INDIVIDUAL COMMUNICATION SUBMITTED TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

UNDER THE FIRST OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Submitted by:
Walter Keim

State Party:
Federal Republic of Germany

Date of Submission:
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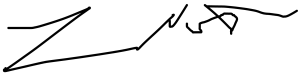

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Claim:
The Federal Republic of German has violated Walter Keim's rights under Article 19 of the International Covenant on Civil and Political Rights.

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A. SUMMARY

1. Walter Keim (the applicant) is a human rights activist and German national. In 2007, he submitted a petition to the Bavarian State Parliament calling for the implementation of recommendations made by the Council of Europe Human Rights Commissioner. The Bavarian Parliament denied the petition based on opinions prepared by two ministries. When Mr. Keim requested access to the opinions, the Bavarian Parliament and both of the ministries which had provided them declined to grant him access to the opinions.

2. Bavaria has not adopted comprehensive legislation giving individuals a right to access information held by public authorities (right to information legislation). No existing Bavarian law gives Mr. Keim a right to access the ministerial opinions. He sought a remedy from the Bavarian courts, which also declined to grant him access to the opinions, and from the European Court of Human Rights, which refused to accept his application.

3. Germany's non-disclosure of the opinions requested by Mr. Keim constitutes a violation of his right to information (right to access information held by public authorities), guaranteed by Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Germany's failure to establish comprehensive right to information legislation in Bavaria, including procedures for making access to information requests, a requirement that reasons are given for any refusal to disclose information and an opportunity to appeal any such refusal to an independent authority, constituted an additional violation of his right to information under Article 19. The restrictions on Mr. Keim's right to information is not justifiable under Article 19(3) including because it is not provided by law, does not serve any legitimate aim and is not necessary.

B. FACTUAL AND LEGAL BACKGROUND

1. Summary of Facts

4. The applicant, Walter Keim, is a human rights activist and German national. He has advocated for the right to information (the right to access information held by public authorities) in the German state of Bavaria, which does not currently have a state-level right to information law. Mr. Keim has, in recent years, requested and been denied access to documents related to his human rights activism.[1] This communication concerns a specific denial of Mr. Keim's right to access information held by public authorities, in particular his request to access two official opinions relating to a petition that he submitted to Parliament.

[1] Mr. Keim lists some of these attempts at his website (in German): http://wkeim.bplaced.net/files/un-0509.htm.

5. The Bavarian Constitution guarantees the right to submit written requests or complaints (hereinafter "petitions") to the Bavarian State Parliament.[2] Petitions may address any matter relating to Bavarian laws or Bavarian government authorities, although some admissibility requirements or restrictions apply, such as the matter not being subject to ongoing legal proceedings.[3] The petition procedure is an important mechanism for citizen participation in Germany. Petitions are considered by parliamentarians, who can introduce the legislative amendments needed to remedy problems revealed by a petition.[4]

6. When parliament receives a petition, it is sent to a parliamentary committee, which decides whether to accept and act on the petition according to a procedure enumerated in the Petitions Act and the parliament's rules of procedure.[5] As part of this procedure, the committee may request written opinions from the relevant government authorities. It may then accept these opinions, whether they recommend positive action or not taking any action, and declare the matter positively or negatively settled, or take other enumerated actions.[6]

7. On 25 October 2007, Mr. Keim submitted a Petition (hereinafter Petition 1) to the Bavarian Parliament.[7] The Petition called for the adoption of certain recommendations contained in an 11 July 2007 report by the Human Rights Commissioner to the Council of Europe, Thomas Hammarberg, following his visit to Germany in October 2006. Specifically, Petition 1 called for the Bavarian Parliament to implement the report's recommendations to enhance human rights education; establish human rights committees in the state parliaments; promote independent extrajudicial complaints bodies; train law enforcement, government officials and parliamentarians in human rights; and develop a national action plan on human rights (in cooperation with the federal government).[8] Petition 1 also referenced other public interest matters, for example relating to the independence of the judiciary in Germany, the incorporation of

[2] Constitution of Bavaria, Article 115. Available in English at: https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16_neu.pdf.

[3] Act on the Treatment of Submissions and Complaints to the Bavarian State Parliament pursuant to Article 115 of the Constitution, Article 4 (hereinafter "Petition Act"). Bayerisches Petitionsgesetz (GVBI. P. 544) of 9 August 1993, last amended 26 July 2006. For an authoritative English-language source describing the petition procedures, see Bavarian State Parliament, "The Bavarian State Parliament in the Maximilianeum", pp. 93-100. Available at: https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Oeffarbeit_Paed_Betreuung/Landtagsbuch_ENGLISCH_072010.pdf.

