employment, public safety, and criminal justice. Information it conveys may be deemed more trustworthy or at least may be more likely to capture the media and public's attention, particularly where it relates to topics that fall within its traditional expertise or function.[93]

The provision of accurate information by states is of critical importance for individual choice and collective action at all times, as 'meaningful participation in democratic processes requires informed participants'.[94] But it is especially critical in times of public crisis. It may be noteworthy in this regard that the judgment in *Association Burestop* was rendered in the wake of the COVID-19 pandemic. The pandemic, and associated 'infodemic',[95] heightened calls for the provision of information by public authorities, and illustrated the importance of public authorities disclosing information that is sincere, accurate, sufficient, and reliable.[96] For example, studies have shown that during his time in office, former President Trump was a 'major vector of disinformation' during the height of the COVID-19 pandemic, and have linked his dissemination of misinformation to 'reduced compliance with pandemic

93 Barendt speaks of an inequality of arms between government speakers, who have an enormous platform to widely disseminate their messages, and other actors in the marketplace: E Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2005) 12. Other speakers may have similarly large or perhaps larger pulpits – like religious leaders, famous athletes and celebrities – but their speech is subject to government *regulation*, and the analysis may therefore differ.

94 J Stiglitz, 'The Role of Transparency in Public Life', in *The Right to Tell: The Role of the Mass Media in Economic Development*, World Bank (eds), (World Bank 2002) 30.

95 WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC, 'Managing the COVID-19 Infodemic: Promoting Healthy Behaviours and Mitigating the Harm from Misinformation and Disinformation' (23 September 2020): <who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>. See also J Zarocostas, 'How to Fight an Infodemic' (2020) *Lancet* 395, 676.

96 R Luscombe, '"That Decision Cost Lives": Covid Data Case Further Deflates Ron DeSantis's Campaign' (The Guardian, 15 October 2023): <theguardian.com/us-news/2023/oct/15/ron-desantis-republican-presidential-campaign-covid-data-florida-deaths>; K Niburski and O Niburski, 'Impact of Trump's Promotion of Unproven COVID-19 Treatments and Subsequent Internet Trends: Observational Study' (2020) 22(11) *Journal of Medical Internet Research* 1; KH Jamieson and DD Albarracín, 'The Relation Between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US' (Harvard Kennedy Misinformation Review, 20 April 2020): <misinforeview.hks.harvard.edu/article/the-relation-between-media-consumption-and-misinformation-at-the-outset-of-the-sars-cov-2-pandemic-in-the-us/>. See further refs in n 95, n 97, n 98, and n 99.

control measures, which eventually translated into higher COVID-19 infection and fatality growth rates in U.S. counties that predominantly voted for Trump in 2016 than in those that voted for Clinton.'[97] State actors also played a role in previous public health crises, including the HIV/AIDS epidemic, during which government actors' denialism and the public mistrust it fuelled complicated and frustrated public health efforts.[98] In sum, the real-world impact of public health emergencies, such as COVID-19 and the HIV/AIDS epidemic, depends on the actions of individuals, which in turn depends in part on the quality of the information available to them.[99]

Finally, and relatedly, the Court's holding may indirectly serve to improve trust in institutions and expertise by setting minimum qualitative thresholds for state provision of information, bolstering informed public debate and action in the result. The Committee of Ministers, in a recent Recommendation, recognised that, '[i]n this increasingly polarised information ecosystem, individuals' trust in media, as well as trust in politics, institutions and expertise, has in many States declined to a worryingly low level.'[100] This has led some experts to remark that democracy is facing an epistemic crisis (referring to the degradation in 'the manner and circumstances in which we as political actors acquire knowledge relevant for participating in politics, as well as the

97 S Lewandowsky and others, 'When Science Becomes Embroiled in Conflict: Recognizing the Public's Need for Debate While Combating Conspiracies and Misinformation' (2022) 700 *ANNALS of the American Academy* 26, 28, citing S Evanega and others, 'Coronavirus Misinformation: Quantifying Sources and Themes in the COVID-19 "Infodemic"' (2020): <allianceforscience.org/wp-content/uploads/2020/09/Evanega-et-al-Coronavirus-misinformationFINAL.pdf>, and A Gollwitzer and others, 'Partisan Differences in Physical Distancing are Linked to Health Outcomes During the COVID-19 Pandemic' (2020) 4(11) *Nature Human Behaviour* 1186.

