Secrecy versus Openness in Criminal Investigation

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1. Introduction

"Ongoing criminal investigation" has often been invoked by the Georgian authorities to restrict the free flow of information that could expose wrongdoing by high-ranking government officials and their close associates. While, under the appropriate circumstances, governments can legitimately place restrictions on the public's right to access to certain information,[1] attempts of the Georgian authorities to justify the total closure of information related to the activities of law enforcement bodies in the interests of "ongoing criminal investigation" have sometimes gone far beyond the limitations allowed under international law.

In November of 2003 in Georgia, after the peaceful "Rose Revolution" the old regime under E. Shevardnadze has been replaced by the energetic team of young leaders oriented on western liberal values. However, since then the status of the public's right to know has not improved dramatically. Unfortunately, as it appears the tendency of governments to maintain maximum secrecy did not vanish with the change of regime.[2]

The present research does not aim to examine the whole range of obligations of law-enforcement bodies in the process of criminal investigation. Nor does it aim to challenge the official version of the most controversial event in "post-revolutionary" Georgia - the death of the Georgian Prime-Minister, and to explore a broad discussion in the light of the limited scope of one concrete case. On the contrary, the purpose of the present paper is to examine the relationship between necessary confidentiality characteristic of criminal investigation and the public's right to know the truth on matters of public concern. While recognizing that criminal investigation is a legitimate ground that may justify closure of certain types of information to the public, the paper will try to answer the question of which interest should prevail when both the public's right to know and the interests of criminal investigation are at stake.

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[1] V. Krsticevic, J.M. Vivanco, J.E. Mendez, D. Poter, "The Inter-American System of Human Rights Protection: Freedom of Expression, 'National Security Doctrines' and the Transition to Elected Governments", in S. Coliver (ed.), Secrecy and Liberty: National security, Freedom of Expression and Access to Information (The Hague, Martinus Nijhoff Publishers, 1999), pp. 161-185, at, p. 161

[2] ibid.

The paper will initially review the current status of the right to freedom of information in Georgia in order to ascertain whether it is legislative deficiency or governmental policy that impedes the realization of the right to know. The relevant section is divided into two parts, trying to delineate mere constitutional guarantees and reality. Following this, the status of the right to freedom of information in international law will be examined. Although some of the instruments discussed in the paper either do not have legally binding force or cannot be viewed as creating legal obligations for Georgia because of their territorial scope, they may nevertheless be regarded as guiding principles for interpreting the relevant provisions of the treaties that *are* legally enforceable in the country. This part of the paper will be followed by an analysis of the permissible grounds for placing restrictions on the right to freedom of information in the light of established international practice and evolving standards. The legitimacy and scope of restrictions on the public's access to information related to criminal investigation will also be examined against international standards. Finally, the paper will try to figure out the possible alternative solutions to the problem.

2. The Right to Access to Public Information and "Open Government" in Georgia - Fiction or Reality?

2. 1. The Right to Access to Information in Georgia

The Constitution of Georgia[3] provides strong guarantees for the protection of the right to freedom of expression and information. Under Article 24(1)

> Everyone has the right to freely receive and impart information, to express and impart his/her opinion orally, in writing or by in any other means.

In addition to the right to freedom of expression and information, the Constitution unequivocally recognizes the right to access to government-held information. Article 41(1) states:

> Every citizen of Georgia shall have the right to become acquainted, in accordance with the procedure prescribed by law, with the information about him/her stored in state institutions *as well as official documents existing there*, unless they contain state, professional or commercial secret.

Following international law, the Constitution does permit restrictions on the rights enumerated in the abovementioned articles. Article 24 (4), modifying the guarantees of the right to freely receive and impart information, provides:

> The exercise of the right enumerated in the first and second paragraphs of the present article may be restricted by law on such conditions which are

[3] Adopted on 24 August 1995, for the English version see the website of the Parliament of Georgia www.parliament.ge

necessary in a democratic society in the interests of ensuring state security, territorial integrity or public safety, for the prevention of crime, for the protection of the rights and dignity of others, for the prevention of the disclosure of information acknowledged as confidential or for insuring the independence and impartiality of justice.

Article 24(3) closely resembles provisions on permissible restrictions on freedom of expression and information found in Article 10(2) of the European Convention on Human Rights (ECHR)[4] and more generally meets the requirements of international law.[5]

The constitutional provisions guaranteeing free access to government-held information are reaffirmed in the General Administrative Code of Georgia,[6] adopted as a result of a long struggle of the civil society of Georgia. Under the Code, any information held by a public agency or "that received, processed, created, or sent by a public agency or a public servant in connection with official activities"[7] shall be open and accessible to the public. However, certain fields of activities of the Executive Branch are outside the Code, creating so called class-based exemptions. Article 3(4) enumerates the activities of the Executive Branch, which is not affected by the General Administrative Code and is therefore closed to the public scrutiny. Article 3(4) reads as follows:

This Code may not affect those activities of the Executive that are related to:

(a) Criminal prosecution and criminal proceeding against the person who committed a crime;

(b) Investigation and task force activities;

(c) ....

This provision has often been heavily criticized by human rights groups, as it serves as a permanent justification for withholding "politically unfavourable" information from the public. Law enforcement bodies interpret the provision as restricting the right of the public to access *any* information related to the investigatory file. As a result, any request for information related to law enforcement activities meets the standard refusal from the relevant bodies referring to Article 3(4) of the General Administrative Code. In the majority of cases, the response from the Prosecutor's Office does not contain any grounding for the refusal.