[4] Report by the Commissioner for Human Rights to the Council of Europe, Mr. Thomas Hammarberg, on his Visit to Germany, CommDH(2007)14, 11 July 2007, para. 16. Available at: https://rm.coe.int/16806db6df.

[5] This procedure is contained in the Petition Act, note 3, and the Rules of Procedure for the Bavarian State Parliament. For the version of the Rules of Procedure for the Bavarian State Parliament in force when Mr. Keim's petition was considered, see: https://www.bayern.landtag.de/www/ElanTextAblage_WP15/Drucksachen/Basisdrucksachen/0000006000/0000006083.pdf (in German). The Rules were subsequently amended but the relevant provisions did not change. For an English language summary of the procedure, see: "The Bavarian State Parliament in the Maximilianeum", note 3, pp. 95-101.

[6] Petition Act, note 3, Article 6, and the Rules of Procedure for the Bavarian State Parliament, note 5, § 80(4).

[7] Petition P II/VF.0993.15: Implement proposals of the Commissioner for Human Rights and train judges in human rights, make the judiciary independent and the Subject to law, 2007. Available at Annex 1.

[8] Petition 1, note 7, referring to the report by the Commissioner for Human Rights Mr. Thomas Hammarberg on his Visit to Germany, note 4, paras. 35 and 46, recommendations 9(2)-(3) and (8)-(9).

human rights into domestic law, access to information in Bavaria and certain practices of the German youth welfare offices.

8. The Parliamentary Committee on Constitutional, Legal and Parliamentary Questions denied Petition 1 on 12 June 2008 and notified Mr. Keim of the denial on 3 July 2008.[9] According to the notice of denial, the Committee obtained opinions on Petition 1 from the Bavarian State Ministry of Justice and the Bavarian State Ministry of the Interior. Based on these opinions, the Committee declared the matter settled, concluding that there was no reason to implement the concerns raised by Mr. Keim in his petition. The Committee gave no other reasons for rejecting Petition 1 and did not describe the contents of the opinions from the two Ministries.[10]

9. One month later, on 8 August 2008, Mr. Keim sent a request to the Bavarian Parliament for access to the opinions of the Ministries of Justice and of the Interior.[11] Under the Bavarian Parliament's Rules of Procedure, some limited access to information rights are granted to third parties who have a legitimate interest in parliamentary matters.[12] However, the Rules specifically exempt petition matters, so that there is no right for third parties to access files relating to petitions.[13] German authorities, in interpreting this exemption, consider petitioners to be third parties, with the primary parties being the members of the Bavarian Parliament and the state government.[14]

10. On 25 August 2008, the Bavarian Parliament denied Mr. Keim's request to access the opinions of the ministries, stating that there is no right to access documents relating to the petition procedure. According to the denial letter, the Committee only shares ministry opinions on a discretionary basis at the time it decides on the petition. Since the Committee did not decide to share the ministerial opinions with Mr. Keim when it denied his request, he could not access them.[15]

11. Mr. Keim then sent letters to the Ministry of Justice and the Ministry of the Interior asking for access to their respective opinions on his petition.[16] Both ministries deferred to the Parliament's decision and denied Mr. Keim access to the opinions.[17]

12. On 25 March 2009, Mr. Keim sent a second petition to the Bavarian Parliament (hereinafter Petition 2). Petition 2 called for a right to information law to be adopted in

[9] Letter from the Bavarian Parliament to Walter Keim, 3 July 2008. Available in German and English at Annex 3.
[10] Letter from the Bavarian Parliament to Walter Keim, note 9, citing the Rules of Procedure, note 5.
[11] Letter from Walter Keim to the Bavarian Parliament, 8 August 2008. Available at Annex 4.
[12] Rules of Procedure, note 5, § 190.
[13] Rules of Procedure, note 5, § 190(3).
[14] This was the approach taken by the Bavarian Parliament, although it is not stated explicitly in their communication with Mr. Keim. The Administrative Court which eventually heard Mr. Keim's case takes this interpretive approach in its decision, *VG München Keim ./. Bavaria Az. M 17 K 12.3408* (Administrative Court in Munich). Available at Annex 19.
[15] Letter from the Bavarian Parliament to Walter Keim, 25 August 2008. Available at Annex 5.
[16] Letter from Walter Keim to the Bavarian State Ministry of Justice, 8 September 2008, available at Annex 7; and letter from Walter Keim to the Bavarian State Ministry of Interior, 5 September 2008, available at Annex 6.
[17] Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available in English and German at Annex 17; and letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available at Annex 19.

