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European Court of Human Rights  
Council of Europe  
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### **Amicus Curiae Brief for the European Court of Human Rights**

#### **In the case of Application no. 10103/20 SIEĆ OBYWATELSKA WATCHDOG POLSKA against Poland lodged on 5 February 2020 communicated on 13 September 2021**

This is an Amicus Curiae Brief submitted by Access Info as a third party under Rule 44 § 3 of the Rules of Court.

Access Info Europe is a human rights organisation that specialises in promoting and protecting the fundamental right of access to information. Access Info's mandate, as established by our statutes, is: "to promote and protect the right of access to information as a tool for defending human rights, for promoting public participation in decision making, and for holding governments and other public and private bodies accountable."

Access Info was founded on 26 June 2006, it is headquartered in Madrid, and is formally established as a not-for-profit, non-governmental association under Spain's Law on the Right of Association, the *Ley Orgánica 1/2002*, the registration was confirmed by Spain's Ministry of Interior on 2 October 2006 (registration number 587828).

In this Amicus Curiae Brief, Access Info provides comparative law, practice, and jurisprudence from a large number of countries in the Council of Europe region, and from the European Union.

This review demonstrates that the meetings calendars of high public officials are public information and therefore fall under the scope of the access to information laws, meaning that they can be requested, or, indeed, be proactively published.

Specifically, this Amicus Curiae will demonstrate the following points:

1. A meetings calendar falls under the definition of "official documents/information" in most access to information laws. It can therefore be requested by anyone;
2. Access to information held by judicial bodies does fall under the scope of the right of access to information;

3. Denial of access to routine administrative information would constitute an interference with freedom of expression, in particular the right to receive and impart information, within the meaning of Article 10 § 1 of the European Convention on Human Right. The refusal of disclosure of this information is not necessary in a democratic society as per Article 10 § 2 (in line with *Magyar Helsinki Bizottság v. Hungary [GC]*, no. 18030/11, 8 November 2016)

**1. A meetings calendar falls under the definition of “official documents/information” under access to information law. It can therefore be requested by anyone.**

It is common practice in international and national access to information laws to contain a very wide definition of “official documents/information”, that captures all information held by public bodies, and that can be requested under access to information laws, subject only to internationally accepted exceptions.

The **Council of Europe Convention on Access to Official Documents** (CETS No. 205) defines “official documents” as:

*Article 1 – General provisions*

*2.b “all information recorded in any form, drawn up or received and held by public authorities.”*

The **European Union’s Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents** contains the below definition of a “document”:

*Article 3 Definitions*

*For the purpose of this Regulation: (a) ‘document’ shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;*

The customary definition of information amongst Council of Europe member states is also very wide in scope.

For instance, in **Bosnia and Herzegovina**, the *Law on Freedom of Access to Information 2000* defines “information” as:

*Article 3 Definitions.*

*any material which communicates facts, opinion, data or any other content, including any copy or portion thereof, regardless of form, characteristics, when it was created or how it is classified*

In **Croatia**, the *Right of Access to Information Act of 2013*, establishes “information” with the following definition:

*Article 5.3*

*"Information is any information held by the public authority in the form of a document, record, dossier, register or any other form regardless of the manner of representation (written, drawn, printed, recorded, magnetic, optical, electronic or any other record), which the public body has created alone or in cooperation with other bodies or received from other persons, and was created within the scope of competencies or in regards to organisation and work of the public body."*

It is evident that the very nature of a calendar of meetings of public officials is in fact a document created by a public body, holding public information and therefore one that should fall under an access to information law.

Specifically, it has been seen in Council of Europe countries, that calendars of meetings of high public figures fall under the definition of “information/documents” within the access to information laws and, where they are not proactively published, can therefore be requested.

This has been confirmed in some countries by recent jurisprudence:

In **Hungary** the Budapest Regional Court ruled that meetings of the Prime Minister fall under the scope of *Act CXII of 2011 on the Right to Information Self-Determination and Freedom of Information* as the meetings are a matter of public interest and are therefore subject to access to information requests, as was confirmed in 2018 by the Constitutional Court.<sup>1</sup>

In the **Netherlands**, the legal basis for the publication of Ministers and State Secretaries agendas was established through the *Implementing Directive of Public Agendas of Ministers* in 2016, stating:

*“Commitment to be more open in areas, for example by providing insight into the agendas of ministers, the working visits made and the speeches. Since taking office in 2017, the Rutte III cabinet has been publishing the agendas of the ministers on Rijksoverheid.nl”*<sup>2</sup>

In **Switzerland**, the agendas and calendars of high-ranking public officials are subject to the *Federal Act of Freedom of Information of the Administration*. This precedent was established in the Federal Court Case 1C\_14/2016 in which the outlook calendar of the former Head of Defence Procurement was published as a result of the following Federal Court ruling:

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<sup>1</sup> *Constitutional complaint against the judgment no. PfvIV.20.561 / 2016/4*. [2018] 3254/2018. (VII. 17.) (Constitutional Court of Hungary).