98 See D Fassin and H Schneider, 'The Politics of AIDS in South Africa: Beyond the Controversies' (2003) 326 *British Medical Journal* 495; M Heywood, 'The Price of Denial' (Southern African Regional Poverty Network, 2005): <sarpn.org/documents/d0001195/4-The_Price_of_Denial-Mark_Heywood.pdf>; C Laurier Decoteau, *Ancestors and Antiretrovirals: The Bio-Politics of HIV/AIDS in Post-Apartheid South Africa* (University of Chicago Press 2013) 78–84 ('It has been estimated that 365,000 people died as a direct result of denialism').

99 G Pennycook and others, 'Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-Nudge Intervention' 31(7) *Psychology Science* 770, 770.

100 Council of Europe, 'Recommendation CM/Rec(2022)4 of the Committee of Ministers to Member States on Promoting a Favourable Environment for Quality Journalism in the Digital Age' (17 March 2022) CM/Rec(2022)4, para 7.

dimension of trust that we can have in such knowledge')[101] while others caution that society has reached a 'critical juncture; an information crisis.'[102] This information crisis is evident in 'five giant evils' – namely, confusion, cynicism, fragmentation, irresponsibility, and apathy – which, in combination, represent 'a threat to decision-making, national security and democratic government'.[103] That is not to suggest that the 'information crisis' specifically, or the epistemic crisis more generally, can be remedied solely through the provision of accurate information from states; broader economic, social, and political changes have contributed to these crises, and broader structural changes will be necessary to address them.[104] However, it is certainly the case that the provision of inaccurate, insincere or untrustworthy information by states contributes to, exacerbates, or (at a minimum) does nothing to *improve* the information crisis and the decay in truth and trust. Trust is necessary for the effective functioning of democracy, and the erosion of public trust comes at a significant price for democracy:

> The combination of *truth* decay and *trust* decay accordingly creates greater space for authoritarianism. Authoritarian regimes and leaders with authoritarian tendencies benefit when objective truths lose their power. If the public loses faith in what they hear and see and truth becomes a matter of opinion, then power flows to those whose opinions are most prominent – empowering authorities along the way.[105]

As alluded to above, trust is particularly important in times of crisis. Indeed, 'effective communications and leadership are central to the management of pandemics and the rapidly changing societal and economic landscape' and can 'facilitate public trust, confidence, and, importantly, compliance with

101 P Dahlgren, 'Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy' (2018) 25(1–2) *Journal of the European Institute for Communication and Culture* 20, 20. See also MA Horowitz and others (eds), *Epistemic Rights in the Era of Digital Disruption* (Palgrave MacMillan 2024); L Watson, *The Right to Know: Epistemic Rights and Why We Need Them* (Routledge 2018).

102 LSE Commission on Truth, Trust, and Technology, 'Tackling the Information Crisis: A Policy Framework for Media System Resilience' (2021): <https://www.lse.ac.uk/media-and-communications/assets/documents/research/T3-Report-Tackling-the-Information-Crisis.pdf> 9.

103 Ibid 10–12.

104 Ibid 9.

105 D Citron and R Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 *California Law Review* 1753, 1786.

the behaviours needed from individuals, communities, organisations, and nations'.[106] Yet according to a report prepared for the European Parliament, the COVID-19 pandemic – and related 'infodemic' – was 'marked by insufficient access to trustworthy information':

> The diffused fear from the invisible threat and restrictive social measures caused an elevated level of anxiety among people. Trust in the media and governments became a key component of social stability and defending against the epidemic. Like most other human rights, freedom of expression and media freedom suffered a decline during this crisis.[107]

Information is 'the essential "raw material" that is worked upon to yield new knowledge.'[108] Beyond knowledge-formation, information can orient and drive action.[109] The information ecosystem is now rife with mis- and disinformation, particularly online. The obligation on states to provide sincere, accurate, sufficient, and reliable information could therefore serve as an important counterweight to mis- and disinformation that is shared by private actors or foreign states, or at least help to mitigate its harmful real-world implications.

Of course, the Court's holding in *Association Burestop* alone will not rectify the existing 'information disorder', nor will it necessarily lead to an improvement of trust in the state. Even accurate and reliable information may not be viewed as such by the public (or by certain segments therein).[110]

106 B Hyland-Wood and others, 'Toward Effective Government Communication Strategies in the Era of COVID-19' (2021) 8(30) *Humanities & Social Science Communication* 1, 2.

107 J Bayer and others, 'The Fight Against Disinformation and the Right to Freedom of Expression' (European Parliament, July 2021): <europarl.europa.eu/RegData/etudes/STUD/2021/695445/IPOL_STU(2021)695445_EN.pdf> 10.