The information related to criminal investigation is only disclosed when the highly politicized Prosecutor's Office decides to do so.[8] In other cases, the Prosecutor's Office of

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[4] Adopted 4 November 1950, entry into force: 3 September 1953, for text see the COE's website: www.coe.int

[5] T. Mendel "Guide to the Law of Georgia on Freedom of Speech and Expression", ARTICLE 19 (2005), for text see website http://www.article19.org/pdfs/analysis/georgia-foe-guide-april-2005.pdf

[6] Adopted on 25 June 1999 by the Parliament of Georgia, for English translation see www.iris.ge

[7] Article 2 of the General Administrative Code

[8] For instance, in September 2005, the Prosecutor's Office of Tbilisi widely circulated video records of interrogation of the person "confessing" that the Presenter of the opposition TV Channel, I. Kakabadze,

Georgia regards ongoing investigation as "an absolute trump" over the right to freedom of information.[9]

2.2. The Death of the Prime Minister of Georgia

More than a year has passed after the mysterious death of the Georgian Prime-Minister, 41 year-old Z. Zhvania. However, questions still surround the official investigation into his unexpected and sudden death. While, according to the official version of events, both the Prime-Minister and his political associate R. Usupov died from carbon monoxide poisoning caused by a malfunctioning gas heater, neither family of the deceased persons nor the Georgian public has accepted the official version.[10] Surprisingly enough, from the very beginning of the investigation, government officials have consistently maintained that the death of the Prime-Minister was "accidental."[11] Some experts expressed doubts upon the haste of the authorities to concede carbon monoxide poisoning as the cause of the Prime-Minister's death, without waiting for the conclusion of the forensic investigation.[12]

The Georgian Minister of the Interior, who first broke the news of the Prime-Minister's death in the early hours of the tragedy, declared:

> *This is a tragic accident.* I went to the scene personally. *We can say this was probably a gas poisoning acciden*t. An Iranian-made gas heater was installed in that room. The deaths must have occurred instantly[13].

Upon being questioned by a journalist as to how he reached the conclusion just a few hours after the tragedy that the deaths were accidental, the Minister cited the smell of gas in the room, apparently forgetting that carbon monoxide is odourless.[14]

Key discrepancies between the official statements made by the General Prosecutor's Office and the official version of the Report from the US Federal Bureau of Investigation (FBI), serious procedural flaws and huge inconsistencies in the process of investigation, revealed by Z. Zhvania's relatives and independent journalists, cause doubts to linger about

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heavily beaten by unknown persons, had decided to use this fact for political reasons. The Prosecutor's Office ignored the requirements of the Criminal Procedure explicitly prohibiting video recording of the witness's confession without his/her consent.

[9] A. Roberts, "National Security and Open Government", 9:2 The Georgetown Public Police Review 60 (2004), at, p. 70

[10] M. Corso "Georgia: One Year Later, Doubts About Zhvania's Death Linger On", ForUm, website <http://en.for-ua.com/forum/read.php?1,852,857>, accessed 10 March 2006

[11] ibid.

[12] P. Richter, "Two Mysterious Deaths in Georgia's 'Rose Revolution' Regime", 16 February 2005, World Socialist Web Site <www.wsws.org/articles/2005/feb2005/geor-f16.shtml>, accessed on 26 February 2006

[13] "Georgia: Government Says Premier Died In Accident As NGOs Demand Independent Probe", 3 February 2005, RadioFreeEurope, RadioLiberty, website <http://www.rferl.org/featuresarticle/2005/02/577fd418-1acc-4110-8214-013d68348fb9.html>, accessed 26 February 2006

[14] V. Komakhidze, "Questions linger about Zhvania Death", Independent Electronic Issue KVALI, website <http://www.kvali.com/kvali/index.asp>, accessed on 26 February 2006.

the official version of the event. Adding to the air of mystery, the General Prosecutor's Office still has not managed to finish the investigation into the "tragic accident".[15]

Numerous questions, doubts and concerns voiced by the deceased Prime-Minister's family, opposition politicians, human rights activists, civil society groups and ordinary citizens, still remain open. The only forthcoming answer from the Prosecutor's Office is as follows:

> . . . Investigation continues. . . Due to the interests of investigation, the information related to the case [of the death of the Prime-Minister] *can not*[16] be issued according to the Article 3 (4) of the General Administrative Code of Georgia.[17]

Unsuprisingly, this fuels the public's doubts about the case. The vast majority of the Georgian population believe that the Prime-Minister was assassinated.

"DID HE DIE OR DID THEY KILL HIM?" - the front page headline of the Georgian weekly newspaper[18] echoes the doubts of the general public.[19]

In the following chapters the paper will examine whether the Georgian society's right to know the truth about the issues of public concern can outweigh the interests of the ongoing criminal investigation. The right to know will be specifically examined in the light of international legal and "soft-law" standards which have evolved in recent decades on the universal and regional planes.

3. Freedom of Information in International Law

At its very first session, the United Nations[20] General Assembly has unequivocally declared:

> Freedom of information is a fundamental human right and . . . the touchstone of all the freedoms to which the UN is consecrated.[21]

Later on, the right "to seek, receive and impart" information was embedded almost in all the major universal and regional human rights instruments, most of which form an

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[15] ibid.

[16] Emphasis added

[17] The official letter of the Prosecutor General of Georgia # 502/14-1/1761^{g}, dated 16/03/2006 (translated by the author). The request for information was submitted by the NGO "Georgian Young Lawyers' Association" on 6 March 2006. The applicant requested the information whether the investigation was working on the version of murder of the Prime Minister.

[18] 'Axali Versia' ('New Version'), 30/01/2006 - 05/02/2006 Edition, front page

[19] M. Corso, supra, n. 10

[20] Georgia joined the membership of the United Nations on 31 July 1992. Under Article 4, Chapter 2 of the UN Charter, "Membership in the United Nations is open to all peace-loving states which accept the obligations of the Charter and … are willing and able to carry out these obligations." The obligations under the Charter include, *inter alia,* respect for human rights (Article 2 read in conjunction with Article 1)

[21] G. A. Res. 59 (1), adopted 14 December 1946, for text see the UN website <www.un.org>

integral part of the Georgian legislation.[22] The right to information was viewed as an integral aspect of the right to freedom of expression. However, traditionally, some international human rights bodies, including the Inter-American Commission on Human Rights and the European Court, have understood the scope of the right as being quite limited.[23] The judgements of the latter is of particular importance for the purposes of the present paper because, as State Party to the European Convention,[24] Georgia is legally accountable before the Court.