Bavaria.[18] The relevant Committee, after soliciting an opinion from the Ministry of the Interior, rejected Petition 2, again on the basis of the opinion of the Ministry. This time, however, the Committee chose to include the opinion of the Ministry of the Interior in its response to Mr. Keim. The opinion stated that it did not believe a state right to information law was necessary and that the adoption of one was not required by domestic or international legal obligations.

13. Due, in part, to the absence of a general a right to information law in Bavaria, Mr. Keim had no legal right to request access to the ministerial opinions related to Petition 1. Instead of a general right to information law, Bavaria has introduced some limited procedures permitting access to government documents. None of these applied in Mr. Keim's case. For example, while the Bavarian Administrative Procedures Act allows parties to an administrative procedure to access the file relating to their case, Mr. Keim's petition was a parliamentary rather than an administrative proceeding.[19] Similarly, as has been noted, there is no right to access files relating to petitions procedures under the Bavarian Parliament Rules of Procedure.

14. Lacking any alternative, Mr. Keim again requested access to the opinions given on Petition 1 in a 13 December 2011 letter to the Bavarian Parliament.[20] The Parliament responded that the Bavarian Parliament Rules of Procedure denied a right to access files on petition matters.[21] It also noted that the relevant Committee had already decided against establishing a right to information law in Bavaria,[22] following some back-and-forth because Parliament initially confused Mr. Keim's request to access the Petition 1 opinions with a request to reconsider Petition 2.[23] At this point, Mr. Keim decided to turn to the courts for assistance.

15. Mr. Keim filed a complaint to the Administrative Court in Munich on 14 July 2012, stating that the repeated refusals to grant him access to the ministerial opinions were a breach of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Bavarian General Rules of Procedure. In its decision of 13 June 2013, the Court denied Mr. Keim access to the opinions in question.[24]

16. On 25 July 2013, Mr. Keim appealed the decision. The Higher Administrative Court of Bavaria confirmed the Munich Court's ruling and rejected Mr. Keim's claims on 14 February 2014.[25] On 13 March 2014, Mr. Keim submitted an application to lodge an appeal before the Federal Constitutional Court in Germany and the Court rejected that

[18] It also called for Germany to adopt the Council of Europe's Convention on Access to Official Documents. See Petition P II / VF.0126.16: Building trust, not mistrust: ratifying the Council of Europe Convention on Access to Official Documents. Available at Annex 10. Petition 2 annexes a Petition sent to the German Parliament, which copied the Bavarian State Parliament and contains a fuller description of the requests contained in Petition 2. See Petition 1-16-06-298-050103 to the German Parliament. Available at Annex 11.

[19] Bayerisches Verwaltungsverfahrensgesetz (Bavarian Administrative Procedure Law), Article 29. Available at: http://www.gesetze-bayern.de/Content/Document/BayVwVfG. Unofficial translation at Annex 27.

[20] Letter from Walter Keim to the Bavarian Parliament, Ministry of Interior and Ministry of Justice, 13 December 2011. Available at Annex 14.

[21] Letter from the Bavarian Parliament to Walter Keim, 23 January 2012. Available at Annex 15.

[22] Letter from the Bavarian Parliament to Walter Keim, 31 January 2012. Available at Annex 17.

[23] See the exchange of four letters contained in Annexes 14-17.

[24] *VG München Keim ./. Bavaria Az. M 17 K 12.3408*, note 14.

[25] *Bayerischer VGH, Beschluss vom 14.02.2014 - 5 ZB 13.1559* (Higher Administrative Court of Bavaria). Available at Annex 21.

application and declined to hear the appeal on 13 January 2016.[26] At this point, no further domestic remedies are available to Mr. Keim.

17. Having exhausted domestic remedies, Mr. Keim submitted a complaint to the European Court of Human Rights (ECtHR) on 8 March 2016 regarding the Bavarian Parliament's repeated refusal to grant access to the requested opinions on Petition 1. The ECtHR declared the application inadmissible on 23 June 2016 and communicated this decision in a letter to Mr. Keim on 30 June 2016, bringing that action to its final conclusion.[27]

18. Mr. Keim now wishes to take advantage of his right to submit an application to the United Nations Human Rights Committee to consider his case. Germany ratified the International Covenant on Civil and Political Rights on 17 December 1973[28] and ratified the (first) Optional Protocol to the International Covenant on Civil and Political Rights on 25 August 1993.[29]