108 Dahlgren (n 101) 20.

109 In the public health context, see n 95–99. In the climate context, see MA Ranney and D Clark, 'Climate Change Conceptual Change: Scientific Information Can Transform Attitudes' (2016) 8 *Topics in Cognitive Science* 49, 68 (which experiments demonstrated that it was possible to 'quickly cause more people to (a) accept global warming's reality (as climatologists see it), (b) express concern about it, and (c) orient toward action regarding it. Naturally, *intentions* to act are not *actions*, but they are often actions' precursors').

110 Dahlgren defines knowledge as 'the integration of new information with people's existing frames of reference – including not least lived experience – to further extend or modify those frames, including even possibly identity aspects' (Dahlgren (n 101) 21). These frames of reference will undoubtedly shape individuals' perception of information provided by the state or other actors.

Moreover, as discussed below, information from public authorities will continue to be mediated by gatekeepers such as the media and NGOs, which may colour public perceptions of its veracity (and, by extension, of the trustworthiness of public officials). At a minimum, however, the judgment does two things. First, it confirms (at least in principle) that the quality of the information provided by public authorities *may* be the subject of review within the meaning of Article 10 ECHR. Second, it provides a mechanism for oversight and review of the state's participatory role in the information ecosystem, and an opportunity for (some members of) the public to push back on insincere, inaccurate, insufficient, or unreliable information from public authorities. It is far from perfect and, admittedly, several challenges and ambiguities remain, as addressed below. But the principle enunciated closes the door to the very argument advanced by the French Government before the Court – that Article 10 requires only the provision of information, regardless of its quality or content. In doing so, the Court has set a (new) minimum threshold for states' provision of information: namely, that governments may violate Article 10 where they provide insincere, inaccurate, insufficient, or unreliable information.

4.2 *Conceptual Challenges, Practical Shortcomings and Lingering Uncertainties*

Though the *Association Burestop* judgment is an important milestone and a new frontier in protecting a meaningful right of access to quality information, that is not the whole story. This section sets out conceptual challenges which arise because of the jurisprudential foundations on which the principle is built; shortcomings in the Court's application of the principle which water down its protective benefits; and lingering uncertainties which persist following the judgment.

4.2.1 Challenge #1: Overly Broad and Unduly Narrow Framing

The first conceptual challenge is that, paradoxically, the right recognised and corresponding duty owed by the state are at once overly broad and unduly narrow. In effect, the right of access to information protects against the provision, by the state, of 'insincere, inaccurate or even insufficient' information, and requires that information provided by the state is reliable.[111] The right is thus cast in broad terms (a right of access to reliable information). However, the principle builds on – and is therefore constrained by – the jurisprudential foundations outlined in section 2 and synthesised in *MHB*, with

111 *Association Burestop 55 and Others* (n 3) para 108 (author's translation).

the result that the category of rights-holder is unduly narrow. In particular, the threshold criteria set down in *MHB* place limits on who can rightfully claim to be a beneficiary of the right, as both the purpose of the request for information and the role of the applicant are weighed in the balance. As a result, only those playing the role of 'watchdog' – be it NGOs, the media, academics and the like – appear able to exercise the right of access to information held by a public authority.[112] In addition, such actors can only do so when disclosure of the information at issue is a precondition to their effective enjoyment of freedom of expression – that is, when it is necessary in order for them to impart information and ideas about matters of public interest. Even though both the 'public interest' and the function of 'watchdog' have been construed broadly, these qualifiers serve to circumscribe the right and narrow its application to particular actors fulfilling particular roles. Requests that are 'too general' or which fail to specify how the information sought 'could be of interest to society as a whole and could enhance public governance, in general, or the quality of the applicant's involvement in the associated public debate' will not suffice.[113]

As a result of this formulation, the public's right to be informed by the authorities is entrusted to, and must be fulfilled and safeguarded by, gatekeepers and intermediaries.[114] The public is, to some extent, at the mercy of their whims and preoccupations; its access to information is mediated in part by the stories they deem worthy of telling.[115] From an 'epistemic equality' perspective, this is problematic: it goes against the notion that individuals in a society should 'be equally capable of making informed choices about matters of societal importance', which requires that they have 'equal access to all

112 See generally M Dahlberg, 'Positive Obligations and the Right of Access to Information in the European Convention on Human Rights: Yes or No?' (2019) *European Human Rights Law Review* 389, 394 ('The Court has stressed the role of the press and press-like applicants (public or social watchdogs) to have the right of access to information for the purpose for [sic] creating public debate and discussion. *In that sense, the right of access to information under art.10 ECHR is not guaranteed for everyone*.'). I am leaving aside, for present purposes, the first category which triggers the obligation to disclose under *MHB* (n 2) (an enforceable judicial decision ordering disclosure). It is possible that a broader category of 'rights-holders' may be envisioned and permitted by domestic access to information legislation, but as noted above, it is not yet clear how the Court will treat such instances following *Association Burestop 55 and Others* (n 3).