For instance, in the case of *Leander v. Sweden,*[25] the European Court of Human Rights observed

> The right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 (art. 10) does not . . . 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.[26]

In the judgment, the European Court made it clear that in its view, Article 10 protected not the general right to receive information from authorities, but the right of the individual to receive and impart information without government interference. The Court reaffirmed its position in the case of *Gaskin v. United Kingdom,*[27] where the Court unanimously held that "Article 10 does not embody an obligation on the state to impart the information . . . to the individual."[28] The position was shared by the Inter-American Commission on Human Rights. In its Annual Report[29] the Commission stated:

> Freedom of information is . . . universal and embodies the collective rights of everyone to receive information without any interference or distortion.

The position of the UN Human Rights Committee on the scope of the right to freedom of information is not clear. Until now, the Committee has not had the chance to examine whether the Article 19 (2) of the International Covenant on Civil and Political

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[22] Under Article 6 (2) of the Constitution of Georgia "The Legislation of Georgia shall correspond to universally recognized principles and rules of international law. An international treaty or agreement of Georgia unless it contradicts the Constitution of Georgia, the Constitutional Agreement, shall take precedence over domestic normative acts."
[23] S. Coliver "Commentary on the Johannesburg Principles on National security, Freedom of Expression and Access to Information," in S. Coliver (ed.), Secrecy and Liberty, supra, n. 1, pp. 11-81, at, p. 55
[24] Georgia has ratified the Convention on 20 May 1999.
[25] Leander v. Sweden, Judgment of 26 March 1987, for text see the website of the Court <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>
[26] ibid. para. 74
[27] Gaskin v. UK, Judgment of 7 July 1989, for text see the website of the Court <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/ >
[28] ibid. para. 52
[29] Annual Report 1980-81, Doc. OEA/Ser.L/V/II.54, Doc. 9, rev. 1 (1981) at 121, for text see the Commission's website, <http://www.cidh.oas.org/annual.eng.htm>

Rights (ICCPR)[30] creates obligations for the States Parties to the Covenant, including Georgia,[31] to ensure access to public information.[32]

Although the foundations of the right to freedom of information were laid down much earlier, only recent developments at international, regional and national levels have marked the emergence of a positive duty on governments to provide access to government-held information.[33]

At the level of the United Nations, the extensive work of the UN Special Rapporteur for Freedom of Opinion and Expression has served as a stimulus for the UN bodies to recognize repeatedly the right to freedom of information as a core element of freedom of expression.[34] In 1997 the Special Rapporteur expressed his concern over "the tendency of many governments to withhold information from the people at large" and called on the UN bodies to check strongly such practices.[35] A year later, in his 1998 Annual Report, the Special Rapporteur formulated the right to freedom of information in much broader terms. The Special Rapporteur unequivocally stated that the right to freedom of information enjoins the States not only to refrain from interfering in individual's right to seek, impart and receive information, but also to take appropriate steps to ensure access to government-held information.

> The right to seek, receive and impart information . . . imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems.[36]

The UN Special Rapporteur's Annual Report in 2000 presents a major development in evolution of the right to freedom of information from a part of the right to freedom of expression to that of a fundamental right in itself.

> The Special Rapporteur wishes to state again that the right to seek, receive and impart information is not merely a corollary of freedom of opinion and expression; it is a right in and of itself[37].

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[30] UN GA res. no. 2200A(XXI), adopted 16 December 1966, entry into force: 23 March 1976, for text see UN website <www.un.org>

[31] Georgia has ratified the Covenant on 3 May 1994

[32] E. Evatt, "The International Covenant on Civil and Political Rights: Freedom of Expression and State Security," in S. Coliver (ed.), Secrecy and Liberty, supra, n. 1, pp. 83-107, at, p. 85

[33] S. Coliver, supra, n. 23

[34] T. Mendel, "Memorandum on Two Drafts of the Law on Access to Public Information of Argentina," ARTICLE 19 (2005), at, p.5, for text see <www.article19.org>

[35] Report of the Special Rapporteur, "Promotion and Protection of the Right to Freedom of Opinion and Expression" (1997), UN Doc. E/CN.4/1997/31

[36] Report of the Special Rapporteur, "Promotion and Protection of the Right to Freedom of Opinion and Expression" (1998), UN Doc. E/CN.4/1998/40, at, para. 12

[37] Report of the Special Rapporteur, "Promotion and Protection of the Right to Freedom of Opinion and Expression" (2000), UN Doc. E/CN.4/2000/63, at, para. 42. This Report was widely welcomed by the UN Commission on Human Rights in its Resolution 2000/38 (2000).

A parallel process of recognition of the right to access to government-held information evolved in all three regional systems of human rights protection.[38]

The *Declaration of Principles on Freedom of Expression in Africa*[39] adopted by the African Commission on Human and People's Rights underlines the fact that public bodies "hold information not for themselves but as custodians of the public good"[40] and recognizes everyone's right to access information held by public authorities. In addition, the Declaration imposes an obligation on public bodies to publish important information of significant public interest, even in the absence of an individual request.[41]

Within the inter-American system of human rights protection, the attitude towards the scope and importance of the right to freedom of information has also changed dramatically. In contrast to the 1980-81 Annual Report, where the Inter-American Commission was extremely cautious about the content of the right, the *Inter-American Declaration of Principles on Freedom of Expression*[42] adopted twenty years later by the Commission has made major contributions to the progressive development of the right. The Preamble of the Declaration underlines the foundational role of the right to access to public information for government transparency and accountability. In addition, it unequivocally recognizes that access to government-held information is a fundamental right on its own.[43]

> Access to information held by the State is a fundamental right of every individual. States have obligations to guarantee the full exercise of this right.