2. Legal Status of Access to Information in Bavaria

2.a Bavaria Does Not Have a Comprehensive Legal Framework for Access to Information

19. In 2005, Germany passed the Federal Act Governing Access to Information held by the Federal Government (Freedom of Information Act),[30] establishing a right to access official information held by federal administrative authorities. By way of context, it may be noted that this is a very weak right to information law. The RTI Rating, a globally renowned methodology for assessing the strength of legal frameworks for the right to information which uses a set of 61 indicators to assess these laws globally, ranks Germany's law in the bottom ten globally.[31]

20. The German Freedom of Information Act only applies to federal public authorities.[32] Thirteen of the sixteen German States have chosen to adopt state-level right to information laws.[33] Bavaria, however, has not. Instead of a comprehensive right to information law, Bavaria has a patchwork of provisions in other laws which offer some limited procedural options for requesting access to government documents.

21. For information which is held by the Bavarian Parliament, the Parliamentary Rules of Procedure provide a limited right to inspect files concerning matters of parliamentary

[26] *Walter Keim v. Bavarian State*, 13 January 2016, 1 BvR 897/4 (Federal Constitutional Court). Available at Annex 23.
[27] Letter from the Legal Secretary of the European Court of Human Rights regarding *Keim v. Germany*, Application No. 13912/16, 30 June 2016. Available at Annex 25.
[28] International Covenant on Civil and Political Rights, UN Treaty Depository. Available at: https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.
[29] Optional Protocol to the International Covenant on Civil and Political Rights, UN Treaty Depository. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en.
[30] An English translation of this law is available at: https://www.rti-rating.org/wp-content/uploads/Germany.pdf.
[31] As of June 2019, Germany's law ranked 117 out of the 124 countries assessed on the RTI Rating. Country Data, RTI Rating. Available at: https://www.rti-rating.org/country-data.
[32] Federal Act Governing Access to Information held by the Federal Government, § 1(1).
[33] A list is available at Transparenzranking, https://transparenzranking.de, last accessed 10 June 2019.

debate.[34] The inspection right only applies to individuals who have a specific legitimate interest in the information.[35] Files related to petition matters are explicitly exempted from the right to inspect files under the Rules of Procedure.[36]

22. Individuals may be able to access information held by public authorities if they have a specific legitimate interest in that information. The Rules of Procedure for Bavarian Authorities provide that, unless regulated by other legal provisions, authorities may disclose information and allow inspection of files if the requester credibly substantiates a legitimate interest in the information.[37] The Bavarian Administrative Procedure Act also provides that participants in administrative proceedings have the right to inspect documents connected with those proceedings if doing so is necessary to assert or defend their legal interests.[38]

23. Bavaria also has legal rules providing for access to information in specific contexts. The opinion of the Ministry of the Interior, in rejecting Mr. Keim's petition to adopt a right to information law, lists these as: a right to environmental information under federal and Bavarian environmental laws; consumer-relevant information under the federal Consumer Information Act; minutes of public meetings of municipal councils; information about data stored about oneself; and press access rights.[39] This is a very limited list, especially given that it was used to justify the lack of a general right to information law.

24. In May 2018, following the events which gave rise to this case, Bavaria enacted a data protection law that contains a provision on the right to information. Despite the title of the provision, this does not establish a general right to information; like the provisions cited above, it applies only when the individual in question can demonstrate a specific interest in the information. It also does not apply to a number of bodies, including the Bavarian Parliament, and it contains wide-ranging exceptions for documents deemed to contain classified information or where public or private interests oppose disclosure.[40]

25. Bavarian law, therefore, does not provide for a general right of the public to access information held by Bavarian public authorities, instead requiring an interest in the matter or proceedings, or the presence of certain specialised circumstances. Bavaria also has no central oversight authority for deciding on complaints about access to information, such as an information commissioner, or any centrally set rules or procedures governing access to information. For this reason, the Transparency Ranking Germany, a civil society-supported ranking of freedom of information and transparency

[34] Rules of Procedure, note 5, § 190.
[35] Rules of Procedure, note 5, § 190(1).
[36] Rules of Procedure, note 5, § 190(3).
[37] Allgemeine Geschäftsordnung für die Behörden des Freistaates Bayern (General Rules of Procedure for the Authorities of the Free State of Bavaria), § 9. Informal translation available at Annex 27.
[38] Bayerisches Verwaltungsverfahrensgesetz (Bavarian Administrative Procedure Act), § 29(1)-(2). Except for a slight wording variation in the first sentence, the language of these provisions is identical to § 29 of the federal Administrative Procedure Act, which is available in English translation at: https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.pdf?__blob=publicationFile&v=1.
[39] Bavarian Ministry of Interior, Opinion on Petition of Mr. Walter Keim, 25 June 2009. Available in German and English at Annex 13.
[40] Bayerisches Datenschutzgesetz (Bavarian Data Protection Act), Article 39. Available at: https://www.gesetze-bayern.de/Content/Document/BayDSG-39.