<sup>2</sup> ‘Uitvoeringsrichtlijn Openbare agenda’s bewindslieden’ (2018)

<https://www.rijksoverheid.nl/documenten/richtlijnen/2018/04/19/uitvoeringsrichtlijn-openbare-agenda's-bewindslieden>

*“The calendar owner is a member of the top management of the DDPS (Federal Department of Defence, Civil Protection and Sport). Its agenda has a significant influence on the whole Administrative activities and processes in the Federal Office for Armaments. Even if the circle of those authorised to access it was limited to the top members of the office management, his Outlook agenda does not merely serve as a reminder of the daily routine and the scheduling of appointments. His electronic agenda is a central management tool for the office management.”*<sup>3</sup>

In the **United Kingdom**, The *Freedom of Information Act 2000* (FOIA), is broad in its scope as established in Article 84, which defines information as:

*“Any information (subject to provisions 51(8) and 75(2) means information recorded in any form.”*

Under the definition, a public official's agenda is subject to a freedom of information request as it is held by the government department. This was confirmed by *Department of Health v. The Information Commissioner and Mr Simon Lewis*<sup>4</sup> in regard to access to the Ministerial diary of the Rt. Hon Andrew Lansley MP. The government's argument that it did not hold information relevant to the Freedom of Information Act was rejected on the following grounds:

*“It seems obvious that, subject to any absolute or qualified exemptions in FOIA, the information in the diary was “held” by the Department for the purposes of the FOIA during such time as Mr Lansley was a Minister in the Department, whether or not the diarised events had already occurred. The information related to one or more of the matters identified in Section 35(1). It was set up and maintained by the Department and at its cost. At the very least the diary was, as Mr Eadie said in his oral submissions, an efficiency tool to enable to Department [...] to know what his upcoming appointments would be, with whom and where, and to facilitate decisions about his availability for other appointments, also to be a record of what he had done, who he had seen and where, should those matters become relevant to Mr Lansley’s Ministerial functions and his private office after the diarised events had occurred.”*<sup>5</sup>

This ruling established that the Minister's diary fell under the scope of the FOIA and, therefore, both personal and professional diary (as permitted by Personal Data Protections) were susceptible to the FOIA and available for publication upon request as they were recorded in execution of his official duties.

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<sup>3</sup> Judgement of June 23, 2016 1C\_14/2016

[https://www.oeffentlichkeitsgesetz.ch/downloads/dokumente/2016/2016\\_06\\_23\\_Urteil%20BGer\\_armasuis se.pdf](https://www.oeffentlichkeitsgesetz.ch/downloads/dokumente/2016/2016_06_23_Urteil%20BGer_armasuis se.pdf)

<sup>4</sup> *Department of Health v. The Information Commissioner Mr Simon Lewis* [2017] EWCA Civ 374, Case No. C3/2015/1811

<sup>5</sup> *ibid*

In a number of jurisdictions, it is not even necessary to request calendars, because they are published proactively:

At the international level, the **European Commission** proactively publishes the calendar meetings of its Commissioners, including those of the President of the European Commission.

In **France** the agendas of senior officials are accessible, with the most of them being published online via an open data platform.<sup>6</sup>

In **Lithuania** the *Law on Lobbying Activities 2021* mandates that the President of the Republic, members of the Seimas and the Government, Vice Ministers, Chancellors of ministries, Heads of parliamentary political parties, Mayors, members of municipal councils, Directors and Deputy Directors of municipal administrations make their agendas public online.

In **Spain**, the agendas of both the President and the Vice President of the Supreme Court are published proactively online. The publication of such information is mandated by *Law 19/2013, of 9 December on Transparency, Access to Public Information, and Good Governance*:

*Article 5*

*“The subjects listed in Article 2.1 shall publish regular and updated information, knowledge of which is relevant in guaranteeing the transparency of their activity related to the functioning and monitoring of public activity.”*

Article 2.1 establishes “*the Constitutional Court and the General Council of the Judiciary*” as subjects under the Law.

**2. Access to information held by judicial bodies falls under the scope of the access to information laws of a majority of Council of Europe member states.**

In a majority of Council of Europe member states, the national access to information laws include the judicial branch in its entirety, or at a minimum incorporate solely the administrative branch of the judiciary.

Those Council of Europe countries that extend their access to information law to the judicial branch, including both administrative and other information, with no bodies excluded, include:

Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czechia, Finland, Georgia, Hungary, Latvia, Lithuania, Montenegro, North Macedonia, Poland, Republic of Moldova, Romania, Russia, Slovenia, Sweden, Turkey, and Ukraine.

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<sup>6</sup> See the French government open data platform here: <https://www.data.gouv.fr/fr/reuses/agenda-de-ministre/#used-datasets>

Even a narrower interpretation of the right nevertheless extends it to the administrative information held by the judicial branch, as per the Council of Europe Convention on Access to Official Documents, where the definition of “public authorities” includes:

*Article 1 – General provisions*

*a i “public authorities” means: ...*

2. *legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;*

The right of access to administrative information held by the judicial branch is established (in addition to those countries listed above) in the following countries:

Andorra, Belgium, Germany, Ireland, Italy, Liechtenstein, Malta, Portugal, Slovakia, Switzerland, and the UK

A meeting calendar of a court official would clearly fall under the definition of an administrative document. It is therefore a document that would be subject to the access to information laws of at least 34 of the 47 countries in the Council of Europe region.