In the first case involving the right to access to public information,[44] the Inter-American Commission affirmed a number of principles regarding freedom of information. The Commission explicitly stated that Article 13 of the American Convention included a general right to access state-held information and a corresponding obligation for states to ensure information availability. In addition, the Commission explained that Article 13 expressly required states to establish "presumption of openness" of official information in

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[38] T. Mendel, supra, n. 34, at, p. 6
[39] Adopted on 17-23 October 2002, at the 32nd Session. Though the Declaration does not have the legally binding character, moreover, for Georgia, it nevertheless reflects the development of the right.
[40] ibid. principle 4, para. 1
[41] ibid. para. 2
[42] adopted on 19 October 2000, at the 108th Regular Session. The Declaration does not have the legally binding force for Georgia; however, it reflects the regional recognition of the right.
[43] T. Mendel, supra, n. 34
[44] Marcel Claude Reyes and Others v. Chile, Case No. 12.108

national legislations.[45] Whether the Inter-American Court will affirm the decision of the Commission is yet to be seen.[46]

The global recognition of the positive obligation on the part of the States to ensure the disclosure of government-held information is also reflected in the European system of human rights protection. In 2002 the Committee of Ministers of the Council of Europe adopted a Recommendation on Access to Official Documents.[47] The Recommendation recommends that member States of the Council of Europe, including Georgia,[48] guarantee everyone's right to access to official documents held by public authorities. In comparison with Inter-American and African instruments, the wording of the Recommendation seems to be more cautious and less demanding,[49] leaving the space for states' wide "margin of appreciation". Nevertheless, the Recommendation represents a major step forward in recognition of the right to access to public information in Europe.

The Joint Declaration[50] adopted by the three special mandates on freedom of expression - the UN Special Rapporteur on Freedom of Opinion and Expression, the Special Rapporteur on Freedom of Expression of the OAS and the Representative on Freedom of the Media of the OSCE - reaffirms the fundamental nature of the right to access to government-held information. The Declaration imposes positive obligation on States to ensure universal access to public information and establishes the presumption in favour of maximum disclosure.

> The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation … based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.

Summing up, it can be concluded that the right to access public information is widely recognized in international law.[51] Although the abovementioned Annual Reports, Declarations and Recommendations do not create legally binding obligations for states, they may nevertheless serve as guiding principles for wider interpretation of the scope of relevant

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[45] "Inter-American Commission finds Chile in Violation of Human Rights Charter," Open Society Justice Initiative, website http://www.justiceinitiative.org/activities/foifoe/foi, accessed on 20 March 2006
[46] ibid.
[47] Recommendation No.R (2002)2, adopted 21 February 2002
[48] Georgia became the 41st Member State of the Council of Europe on 27 April 1999.
[49] For instance, the Recommendation gives the discretion to the member States to decide to what extent the principles elaborated in it should be applied to information held by legislative bodies and judicial authorities. In addition, the scope of possible limitations on the right to access is much wider.
[50] International Mechanisms for Promoting Freedom of Expression, Joint Declaration, adopted 6 December 2004, for text see <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&lID=1>
[51] T. Mendel, supra, n. 34, at, p. 9

provisions[52] of the human rights instruments that are legally binding for Georgia.[53] This statement will not seem groundless if one takes into consideration the increased demand for access to government-held information nowadays and the fact, that, for instance, European Court usually views the European Convention as "a living instrument which . . . must be interpreted in the light of present-day conditions."[54]

Following the widespread international recognition of the right to freedom of information, an unprecedented number of states has adopted access to information legislation around the world. According to the *Global Survey Freedom of Information and Access to Government Record Laws around the World* as of May 2004 over fifty counties around the world had already adopted comprehensive Freedom of Information laws to ensure access to government-held records and "over thirty more have pending efforts".[55]

4. Are the Interests of Criminal Investigation Legitimate Ground for Restrictions on the Right to Freedom of Information?

4.1. Permissible Grounds for Restrictions

P. Mahoney and L. Early rightly note - "Democracy is built on a paradox: By guaranteeing freedom of expression and information, it gives its opponents the means to undermine its existence."[56] These means usually take the form of different restrictions which governments, even democratic ones, usually tend to employ to conduct their business away from the gaze of public scrutiny.[57] However, since the right to freedom of expression and information carries with it certain duties and responsibilities, it can never be absolute.[58] This issue naturally raises the question of which grounds are permissible for placing the restrictions on the right to freedom of information under international law.

Almost all the human rights instruments provide an identical three-part test for checking the legitimacy of restrictions on the right to freedom of expression. As the right to "seek, receive and impart information" constitutes the core element of right, the same three-part test can legitimately be applied to it as well. According to the test, any restriction:

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[52] N. Rodley, "Soft Law," 7 (3) Interights Bulletin (1999)

[53] For instance, Article 10 of the ECHR; Article 19 of the ICCPR;

[54] Soering v. UK, judgment (1989), at, para. 102, for text see the website of Court http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/

[55] Global Survey carried out by Freedominfo.org., for full text see website <www.freedominfo.org/survey/global_survey2004.pdf>, accessed 15 March 2006

[56] P. Mahoney and L. Early, "Freedom of Expression and National Security: Judicial and Policy Approaches Under the European Convention on Human Rights and Other Council of Europe Instruments," in S. Coliver (ed.), Secrecy and Liberty, supra, n. 1, pp. 109-128, at, p.109

[57] T. Mendel, The Public's Right to Know, (London, ARTICLE 19, 1999), p. 7

[58] The ARTICLE 19 Freedom of Expression Handbook (London, Bath Press, 1993), p. 16

1. Must be prescribed by law;
2. Must pursue one or more legitimate aims expressly provided by the texts of the relevant articles;
3. Must be necessary;

It should be noted that, unlike the ICCPR or the American Convention on Human Rights[59], the ECHR[60] adds one more requirement to the third part of the test, stipulating that "restrictions must be necessary *in a democratic society*".