113 *Georgian Young Lawyers' Association v Georgia* 2703/12 (ECtHR, dec, 19 January 2021) paras 30–33.

114 *Sunday Times* (*No 1*) (n 91) para 66.

115 This is particularly concerning with respect to the media in the current digital age, as a significant amount of control is in the hands of corporate actors which may 'shape the character of the information made available' (see Dahlgren (n 101) 21).

relevant information and knowledge necessary for informed will formation.'[116] From a rights perspective, this confinement of the right to a particular subset of 'watchdogs' goes against the wording of Article 10 (which purports to apply to 'everyone') and creates a hierarchy of rights-holders, in which exists 'a privileged elite with special rights to access information, and the "commoners", subjected to a general regime allowing more far-reaching restrictions.'[117] In confining the right of access to reliable information to 'watchdogs' rather than the broader public, the Court has limited the right to an instrumental, rather than an intrinsic, one which can only be claimed by particular groups or professions.[118] Paivi Tiilikka points to the deficiencies and inequalities of this approach:

> One could claim that natural persons should have as broad a right to receive information as the press, radio and television stations, and NGOs. In addition, it should be asked whether it is right from the point of view of equality that some legal persons or natural persons, such as journalists, have a broader right to receive information than other persons, as appears to be the case from the Court's decisions where the press, radio and television stations, and journalists enjoy a special position.[119]

With respect to the duty on the state, at first glance it appears quite sweeping: it is obliged to provide reliable, accurate, and sufficient information. However, this duty remains limited to the two circumstances laid out in *MHB*. It is seemingly confined (exclusively or, at least, mainly) to circumstances in which information is provided pursuant to a legal compulsion. This may not be a problem in practice, as most member states to the ECHR recognise a statutory

116 A D'Arma and others, 'Introduction: The Epistemic Turn', in *Epistemic Rights in the Era of Digital Disruption*, MA Horowitz and others (eds), (Palgrave MacMillan 2024) 4.

117 *MHB* (n 2) Dissenting Opinion of Judge Spano, Joined by Judge Kjølbro, citing Judge Wojtyczek in *Guseva* (n 24) para 7. Judge Wojtyczek went on to observe: 'We are all social watchdogs who oversee the action of the public authorities. Democratic society is - *inter alia* - a community of social watchdogs. The old distinction between journalists and other citizens is now obsolete. In this context, the case-law hitherto on the functions of the press seems out of date in 2015 and should be adapted to the latest social developments. […] Access to information should not depend on the status of the person requesting information.' See also S Parmar, 'Affirming the Right of Access to Information in Europe: The Grand Chamber Decision in *Magyar Helsinki Bizottsag v Hungary*' (2017) *European Human Rights Law Review* 68, 72–73.

118 McDonagh (n 86) 26–28. See also Parmar (n 117) 73.

119 Tiilikka (n 26) 102. This statement predates the Court's judgment in *Association Burestop 55 and Others* (n 3) but remains equally apt in the wake of it.

right of access to state-held information.[120] However, the judgment does seem to exclude from protection situations where public authorities choose to provide information that is insincere, inaccurate, insufficient, or unreliable *of their own motion*. In such circumstances, it appears that the *Association Burestop* holding would not apply. Thus, where the state chooses to disclose information, or to 'speak' of its own volition – through policy statements, press briefings, and media statements – *Association Burestop* appears to have little to offer or require about the quality of the information that must be provided. Taken together with the Court's frequent refrain that the right of access to information does not impose on states the proactive obligation to collect or disseminate information of public interest, the duty imposed on states by virtue of *Association Burestop* is more circumscribed, and the protection afforded by the principle potentially less effective, than it appears at first blush.

Take, for instance, the release of insincere, inaccurate, or unreliable information about COVID-19 infection rates by a public health authority or government official at the height of the pandemic. Where government officials – say, Presidents or Ministers of Health – misinform (or disinform) during a press conference, or in a Tweet to their followers, the judgment in *Association Burestop* has no application. The public's right to be (properly) informed has no remedy in such instances.[121] It is only where such disclosure arises because of an enforceable judicial order, or where a public 'watchdog' such as a journalist, an NGO, or an academic researcher makes a request for access to information concerning COVID-19 infection rates, and the information provided is insincere, inaccurate, insufficient, or unreliable, that the right may have been infringed. This places significant pressure on watchdogs to oversee

120 See Hins and Voorhoof (n 19) 114, citing D Banisar, 'Freedom of Information Around the World 2006: A Global Survey of Access to Government Records Laws' (Privacy International, 2006): <https://www.humanrightsinitiative.org/programs/ai/rti/international/laws_papers/intl/global_foi_survey_2006.pdf>. This is in line with international trends and practices: as of 2022, 133 of 193 UN member states have adopted legislation setting out the rules governing (and providing) access to information (which accounts for 91% of the world's population): Article 19, 'Progress on the Right to Information Around the World' (7 July 2022): <article19.org/resources/infographic-progress-on-the-right-to-information-around-the-world/>.