**3. Denial of access to the meetings calendars of senior public officials constitutes an interference with freedom of expression, in particular with the right to receive and impart information, within the meaning of Article 10 § 1 of the European Convention on Human Rights. Such a refusal is not necessary in a democratic society as per Article 10 § 2 (in line with Magyar Helsinki Bizottság v. Hungary [GC], no. 18030/11, 8 November 2016)**

It has been established that documents such as the calendars of senior officials of all branches of government constitute documents that fall under the scope of access to information laws.

The right of access to information is not, however, an absolute right. The Council of Europe Convention on Access to Official Documents sets out in Article 3 a limited set of exceptions. These exceptions may be invoked as grounds to deny access to documents, provided that there is a reasoned motivation for such denial and that this justification demonstrates that there is a demonstrable harm to a protected interest and that there is no overriding public interest which would justify access to these documents.

To deny access to any document held by a public body without invoking a permissible exception, and without demonstrating both the harm that would likely flow, and without taking into consideration the public interest, is an unacceptable limitation on the right of access to information and hence of the right to freedom of expression.

As to the factors which should be taken into consideration when assessing the public interest, it is important to note that the Convention on Access to Official Documents explicitly establishes in Article 4 that an “*applicant for an official document shall not be obliged to give reasons for having*

*access to the official document*". In the vast majority of cases, and in the first instance, the onus is therefore on the public authority to determine the public interest in the publication of the information, irrespective of the identity of the applicant or his or her reasons for accessing the document.

This standard reflects the access to information laws of the Council of Europe region, many of which derive from constitutional provisions on access to information and/or freedom of expression, and which do not require motivations to be provided by requesters.

Rather, when assessing the application of limits on this right, the consideration of public interest should be derived from the broader public benefits of transparency. Among these benefits is that information is necessary to be able to exercise the right of freedom of expression. As the European Court of Human Rights has stated, public bodies cannot "*allow arbitrary restrictions which may become a form of indirect censorship*".<sup>7</sup> The European Court of Human Rights has made clear that there is a positive obligation to eliminate such obstacles: "*The State's obligations in matters of freedom of the press include the elimination of barriers to the exercise of press functions where, in issues of public interest, such barriers exist solely because of an information monopoly held by the authorities*".<sup>8</sup>

Additional bases for the public interest in releasing requested information are set out in the preamble of the Council of Europe Convention on Access to Official Documents, which recalls "*the importance in a pluralistic, democratic society of transparency of public authorities*". The preamble goes on to affirm that "*exercise of a right to access to official documents:*

- (i) *provides a source of information for the public;*
- (ii) *helps the public to form an opinion on the state of society and on public authorities;*
- (iii) *fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy*".

With respect to the material that is the subject of this Amicus Curiae Brief, namely the calendars of senior public officials (in the judicial or any other branch), it is clear that this is information which will help the public be informed and form an opinion about the activity of the relevant public body. Furthermore, such transparency will help ensure the accountability and, should it be so merited, the legitimacy, of that public body. Such an outcome cannot be achieved without transparency.

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<sup>7</sup> Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 27

<sup>8</sup> Társaság a Szabadságjogokért v. Hungary, App. No. 37374/05, ECHR, 14 April 2009, para 36

The European Court of Human Rights has in some earlier jurisprudence assessed whether the applicant for information was playing the particular role of a social watchdog, and hence had a reinforced right to obtain certain documents.

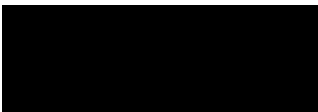
A review of comparative law, jurisprudence, and practice, makes clear that in the majority of cases such an assessment of the nature of the applicant should not be necessary.

Be that as it may, to the extent that there are rare instances where there is a fine balance between the harm and the public interest, the previous jurisprudence of the Court may be pertinent as it establishes a reinforced right of access for social watchdogs such as civil society organisation or investigative journalists involved in “*the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate*”.<sup>9</sup> In these instances, to deny access to the requested information would be more likely to be determined to be an interference with freedom of expression and information under Article 10 of the European Convention of Human Rights.

In this review of the comparative law and practice, however, for routine administrative material such as the planning of meetings of officials, there are grounds for denying public access to the relevant documents, and the meeting calendars of senior public officials should be accessible upon request. Indeed, the better practice in the Council of Europe region indicates that such material can be published proactively.

We remain at the Court’s disposition for any questions or clarifications regarding this Amicus Curiae Brief and the comparative information provided therein.

For and on behalf of Access Info Europe



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<sup>9</sup> European Court of Human Rights, *Youth Initiative for Human Rights*, 25 June 2013, § 24