laws in Germany, considers Bavaria in last place in terms of administrative transparency in Germany.[41]

26. The Bavarian Parliament's rationale for not enacting right to information legislation, based on its adoption of the Ministry of Interior's opinion prepared in response to Mr. Keim's Petition 2, is that Bavarian citizens already have extensive rights to access information. The Ministry's opinion refers to the legal provisions described above, as well as existing rule of law protections, and suggests that a right to information law would not materially extend information rights.[42] The opinion also argues that other constitutionally protected and public sector interests would require "far-reaching exceptions" to be included in any right to information law. It suggests the breadth of these exceptions would prevent a right to information law from substantially increasing access to information rights.[43]

27. As this Communication will show, these justifications are not well founded and the current law fails to guarantee the right to access information for those living in Bavaria, including Mr. Keim. Indeed, this is clearly shown by the facts of this case, where Mr. Keim had no legal right to access the ministerial opinions related to his petition and, instead, the decision to grant or deny access was in the unfettered discretion of Parliamentary and the ministries themselves. This violated his right to information protected in Article 19 of the ICCPR.

2.b Approach of the German Courts in Considering Mr. Keim's Case

28. Mr. Keim filed a suit with the Bavarian Administrative Court in Munich on 25 July 2012 seeking to compel the Bavarian State Parliament to allow him to inspect the files containing the opinions of the Ministries of Justice and of the Interior regarding his petition.[44]

29. The Administrative Court in Munich did not grant Mr. Keim access to the opinions. In its reasoning, it first established that Mr. Keim did not have a right to this information under the Bavarian Administrative Procedure Act or under the Rules of Procedure for Bavarian Authorities, because the proceedings were not administrative and parliament is not an administrative authority.[45] Mr. Keim also did not have a right to access the information under parliamentary rules of procedure since they did not grant a right to access files relating to petition matters.[46] In addition, a right to inspect the files, based on rule of law principles, was unlikely to apply, given the existence of specialised rules limiting access. Even if such a right did apply, it would apply only to those who could establish that they had a specific legitimate personal interest in the information. In the Court's view, Mr. Keim's claim that the information would be of interest to the Council of Europe Human Rights Commissioner did not satisfy this standard.[47]

[41] "Bayern", Transparenzranking Deutschland, https://transparenzranking.de/laender/bayern/ (in German)
[42] Bavarian Ministry of Interior Opinion, note 39, para. 2.5.2.
[43] Bavarian Ministry of Interior Opinion, note 39, para. 2.5.2.
[44] Administrative Court in Munich, note 14.
[45] Administrative Court in Munich, note 14, para. 2(a).
[46] Administrative Court in Munich, note 14, para. 2(b).
[47] Administrative Court in Munich, note 14, para. 3.

30. The Higher Administrative Court of Bavaria, on appeal, agreed with the reasoning of the lower court. It also expanded significantly on the question of whether the European Convention of Human Rights imposed an obligation on Bavaria to grant Mr. Keim access to the documents in question, and concluded it did not.[48]

C. ADMISSIBILITY

31. This communication meets the admissibility requirements set out in Articles 1, 2, 3 and 5 of the First Optional Protocol to the ICCPR.

32. Germany is a State Party to the International Covenant on Civil and Political Rights, as both parts of a then divided Germany ratified the ICCPR in 1973.[49] Germany (by then united) acceded to the First Optional Protocol to the ICCPR on 25 August 1993.[50] Mr. Keim, as a national of Germany, is subject to the jurisdiction of Germany within the meaning of Article 1 of the First Optional Protocol.