121 The *individual's* right to be informed as distinct from the *public's* right to be informed has been a point of some contestation, best illustrated in the 'right to the truth' cases: see generally M van Noorloos, 'A Critical Reflection on the Right to the Truth About Gross Human Rights Violations' (2021) 4(21) *Human Rights Law Review* 874, 881–883; AM Panepinto, 'The Right to the Truth in International Law: The Significance of Strasbourg's Contributions' (2017) 37 *Legal Studies* 739, 753.

the accuracy and sufficiency of government information, and comparably less on government actors who choose to speak.

Accordingly, though the right and corresponding duty on the state in respect of providing access to sincere, accurate, sufficient, and reliable information are formulated in broad terms with significant protective implications, both are narrowed (arguably unduly) by the Court such that their impact in practice may be limited in application and scope.

4.2.2 Challenge #2: Shortcomings in the Application of the Principle

A second conceptual challenge – and practical shortcoming – of the judgment relates to the Court's assessment on the merits and practical application of the principle to the facts. Despite recognising that the right of access to information must be interpreted in a manner that is practical and effective, the Court required only that a procedure to test or challenge the information exist for the state to have fulfilled its obligation. The Court tied this procedural inquiry to the 'effectiveness' of the right of access to *reliable* information, such that where the reliability of the information is disputed, 'the interested parties have a remedy enabling them to check the content and quality of the information provided, within the framework of an adversarial proceeding.'[122] As the applicants had such an opportunity in adversarial proceedings in France (and therefore 'had access to a remedy meeting the requirements of Article 10 of the Convention'), the Court found that no violation had occurred.[123]

This requirement sets a rather low bar for compliance and is difficult to reconcile with the overarching premise that the right of access to information would be 'deprived of its substance' if the information provided by public authorities was insincere, inaccurate or even insufficient. It may be more readily understood as a compromise borne of necessity – for the adjudication of what is 'true' and 'false' poses significant challenges, particularly where the information comes from the state and concerns contentious issues or grey areas where statements of fact and opinion overlap.

A preferable approach may have been for the Court to indicate certain benchmarks to ensure that even if the 'truth' of the information cannot be assured, the accuracy and reliability of the information are foregrounded and pursued in the process leading to its dissemination. This is the approach it has endorsed in analogous situations, including in respect of access to information requests which are denied on the basis of national security concerns.[124] In such

122 *Association Burestop 55 and Others* (n 3) para 108 (author's translation).

123 Ibid paras 115–116.

124 *Saure v Germany* 8819/16 (ECtHR, 8 November 2022) paras 53–54.

cases, establishing that the applicant had access to adversarial proceedings, without more, does not suffice: the Court 'scrutinise[s] the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned.'[125] Such an approach allows for a more probing inquiry than that undertaken in *Association Burestop*, wherein the Court found no interference with Article 10 – and no need to engage in the analysis under Article 10(2) – despite recognising that the NGO s' application had been declared inadmissible at first instance and the grounds for the appellate court's ruling were 'certainly not without criticism'.[126] In particular, the Court held that it would have been 'desirable' for the judges in the Versailles Court of Appeal to have better substantiated their response to the applicants' challenge to the reliability of the information provided.[127] As this was the central issue in the case, a more fulsome review and greater scrutiny of the sufficiency of the remedial process would have been preferable to support the conclusion that no violation of Article 10 had occurred.

As it stands, the Court's assessment of the Article 10 claim (and its application of the principle to the particular facts at hand) calls into question the distinct role played by Article 10, as the right to an effective remedy is provided for under a separate heading (namely, Article 13 ECHR). Indeed, as noted above, the applicants in *Association Burestop* had alleged a violation of this provision as well, but the Court declined to deal with it separately, opting instead to address all of the allegations under Article 10.