What should count as a legitimate interest against which the right can be restricted slightly varies among the ICCPR, the ECHR and American Conventions. Article 19 of the International Covenant on Civil and Political Rights permits restrictions for the protection "of the rights and reputations of others"; "national security"; "public order" (*ordre public*)[61]; and "public health or morals."

Article 13 of the American Convention apparently follows the language of the ICCPR with one exception. Instead of broader "*ordre public*" it adopts the term "public order."[62]

The European Convention extends the list of the permissible restrictions by adding to the list legitimate aims such as "territorial integrity or public safety"; "prevention of crime"; confidentiality of "information received in confidence"; and "authority or impartiality of judiciary."[63]

The test for determining the legitimacy of restrictions on the right to access to official documents set forth by the Recommendation[64] adopted by the Committee of Ministers of the COE reiterates the requirements of the abovementioned human rights instruments. However, the list of legitimate aims for the protection of which the limitations can be justified is more comprehensive and includes:

1. National security, defence and international relations;
2. Public safety;
3. The prevention, investigation and prosecution of criminal activities;
4. Privacy and other legitimate private interests;
5. Commercial and other economic interests, be they private or public;
6. The equality of parties concerning court proceedings;
7. Nature;
8. Inspection, control and supervision by public authorities;

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[59] Adopted on 22 November 1969, entry into force: 18 July 1978, for text see the website of the OAS <http://www.cidh.oas.org/Basicos/basic3.htm>

[60] The European Convention is of particular interest to the author for the reason that Georgia is a member of COE and, therefore, legally bound by the Convention.

[61] Media experts, including ARTICLE 19, explain that the term '*ordre public*' in addition to "public order includes the general welfare and even public policy."

[62] ARTICLE 19 Handbook, supra, n. 58

[63] ibid.

[64] supra, n. 47

9. The economic, monetary and exchange rate policies of the state;
10. The confidentiality of deliberations within or between public authorities during the internal preparation of matter;[65]

Although the Recommendation broadens the scope of the legitimate interests for the protection of which States are permitted to refuse disclosure of information, it nevertheless still promotes some progressive developments. These developments will be discussed in detail in the following chapters.

4.2. Criminal Investigation - Legitimate Ground for Restricting the Right to Freedom of Information

From the instruments enumerated above only the Recommendation adopted by the Committee of Ministers of the COE provides "the prevention, investigation and prosecution of criminal activities" as a legitimate aim for the protection of which States are entitled to refuse access to a requested document. However, this does not necessarily mean that under appropriate circumstances refusal to disclose information related to criminal investigation will be considered illegitimate under the ICCPR, the ECHR or the American Convention.

In the absence of the relevant case-law from human rights bodies, one could only presume that if other parts of the established three-part test will be met, the refusal on the grounds of protecting "interests of investigation" will fit under the broad notions of either "protection of the rights or reputations of others," "prevention of crime," "authority or impartiality of judiciary" or even for the preservation of "public order."

The suggestion is supported by the case of *Tourancheau and July v. France,*[66] recently decided by the European Court. Although the case concerned the alleged violation of applicants' right to freedom of expression, the findings of the Court can nevertheless be applied by analogy to the freedom of information cases. In the abovementioned *Tourancheau Case* the applicants were French journalists criminally convicted by French authorities for publishing documents from the criminal case file ahead of the proceedings in open court. After establishing that the interference in question was "prescribed by law" and was "necessary in a democratic society," the Court stressed the "damaging consequences of publication of the article *for the protection of the reputation and rights* of the suspects and for their

[65] ibid. at, interest IV, para. 1
[66] Judgment of 24 November 2005, for text see the website of the Court http://www.echr.coe.int/echr in French only

right to be presumed innocent, and also for *the authority and impartiality of the judiciary*."[67] The Court held that as the interference with applicants' right to freedom of expression had been "necessary in a democratic society" for the protection of the reputation and rights of others and for maintaining the authority and impartiality of the judiciary, there had been no violation of Article 10.

A Model Freedom of Information Law[68] elaborated by ARTICLE 19[69] and strongly endorsed by the UN and OAS Special Rapporteurs on Freedom of Opinion and Expression, does provide "law enforcement" as a legitimate exception to the right to freedom of information provided that certain requirements of the model law are met. In particular, Article 29 states:

> A body may refuse to indicate whether or not it holds a record, r refuse to communicate information, where to do so would, or would be likely to, cause serious prejudice to:
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> a) The prevention or detection of crime;
> b) The apprehension or prosecution of offenders;
> c) The administration of justice; ….

Law enforcement and consequently, criminal investigation as a legitimate ground for restricting the access to government-held information is recognized in many national legislations on freedom of information around the world. However, does this recognition necessarily mean that international law permits law enforcement to have an absolute trump over the right to freedom of information?

In the next chapter, we will try to examine whether there are national models or international standards that proved that the striking of the right balance between the two interests at stake is manageable.

5. "Public Interest" Test - Should it be Satisfied?