33. Mr. Keim is claiming a violation of his rights under the Covenant, specifically his right under Article 19 to "seek, receive and impart information and ideas of all kinds". The Human Rights Committee has recognised that the right to access information held by public authorities is part of the protection afforded by Article 19.[51] As the Committee affirmed in General Comment No. 34[52] and *Toktakunov v. Kyrgyzstan*,[53] the right to access information is a universal right in the sense that it is not dependent on the identity of the person requesting information or whether that person has a direct interest in the information being requested.[54] This reflects an evolution of the Committee's views from its decision in *S.B. v. Kyrgyzstan*, where the Committee found that the petitioner's failure to establish a personal interest in the information he requested meant his claim was not admissible.[55] In contrast, the language of *Toktakunov v. Kyrgyzstan* suggests that a claim can be admissible if it simply shows that the applicant "as an individual member of the public" was affected by a refusal to make information available (such as by a denial of a request).[56] However, even if the Committee's approach to the right to information had not evolved, this complaint would still be admissible because the facts of this case are distinct from those in *S.B. v. Kyrgyzstan*. Mr. Keim's request related to a petition procedure which he had personally initiated and which was refused, at least in part, directly on the basis of the information he was seeking (the opinions of the ministries). He therefore had a direct interest in the results of the petition procedure

[48] Higher Administrative Court of Bavaria, note 25.
[49] International Covenant on Civil and Political Rights, UN Treaty Depository. Available at: https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf.
[50] Optional Protocol to the International Covenant on Civil and Political Rights, UN Treaty Depository. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en.
[51] See paragraph 41.
[52] Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, CCPR/G/GC/34.
[53] Human Rights Committee, *Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006, 21 April 2011, CCPR/C/101/D/1470/2006.
[54] See paragraphs 47-53.
[55] Human Rights Committee, *S.B. v. Kyrgyzstan*, Communication No. 1877/2009, 30 July 2009, CCPR/C/96/D/1877/2009.
[56] *Toktakunov v. Kyrgyzstan*, note 53, para. 6.3.

and, as a result, the content of the reasons for refusing it. For a further discussion of this issue, see paragraphs 40-53 and 66-68.

34. Mr. Keim's rights were violated by a State Party to the Covenant. The German state of Bavaria failed to provide him with access to the requested information. When national States ratify the ICCPR, the obligations they thereby assume apply equally to national and sub-national government actors. According to Article 50 of the Covenant, the Covenant extends to "all parts of federal States without any limitations or exceptions". Furthermore, it is well established under international law that States as a whole are responsible for treaty obligations. Under the Vienna Convention on the Law of Treaties, States "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[57] The Human Rights Committee itself, in its General Comment No. 31, has affirmed that the obligations of the Covenant are binding on all branches of government "at whatever level – national, regional or local".[58]

35. Mr. Keim has exhausted all available domestic remedies. No procedural framework exists in Bavaria for making an access to information request. Lacking such a framework, Mr. Keim brought a case in the Administrative Court of Munich seeking access to the documents.[59] After this was denied, he appealed to the Higher Administrative Court of Bavaria and this appeal was rejected.[60] Mr. Keim also attempted to petition the Federal Constitutional Court, which declined to hear his case.[61]

36. This matter is not currently being examined under another procedure of international investigation or settlement. Mr. Keim has not submitted a complaint or communication to any other such body, except for the European Court of Human Rights. The European Court of Human Rights made a final decision that the complaint was inadmissible, not subject to appeal, in June 2016, and accordingly is not currently examining the matter.[62]

37. This matter has not already been considered by another procedure of international investigation. Germany, upon its accession to the First Optional Protocol, included a reservation to Article 5(2)(a) stating that the competence of the Committee shall not apply to communications "which have already been considered under another procedure of international investigation or settlement".[63] The European Court of Human Rights or another body has not considered this communication. That Court's 30 June 2016 letter to Mr. Keim stated that a single-judge panel had found the application to be inadmissible. It gave no indication that the Court had considered the merits of the case, merely stating that "the Court found that the admissibility criteria set out in Articles 34 and 35 of the Convention have not been met."[64]

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[57] Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Article 27.
[58] Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligations on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), para. 4.
[59] Administrative Court in Munich, note 14.
[60] Higher Administrative Court of Bavaria, note 25.
[61] Federal Constitutional Court, note 26.
[62] Letter from the Legal Secretary of the European Court of Human Rights regarding *Keim v. Germany*, Application No. 13912/16, 30 June 2016. Available at Annex 25.
[63] Germany, Reservation to the Optional Protocol, English translation. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en#EndDec.
[64] Letter from the Legal Secretary of the European Court of Human Rights regarding *Keim v. Germany*, Application No. 13912/16, 30 June 2016. Available at Annex 25.