4.2.3 Challenge #3: Lingering Uncertainties over Permissible Restrictions and Limitations

In addition to these conceptual challenges and practical shortcomings, several uncertainties persist and may require clarification in future cases. The first is when the right to receive accurate information can justifiably be limited or restricted within the meaning of Article 10(2), for instance in the interests of national security, to prevent disclosure of information received in confidence, or to protect the reputation or rights of others. This issue often arises in access to information cases, but the Court did not undertake such

125 Ibid para 54; *Šeks v Croatia* 39325/20 (ECtHR, 3 February 2022) para 65; *Yam v the United Kingdom* 31295/11 (ECtHR, 16 January 2020) para 56. The same principle has also applied in other contexts and in respect of other grounds: see *Janowiec and Others v Russia* [GC] 55508/07 and 29520/09 (ECtHR, 21 October 2013) para 213; *Fitt v the United Kingdom* [GC] 29777/96 (ECtHR, 16 February 2000) para 46; *Regner v the Czech Republic* [GC] 35289/11 (ECtHR, 19 September 2017) para 149.

126 *Association Burestop 55 and Others* (n 3) paras 110–116 (author's translation).

127 Ibid (author's translation).

an analysis in *Association Burestop*, which leaves unanswered how it might do so in future cases.[128] Arguably, the holding could add a new dimension to the Article 10(2) analysis, in particular where selective disclosure leads to inaccurate or misleading information being released into the public domain. How the analysis might change depending on the aim being pursued, together with the nature of the deficiency alleged (that is, whether it is the insincerity, inaccuracy, insufficiency, or unreliability of the information provided that is challenged) remains to be seen, but one could expect that these differences would bear on the analysis undertaken and the conclusion reached.

Take, for instance, the recent case of *Saure v Germany*.[129] The applicant (a journalist) had been refused physical access to certain files held by the German Foreign Intelligence Service concerning the death of a prominent politician in 1988. The applicant had received information on the content of the files (in the form of a summary of declassified information) but complained that only documents dating from 1991 onwards had been included.[130] In the domestic proceedings, the applicant argued that the voluminous scope of the files at issue meant that access to the information in a 'complete and appropriate manner' could only be achieved by allowing him to consult the files in person.[131] The authorities countered that 'there were no grounds for concluding that the obligation to give access to the information *in a complete and truthful manner* could only be achieved by way of allowing the applicant to consult the files in person.'[132]

The ECtHR held that the question of whether the threshold set out in *MHB* had been met could 'ultimately be left open' as even assuming that physical access was instrumental to his freedom of expression, and that its denial constituted an interference with the applicant's Article 10 rights, the denial 'was in any event justified' under Article 10(2).[133] The Court reiterated that states enjoy a wide margin of appreciation in the area of national security and noted that the proportionality assessment should have due consideration for the fact that classified files held by an intelligence service may legitimately be subject to additional access restrictions to protect internal functioning and working methods.[134] However, 'even where national security is at stake, the

128 See the references in n 119. See also *Georgian Young Lawyers' Association* (n 113) paras 30–33.
129 *Saure* (n 124).
130 Ibid paras 16–17.
131 Ibid para 11.
132 Ibid para 10 (emphasis added).
133 Ibid para 51.
134 Ibid para 52.

concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision.'[135] Absent the opportunity to effectively challenge the Government's assertion that national security was at stake, the authorities would have *carte blanche* to arbitrarily encroach on Convention rights.[136] The Court also stressed that 'the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10'.[137] The Court noted that the applicant had access to multiple adversarial proceedings and had been afforded several opportunities to justify his need for physical access, but had instead 'limited himself to a general reference to his watchdog role as a journalist, to the public interest in the circumstances of [the politician's] death and to the voluminous scope of the files concerned'.[138] This did not allow the domestic courts to engage in a balancing exercise between the applicant's interest in physical access and the national security interests at stake, nor did it allow the Court to conclude that the manner in which the domestic authorities assessed the applicant's request had been 'fundamentally flawed or devoid of procedural safeguards'.[139] No violation of Article 10 was found.

This judgment appears consistent with *Association Burestop*, though the Court did not refer to it. The closest it came was noting – towards the very end of its reasons – that 'the applicant did not put forward arguments that the information that had been disclosed to him was incorrect.'[140] One can perhaps glean from this statement that the analysis or outcome may have been different had the case been framed in such terms. Yet the Court did not limit its statements in *Association Burestop* to *inaccurate* information: it also held that the provision of insincere, insufficient, or unreliable information was akin to a refusal to inform.[141] How might the proportionality analysis change – in *Saure* or analogous cases – where the applicant argues that the partial provision of information, or the refusal to allow access to the physical files where only a summary of the information contained therein has been disclosed, renders the

135 Ibid para 53.
136 Ibid.
137 Ibid para 54; *Šeks* (n 125) para 64.
138 *Saure* (n 124) para 57.
139 Ibid. Contrast *Yuriy Chumak v Ukraine* 23897/10 (ECtHR, 18 March 2021) paras 43–48.
140 *Saure* (n 124) para 57.
141 *Association Burestop 55 and Others* (n 3) para 75.

picture incomplete, the factual matrix insufficient? The Court may once again seek refuge in procedural safeguards, such as the opportunity to challenge the content and quality of the information at issue, in order to avoid the messy business of assessing the sincerity, accuracy, sufficiency, and reliability of the underlying information. This would be consistent with its practice in national security cases.[142] But as discussed above, doing so dilutes the principle set down and renders somewhat hollow the protection it affords.