5.1. The American Model

Perhaps it is the United States that offers the strongest presumption of access to government-held information.[70] Although some scholars believe that the First Amendment of the Constitution guarantees the right to access to government information, it was not until

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[67] European Court of Human Rights Press Release issued by the Registrar, Chamber Judgement Tourancheau and July v. France, 24.11.2005, Council of Europe website <http://press.coe.int/cp/2005/640a(2005).htm#1#1>

[68] Adopted on August 10 2001, for the full text see <http://www.article19.org/pdfs/standards/modelfoilaw.pdf>

[69] A London-based highly respected NGO campaigning for free expression, for additional information see the website www.article19.org

[70] S. Coliver, supra, n. 1, at, p. 57

1966 that the constitutional "right to know" was guaranteed by the Freedom of Information Act[71] (FOIA).[72]

The Act sets forth the principle of maximum disclosure and requires that all government information must be made public except nine exemptions provided. The original version of the law did not apply to investigatory files complied for law enforcement purposes except to the extent available by law to a party. The Act, especially the part of exceptions, was heavily amended in 1974. The amendments were introduced partly in response to the abuses committed by the Federal Bureau of Investigation under the Nixon Administration.[73] Under the 1974 amendment, files compiled for law enforcement purposes are exempted from disclosure *only* if disclosure would *cause harm* to *one of the legitimate interests* listed in the amended section (b)(7). According to the introduced amendment, it is the government that has the burden to prove that information is exempt from disclosure.

The amended Act reads as follows:

[FOIA] does not apply [to] records or information compiled for law enforcement purposes, *but only to the extent*[74] that the production of such law enforcement records or information

> A) Could reasonably be expected to interfere with enforcement proceedings;
> (B) Would deprive a person of a right to a fair trial or an impartial adjudication;
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
> (F) could reasonably be expected to endanger the life or physical safety of any individual;

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[71] 5 U.S.C. 552, adopted in 1966, entry into force: 1967, for text see the website <http://www.usdoj.gov/04foia/foiastat.htm>

[72] P. Hoffman & K. Martin, "Safeguarding Liberty: National Security, Freedom of Expression and Access to Information: United States of America," in S. Coliver (ed.), Secrecy and Liberty, supra, n. 1, pp. 478-505, at, p. 487

[73] J. Michael, "Freedom of Information in United States of America," in N. S. Marsh (ed.), Public Access to Government-held Information (London, Stevens & Son Ltd., 1987), pp. 55-87, at, p.71

[74] Emphasis added

The Federal Bureau of Investigation alleging that limitations on exemptions impeded working with criminal informants heavily criticized the 1974 amendments. Although the claims of the FBI do not seem groundless, however, as J. Michael rightly notes "FBI's assertions must be weighted against the Bureau's documented abuses in the . . . past, such as active harassment of political dissidents on the left and right." If not a successful freedom of information lawsuit filed by a journalist, the general public would never have become aware of this systematic policy carried out by the FBI.[75]

In the aforementioned case of *Stern v. Richardson*[76] the plaintiff, a professional broadcast journalist sued the Attorney General of the United States for refusal of the disclosure of documents related to a programme instituted by the FBI. The requested documents related to the counter-intelligence programme under the code-name "Cointelpro-New Left" (COINTELPRO). In particular, the journalist requested the documents that

(a) authorized the establishment and maintenance of the Cointelpro programme;
(b) terminated such programme; and
(c) ordered or authorized any change in the purpose, nature or scope of the programme.

The Justice Department admitted to the existence of a programme, but refused to issue the material claiming that the requested documents fell within exemptions from the Freedom of Information Act as they were related, *inter alia,* to "investigatory files compiled for law enforcement purposes."

The Court made it clear that the only test it intended to apply in determining the appropriateness of disclosure was the "significant harm test."

> The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interest. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly.

The Court maintained that it was not satisfied with the government's self-serving argument that since documents were contained in an "investigatory file" disclosure was not mandated. The Court explained

> Law enforcement is the process by which a society secures compliance with its duly adopted rules. Enforcement is adversely affected *only*[77] when information is made available which allows persons simultaneously to violate

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[75] ibid. p. 72
[76] United States District Court, District of Colombia, Stern v. Richardson, 367 F. Supp. 1316 (25 September, 1973)
[77] Emphasis original

the law and to avoid detection.

To the extent that the requested information was not related to "detailed investigatory activities of the FBI, the public disclosure of which, assuming law enforcement proceedings were contemplated, would afford a potential criminal the opportunity to 'violate law and to avoid detection'," the Court concluded that the government did not manage to establish that the requested information was covered by the seventh exemption.

The judgement of the Court develops several illustrative guidelines:

1. The policy underlying the Freedom of Information Act in all respects favours disclosure;
2. The withholding agency has burden of justifying its refusal to disclose requested material;
3. Public access should be assured to all governmental records whose disclosure would not significantly harm specific governmental interests;

There have been unsuccessful FOIA cases as well, where US federal courts held that the government adequately showed that disclosure of certain investigative materials held by the law enforcement agencies (such as the FBI or the Drug Enforcement Administration of the Department of Justice) "could reasonably be expected to interfere with enforcement proceedings," so that the documents were legitimately withheld from disclosure in accordance with the section (b) (7) (A) of the FOIA.

However, in all of these cases the courts have first satisfied themselves that:

1. Records were compiled for law enforcement purposes;

2. The government was able to show that there were ongoing or potential enforcement proceedings that would have been interfered with disclosure; and

3. Revelation of document could in fact have impeded ongoing or potential investigations.[78]

In the case of *Wichlacz v. US Department of Interior,* [79] the United States District Court dismissed the claim of the newsletter seeking the information concerning the death of the former deputy counsel to the White House from the Federal Bureau of Investigation.