38. The Committee has consistently interpreted reservations along the lines of Germany's to mean that another international procedure has considered the substance or merits of the case and not merely made a procedural determination not to hear the matter.[65] For example, in *Yaker v. France*, the Committee found a communication to be admissible in almost identical procedural circumstances to Mr. Keim's. France, like Germany, made a reservation to Article 5(2)(a) of the First Optional Protocol against the Committee's competence to consider a communication which "has already been considered by another procedure of international investigation or settlement" (near identical language to the German reservation, in the English translation).[66] In *Yaker*, a prior application had also been submitted to the European Court of Human Rights and, as in Mr. Keim's case, the European Court of Human Rights had found, via a single judge, that "the conditions of admissibility laid down in articles 34 and 35 of the Convention had not been met".[67] The Committee determined that "from the succinct nature of the reasoning by the Court" and the lack of any clarification explaining the nature of the rejection, the Committee could not conclude that the communication had been considered by the European Court within the meaning of France's reservation.[68] This reasoning also applies to Mr. Keim's complaint with the result that Germany's reservation to Article 5(2)(a) of the First Optional Protocol does not render it inadmissible.

39. This complaint is not anonymous or incompatible with any provisions of the ICCPR. It also is not an abuse of the right of submission, as it was submitted in a reasonably timely manner. It took several years for Mr. Keim to attempt to access the information via domestic channels, given the lack of a clear procedure for making an access to information request and the time it took to appeal to the courts. Mr. Keim submitted a claim to the European Court of Human Rights one month after the German Federal Constitutional Court denied his appeal.[69] After the European Court of Human Rights found his complaint to be inadmissible, Mr. Keim submitted an initial complaint to the Human Rights Committee.[70] Upon being informed that he had not satisfied certain preliminary criteria,[71] he obtained legal counsel and is now submitting this more detailed complaint, still within three years of the 30 June 2016 date of having concluded the proceedings before the European Court of Human Rights, as stipulated in the Committee's Rules of Procedure.[72]

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[65] See, for exampe, *Chanderballi Mahabir v. Austria*, Communication No. 944/2000, 11 November 2004, CCPR/C/82/D/944/2000, para. 8.3; *Petersen v. German*, Communication No. 1115/2002, 30 April 2004, CCPR/C/80/D/1115/2002, para. 6.3; and *Pronina v. France*, Communication No. 2390/2014, 3 November 2014, CCPR/C/111/D/2390/2014, para. 4.3.

[66] France, Reservation to the Optional Protocol, English translation. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&clang=_en#EndDec.

[67] *Sonia Yaker v. France*, Communication No. 2747/2016, 7 December 2018, CCPR/C/123/D/2747/2016, para. 6.2.

[68] *Ibid*. The Committee also made a similar finding as regards a reservation made by Spain in *María Cruz Achabal Puertas v. Spain*. *María Cruz Achabal Puertas v. Spain*, Communication No. 1945/2010, 18 June 2013, CCPR/C/107/D/1945/2010.

[69] Submission to the European Court of Human Rights, 8 March 2016. Available at Annex 24.

[70] Letter from the Office of the High Commissioner for Human Rights, 17 May 2018. Available at Annex 26 (referencing Mr. Keim's 8 May 2018 submission).

[71] Letter from the Office of the High Commissioner for Human Rights, 17 May 2018. Available at Annex 26.

[72] Letter from the Legal Secretary of the European Court of Human Rights regarding *Keim v. Germany*, Application No. 13912/16, 30 June 2016, available at Annex 25; and Rules of Procedure of the Human Rights Committee, 9 January 2019, CCPR/C/3/Rev.11, Rule 99(C).

D. THE VIOLATION OF MR. KEIM'S RIGHTS

1. The Right to Information is Protected by Article 19

1.a Article 19 Protects the Right to Access Information Held by Public Authorities

40. Article 19(2) of the ICCPR protects the right to "seek, receive and impart information". A crucial component of this right is the public's right to access information about their governments and to "know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented."[73] Accordingly, individuals should be able to request information from their governments, which they can then share with the broader public, contributing to the circulation of information about the actions and decisions of public authorities.[74] Governments in turn have a corresponding responsibility to provide information to the public, as they "hold information not for themselves but as custodians of the public good".[75]

41. The right to seek, receive and impart information under Article 19 of the ICCPR therefore includes a right to access information held by public authorities. This right has been clearly recognised by the Human Rights Committee, which dedicated two paragraphs of General Comment No. 34 to describing the right and its scope.[76] Specifically, paragraph 19 of that General Comment states: "Article 19, paragraph 2 embraces a right of access to information held by public bodies." In its Concluding observations on various communications, the Committee has also affirmed the right of individuals to access information held by public authorities, subject to those limited cases where a restriction is allowed pursuant to Article 19(3).[77]