A further uncertainty which remains following *Association Burestop* relates to the 'duties and responsibilities' clause in the Article 10 guarantee: in particular, whether and to what extent it might have a role to play in cases concerning the reliability and accuracy of the information provided by public authorities. Article 10(2) is the sole provision in the Convention which provides such a caveat: that the exercise of freedom of expression, since it carries with it 'duties and responsibilities', may be limited or otherwise restricted where the requirements of Article 10(2) are met. The Court did not rely on (or even allude to) this clause in its reasons, and the clause has predominantly been invoked in relation to the proportionality of limitations imposed on certain actors' expression. For instance, the Court has held that the heightened protections for journalists reporting on matters of general interest are subject to the proviso that they act 'in good faith and on an accurate factual basis and provide "reliable and precise" information'.[143] Where the expression in question impinges on the 'rights of others', the Court will inquire into whether the journalists 'relied on a sufficiently accurate and reliable factual basis which could be considered proportionate to the nature and degree of their allegation, given that the more serious the allegation, the more solid the factual basis has to be.'[144] Similarly, certain 'duties and responsibilities' must be borne in mind in assessing the increased protection afforded to 'public watchdogs' such as NGOs and academic researchers.[145] There may be parallels to be drawn here where the 'reliability' of the information provided by public authorities – in order to allow journalists and other 'watchdogs' to fulfil their role and impart information of general importance to the public – is contested.

142 See, for example, *Šeks* (n 125) paras 68–70 and the cases cited therein.

143 See, for example, *Axel Springer AG v Germany* [GC] 39954/08 (ECtHR, 7 February 2012) para 93; *Bladet Tromsø and Stensaas v Norway* [GC] 21980/93 (ECtHR, 20 May 1999) para 65; *Pedersen and Baadsgaard v Denmark* [GC] 49017/99 (ECtHR, 17 December 2004) para 78.

144 *Pedersen and Baadsgaard* (n 143) para 78.

145 *MHB* (n 2) paras 159 and 166.

What role the 'duties and responsibilities' framework could play in cases concerning the right of access to reliable information remains to be seen. One limiting factor is that the 'duties and responsibilities' clause is tied to the 'exercise' of the freedom to hold opinions, and to receive and impart information and ideas without interference; it has not bound the state where it is the 'speaker' – the actor imparting the information – rather than the 'regulator'. However, in providing information, the state has to act through individuals, and the 'duties and responsibilities' requirement has been invoked in previous cases concerning public and elected officials[146] as well as public sector 'whistleblowers'.[147] Accordingly, the 'duties and responsibilities' clause could play one of two roles in future cases. First, it could bolster the claim of 'public watchdogs' that the state has inhibited their freedom to impart information and ideas by providing insincere, inaccurate, insufficient, or unreliable information, thereby undermining their duty and responsibility to provide accurate and reliable information to the public. Second, it could be used in assessing the procedural obligation of the state (representatives) to impart accurate and reliable information to the public – and whether they did 'all that was reasonably expected of them under the circumstances, to confirm that the information they are disclosing is factually accurate.'[148]

Accordingly, though the judgment is a new frontier in the recognition and protection of a right of access to 'reliable' information under the ECHR, realising its full promise will require further development and (ideally) some

146 With respect to elected officials, the Court has held that they have duties and responsibilities where they act in their official capacity and use the powers attached to their office: see, for example, *Baldassi and Others v France* 15271/16 and others (ECtHR, 11 June 2020) para 69; *Willem v France* 10883/05 (ECtHR, 16 July 2009) para 37. The Court has also highlighted the importance of politicians avoiding public comments that could foster intolerance in light of their duty to defend democracy and its principles: see, for example, *Féret v Belgium* 15615/07 (ECtHR, 16 July 2009) paras 75–76; *Erbakan v Turkey* 59405/00 (ECtHR, 6 July 2006) para 64. See more recently *Sanchez v France* [GC] 45581/15 (ECtHR, 15 May 2023) paras 150, 180–189, 201.