At the beginning, the court explained that to satisfy the requirement that disclosure of requested documents "could reasonably be expected to interfere with law enforcement proceedings," the government had the burden to demonstrate that law enforcement proceedings were *pending* or *prospective*, and that release of information could reasonably be

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[78] American Law Reports, 189 A.L.R. Fed. 1, (originally published in 2003), available on the website of Westlaw.UK

[79] United States District Court, E.D. Virginia, Wichlacz v. U.S. Dept. of Interior, 938 F. Supp. 325 (1996), summary of the case is available at Westlaw.UK

expected to cause substantial harm. The defendant managed to convince the court that the public disclosure of information could have led to intimidation or harassment of the witnesses, to "reduced cooperation by other potential witnesses after learning of the disclosure of the names of other witnesses, and to alteration, tailoring, or construction of testimony by witnesses out of fear of intimidation or harassment."[80] The Court satisfied itself that the conclusion of the defendant were supported by the facts and held that the government met its burden of demonstrating that the reports came within Exemption (b)(7)(A).[81]

Summing up it can be concluded that under the jurisprudence developed by the US courts, the "mere fact that the information is related to ongoing investigation"[82] does not necessarily mean that the information could not be disclosed. In addition, governmental agency has the obligation to prove that the disclosure of the record "would disrupt, impede, or otherwise harm" the ongoing or pending enforcement proceeding.[83]

5.2. International Standards – The "Harm Test" and The "Public Interest Test"

Despite the fact, that unlike the United States the rest of the world does not view freedom of expression and information as an "unyielding absolute"[84] the restrictive approach to exemptions has nevertheless been reflected in developing international standards.

Moreover, the development on international and regional levels went even further requiring that every exception to the right to freedom of information should satisfy not only the "harm" test widely accepted in the United States, but also "public interest test."

For instance, the Recommendation[85] adopted by the Committee of Ministers of the COE requires the states to ensure access to government-held information even if the disclose *would harm* one of the legitimate interests enumerated in the Recommendation,[86] if there is a *overriding public interest* in having the requested information. The Principle 4 (2) provides:

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

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[80] ibid.
[81] ibid.
[82] Corpus Juris Secundum, 76 C.J.S. Records # 108, available at website of the Westlaw.UK
[83] ibid.
[84] Mahoney & Early, supra, n. 56, at, p. 109
[85] Supra, n. 47
[86] For the list see above

Interestingly enough the list includes "the prevention, investigation and prosecution of criminal activities" as one of legitimate interests, thus providing that *overriding public interest* is a trump over the secrecy usually claimed to be "absolutely necessary" for the interests of ongoing criminal investigation.

The principle that requested information should be disclosed if there is an overriding public interest in having access to information, has been reaffirmed in the Joint Declaration adopted by the three special mandates on freedom of expression,[87] thus reflecting the approval of the principle on international as well as on regional levels. The Declaration states:

> The right of access should be subject to a narrow, carefully tailored system of exceptions …. Exceptions should apply only where there is a risk of *substantial harm* to the protected interest and where that *harm is greater* than the *overriding public interest in having access to the information.*

In June 1999 ARTICLE 19 has produced the set of international standards on freedom of information legislation that provides perhaps the most comprehensive summary of the best international standards and evolving state practice on freedom of information legislation.[88] The principles have been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and referred by the Human Rights Commission in its 2000 resolution on freedom of expression.[89]

ARTICLE 19 translates the three-part test established by the international human rights instruments and bodies into the following requirements:

> A public authority may not refuse to disclose information unless it can show that the information meets the following three-part test:

1. the information must relate to a legitimate aim listed in the law;
2. disclosure must threaten to cause substantial harm to that aim; and
3. the harm to the aim must be greater than the public interest in having the information;[90]

The first part of the test requires that no legitimate aim other than those explicitly provided by the freedom of information law may be invoked to deny access to government-held information.

The second part of the test provides that a public body has the obligation to demonstrate that the disclosure would *substantially harm* the legitimate interest, for instance, the interests of an ongoing investigation.[91]

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[87] Joint Declaration, supra, n. 50

[88] Mendel, supra, n. 57, at, p. 8

[89] ibid. p. 3

[90] "Memorandum on the Draft Malawian Access to Information Bill," ARTICLE 19, (London, 2004), for text see the <www.article19.org>

The third part of the test requires the public authority to balance "whether the risk of harm to the legitimate aim from disclosure is greater than the public interest in accessing the information (public interest override)."[92] According to public interest test, even if a public agency demonstrates that the disclosure of information would substantially harm a legitimate interest, it is nevertheless obliged to disclose the requested information if the public interest in disclosure is sufficient enough to overweigh the harm.

However, the last part of the test naturally raises the question of what the "public interest" should be understood to mean. Is it something that the public is simply interested in? Is public agency obliged to satisfy the simple curiosity of individuals?

The Law of Georgia on Freedom of Speech and Expression[93] defines "public interest" as "the interest of society as a whole in events related to the exercise of self-government in a democratic state (not the simple curiosity of individuals)."[94] The definition is somewhat vague but this allows it to be read broadly in the light of international standards.

The European Court does not provide the concrete definition of the "public interest." However, for instance, in the case of *Thorgeir Thorgeirson v. Iceland*[95] it held that "public interest" covers all matters of *public concern* and includes political discussion as well. The National Union of Journalists, a professional body of journalists in the UK, gives the illustrative, non-exhaustive list of matters of public interest. The list includes but is not confined to:

1. Detecting or exposing crime or a serious misdemeanour;
2. Protecting public health and safety;
3. Preventing the public from being misled by some statement or action of an individual or organization;
4. Exposing misuse of public funds or other forms of corruption by public bodies;
5. Revealing potential conflicts of interest by those in positions of power and influence;
6. Exposing hypocritical behaviour by those holding high office;[96]

Summing up, the notion "public interest" covers all the legitimate interests of the public, satisfaction of which is the essential prerequisite for exercising effective democratic control over governmental institutions.

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[91] ibid.
[92] ibid.
[93] The Law on Freedom of speech and Expression, adopted on 24 June 2004
[94] ibid. Article 1 (g)
[95] Thorgeir Thorgeirson v. Ireland, Judgment of 25 June 1992, for text see the website of the Court <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=6334652&skin=hudoc-en&action=request>
[96] National Union of Journalists, website <http://www.nuj.org.uk/inner.php?docid=224>

5.3. Right to Truth

The present chapter deals briefly with the "right to truth," an emerging principle of international human rights law developed by the Inter-American system of human rights protection in recent years.

The principle has emerged in the aftermath of the change of military regimes in Latin America, followed by the legitimate demand for accountability for the massive human rights violations committed under the military dictatorships.[97] The principle reflects the phenomenon common only to the Inter-American region notorious for pardoning those responsible for massive extrajudicial executions and forced disappearances through amnesty laws. The principle stems from the desperate will of the ordinary citizens to know the truth what happened to their loved ones.

The Inter-American Commission elaborated the right as deriving from Articles 2 and 25 of the Convention, requiring the states to carry out an investigation of violations committed within its jurisdiction; to identify, prosecute and punish those responsible; and to ensure that victims and/or their next-of-kin have the simple and prompt recourse for protection against violation of fundamental rights.[98]

However the understanding of the right has evolved gradually from individual dimension to collective one. Under the current understanding, it is rooted not only in Articles 2 and 25 of the Convention, but in articles 1, 8 and 13 as well.[99]

It was in 1998 when the Commission recognized for the first time that the right to truth belonged to the whole society and connected it to the right to access to information reflected in Article 13.[100] However, it was not until the case of *Ignacio Ellacuria v. El Salvador*[101] in 1999 when the Commission expressly stated that Article 13 of the Convention was violated.

The position of the Commission is well summarized in the case of *Barrios Altos v. Peru*[102]

> The right to truth is founded in Articles 8 and 25 of the Convention, insofar as they are both "instrumental" in the judicial establishment of the facts and circumstances that surrounded the violation of a fundamental right . . . this right has its roots in Article 13(1) of the Convention, because that article

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[97] Krsticevic, supra, n. 1, at, p. 182

[98] Right to Truth, website of the Office of the Special Rapporteur for Freedom of Expression, http://www.cidh.org/relatoria/showarticle.asp?artID=156&lID=1

[99] ibid.

[100] ibid.

[101] IACHR, Ignacio Ellacuria v. El Salvador, Report # 136/99, 22 December 1999

[102] Inter-American Court of Human Rights, Barrios Altos v. Peru, Judgment of 14 March 2001, for text see the website of the Court <http://www.corteidh.or.cr/seriec_ing/seriec_75_ing.doc>

> recognizes the right to seek and receive information. With regard to that article . . . the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights.

According to the Commission the rationale of the right is that it allows the society "to gain access to information essential to the development of democratic systems" as well as it provides a "form of reparation" to relatives of the victim.

In two cases[103] discussed by the Inter-American Court, the Court has recognized the right to truth but not in relation to Article 13. However, the Court ordered the state as reparation to conduct investigation, punish those responsible and to disseminate the results of the investigation publicly. This part of the judgment gives us the right to assume, that the Court implicitly recognized the legitimate interest of society in having the information; in knowing the truth what had really happened during their collective past.

Although the "right to truth" is still in the process of crystallization and unfortunately, did not get the universal recognition yet, it nevertheless can be used as a guiding principle for extending the protection from the pre-existing rights to new situations.[104] One might think that the right that emerged as a consequence of the phenomenon common only to Latino American region can not be applied to different contexts. However, the successful claim of the Amnesty International that the people of Niger have the right to know the truth about the assassination of the President of Niger[105] points to the opposite direction.

6. Conclusion

Summing up it can be said that the right "to seek, receive and impart" information, - though not yet affirmed by the authoritative explanations of the judicial or quasi-judicial human rights bodies - nevertheless imposes the positive obligation on the states to ensure access to official documents. At least, recognition of the right on international as well as all three regional and national levels demonstrates that the right of access to government-held information exists.

Indisputably, the right is not absolute. Like freedom of expression, it bears certain duties and responsibilities, and therefore, can be subjected to some limitations for the

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[103] Bamaca Velasquez v. Guatemala, Judgment of 25 November 2000; Barrios Altos v. Peru, ibid., for text see the website of the court <http://www.corteidh.or.cr/seriec_ing/index.html>
[104] Bamaca Velasquez v. Guatemala, Separate Opinion of Judge Candado Trindade, at, para. 34
[105] Niger: the People of Niger Has the Right to Truth and Justice, Amnesty international (2000), for text see the website http://web.amnesty.org/library/Index/ENGAFR430032000?open&of=ENG-NER

protection of the higher legitimate interests. International instruments by the authoritative international human rights bodies, as well as established state practice, demonstrates that interests of ongoing criminal investigation legitimately represents one of the interests for the sake of which the right to freedom of information can be restricted. However, this restriction does not allow the states to turn the criminal investigation into the absolute trump over the public's right to be informed. The exemption first has to meet the "substantial harm" and "public interest test" dictated by the "soft law" instruments.

The rationale of the right is that the citizen of a democratic state is entitled to have the power to control the policing authorities of the state that may have an immediate effect on his daily life, personal freedom and property.[106] Moreover, the public has the right to know the truth on the matters of genuine public concern not only because of the simple curiosity. As C. Trindade rightly mentions, "the prevalence of the right to truth is essential to the struggle against impunity,"[107] to the genuine democracy and non-repetition of human rights violations.

In the light of the developments of the international law, the provision of the Georgian Administrative Code guaranteeing the total closeness of the law enforcement system seems to be contradicting with the developed international standards. "Interests of investigation" frequently invoked by the law enforcement bodies raises some suspicions and unfortunately, often does not serve the interests of the public. Finally, if one applies the test used by the Inter-American Commission for determining whether the issue in question amounted to the violation of the right to truth to the Georgian context, where the unanswered questions about the death of the Prime-Minister enormously fosters alienation to the Government, one can claim that the Georgian society has the right to know the truth.

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[106] N. S. Marsh, "Access to Government-held Information: An Introduction", in N. S. Marsh (ed.), Public Access to Government-held Information, supra, n. 73

[107] Trindade, supra, n. 104