147 See generally D Kagiaros, 'Reassessing the Framework for the Protection of Civil Servant Whistleblowers in the European Court of Human Rights' (2021) 39(3) *Netherlands Quarterly of Human Rights* 220. The accuracy of the disclosed information is one criterion in the Court's proportionality assessment, along with the public interest in the disclosed information.

148 Kagiaros (n 147) 228, citing *Rungainis v Latvia* 40597/08 (ECtHR, 14 June 2018) para 57. See also *Guja v Moldova* 14277/04 (ECtHR, 12 February 2008) para 74 ('[a]ny person who chooses to disclose information must carefully verify, to the extent permitted by the circumstances, that it is accurate and reliable'). This would likely raise attribution issues, which would have to be addressed.

course correction in future cases. It will also depend on how lingering questions are answered, including when and to what extent the right can be limited.

5 Conclusion

The road to recognition of a right of access to information under Article 10 ECHR has been described as 'long and torturous,' perhaps for good reason.[149] This article charted the three distinct phases of its development, from denying that such a right could be read into Article 10 in its earliest cases (Phase One), to hesitant recognition that such a right was at least not precluded (Phase Two), to recognition of a limited right of access where disclosure has been imposed by a judicial order or where access is instrumental for the individual's exercise of freedom of expression (Phase Three). Against this backdrop, the article argued that the Court's recent judgment in *Association Burestop* builds on these foundations, but marks a new frontier (a possible 'Phase Four') in the recognition of a meaningful and effective right to *quality* (that is, sincere, accurate, sufficient, and reliable) information, and a corresponding obligation on states to provide it.

While the import of the judgment remains to be seen, it is significant for several reasons, as outlined herein. First, it accounts for the information monopoly enjoyed by states and the symbiosis between states' provision of (accurate) information and individuals' and the collective public's need for it to be informed and to hold government accountable. Second, the judgment recognises that states play varying roles in the information ecosystem, and they may interfere with freedom of expression not only where they withhold information or censor its exchange, but also where they fail to provide sincere, accurate, sufficient, and reliable information on which public debate may depend. Finally, at a time when trust in institutions, expertise and even the notion of 'truth' itself is in decline, the Court's judgment could serve to restore some degree of faith that public authorities will provide reliable information – if not of their own volition, then because they may be held accountable for their failure to do so under the ECHR. As states (and regional organisations like the Council of Europe and European Union) increasingly wade into the difficult terrain of regulating harmful content online to curb its spread and effects, it is more important than ever that public authorities are not themselves spreading mis- and disinformation. The old adage that justice must not only be done, but be *seen* to be done, is apt in this context.

149 McDonagh (n 86) 34.

More broadly, *Association Burestop* is the closest we have come to government misinformation being brought before the ECtHR as a potential rights violation. It may reflect a growing recognition that government interference with the public's right to be informed can take various forms – from censoring truth to withholding information to sharing falsehoods. While there are aspects of the Court's reasoning which can and should be subjected to scrutiny, its recognition of a right of access to reliable information – and a corresponding obligation on states to disclose *reliable* information – is a welcome development in this regard.

While it has ushered in a 'Fourth Phase' in the right of access to information jurisprudence under the ECHR, and created a foundation on which further gains can be made in future cases, several conceptual challenges, practical shortcomings, and unanswered questions remain following the judgment. First, the right and corresponding duty have been framed at once overly broadly and unduly narrowly, largely on account of the jurisprudential foundations on which they are based. This serves to limit the full potential and scope of the principle enunciated. Second, the Court imposed a rather low bar for compliance with the obligation by requiring only that a procedure to test or challenge the information exist. Moreover, despite criticising the procedure followed and reasons offered in the domestic proceedings, the Court held that no violation of Article 10 had occurred. This calls into question the distinct value of Article 10 and the import of the Court's stipulation that the right of access to information must be a 'meaningful' one. Finally, several lingering uncertainties persist, namely when and to what extent the right can be justifiably limited, as the Court did not undertake any analysis under Article 10(2), and what (if any) role the 'duties and responsibilities' clause could play in future cases.

In sum, the *Association Burestop* judgment is an important milestone on the 'long and torturous' road to recognising a meaningful and effective right of access to information under Article 10. It warrants greater scholarly attention both for the protective benefits it heralds and the shortcomings it entails. It could also be a useful precedent for civil society and future litigants to rely on and (ideally) build upon to hold public officials accountable for the quality and sufficiency of the information they provide to the public. The present contribution takes a step in this direction by calling attention to the judgment, highlighting its protective potential, and critiquing its conceptual and practical shortcomings – in the hopes that the 'Fourth Phase' will at long last usher in a meaningful and effective right of access to reliable information.

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