42. The Inter-American Court of Human Rights was the first regional court to recognise the right to information, as part of the general guarantee of freedom of expression, in 2006, in the case of *Claude-Reyes et al. v. Chile*. In that case, the Court stated very clearly: "[T]he Court considers that article 13 of the Convention, in guaranteeing expressly the rights to 'seek' and 'receive' 'information', protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order

[73] UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression, 1999 Joint Declaration on Freedom of Expression as a Fundamental Human Right. Available at: https://www.osce.org/fom/99558?download=true.
[74] See *Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006, 21 April 2011, CCPR/C/101/D/1470/2006, para. 7.4.
[75] African Commission on Human and Peoples' Rights, *Declaration of Principles on the Freedom of Expression in Africa*, adopted at the 32nd Ordinary Session, 17-23 October 2002, Principle IV(1). Available at: http://www.achpr.org/sessions/32nd/resolutions/62.
[76] Human Rights Committee, General Comment No. 34, note 52, paras. 18-19.
[77] *Toktakunov v. Kyrgyzstan*, note 53, para. 7.3. See also *Castañeda v. Mexico*, Communication No. 2202/2012, 29 August 2013, CCPR/C/108/D/2202/2012.

to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied."[78]

43. Prior to that, in 2004, the (then three) special international mandates on freedom of expression at the UN, OSCE and OAS had clearly indicated that individuals have a human right to access information held by public authorities, stating, in their 2004 Joint Declaration on Access to Information and on Secrecy Legislation: "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 (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions."[79]

44. Within Europe, in its early case law, the European Court of Human Rights had refused to recognise a right to information as part of the right to freedom of expression,[80] but that changed in 2009 with the case of *Társaság A Szabadságjogokért v. Hungary*,[81] when the Court first, and rather cautiously, recognised a right to information as part of the right to freedom of expression, albeit as part of the expressive part of that right (i.e. as a component of the right to impart information and ideas), rather than as a free-standing right. The Court has gradually expanded its interpretation of the scope of the right, most notably in a 2016 Grand Chamber decision on the matter,[82] so that while it continues to link the right to the expressive aspect of freedom of expression, which is more limited than the approach taken by other courts and leading commentators, it has at least broadened the grounds upon which it will make that link.

45. The African Commission on Human and Peoples' Rights has also affirmed the right to access information held by public authorities, in its 2002 Declaration on Principles on Freedom of Expression in Africa.[83]

46. Consistently with all human rights, the right to information applies to all public authorities.[84] In its General Comment No. 34, the Human Rights Committee specifically indicated that the right to information applies to: "All branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State

[78] 19 September 2006, Series C No. 151 (Inter-American Court of Human Rights), para. 77. Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf.
[79] UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004 Joint Declaration on Access to Information and on Secrecy Legislation, 6 December 2004. Available at: https://www.osce.org/fom/99558?download=true.
[80] See, for example, *Leander* v. *Sweden*, Application No. 9248/81, 26 March 1987; *Gaskin* v. *United Kingdom*, Application No. 10454/83, 7 July 1989; and *Guerra and Ors*. v. *Italy*, Application No. 14967/89, 19 February 1998.
[81] Application No. 37374/05, 14 April 2009.
[82] *Magyar Helsinki Bizottság v. Hungary*, Application No. 18030/11, 8 November 2016.
[83] 32nd Session, 17-23 October 2002: Banjul, the Gambia.
[84] See Human Rights Committee, General Comment No. 31, note 58, para. 4.

party."[85] As noted above, once ratified, treaty obligations bind the whole of the State, regardless of its internal political or legal arrangements. The scope of coverage in terms of information is also broad in scope, applying to all "records held by a public body, regardless of the form in which the information is stored, its source and the date of production."[86]

47. Like most other human rights, the right to information is universal and belongs to everyone. The universality of the right flows directly from its protection as part of Article 19, as this right ICCPR applies to everyone. International standards clearly affirm this, stating that "everyone"[87], "every member of the public" [88], "every individual"[89] and "everyone . . . without discrimination on any ground"[90] has the right to access information held by public authorities.

48. Because the right to information extends to all persons, it applies regardless of whether the requestor can demonstrate a direct interest in the information. As the Committee noted in *Toktakunov v. Kyrgyzstan*, "information should be provided without the need to prove a direct interest or personal involvement",[91] language closely mirroring a similar finding by the Inter-American Court of Human Rights in the *Claude Reyes v. Chile*.[92] The Committee's language in *Toktakunov* instead suggests that a claim can be admissible if it merely shows that the applicant "as an individual member of the public" was refused access to information.[93] This represents an evolution from the Committee's decision in *S.B. v. Kyrgyzstan* not to consider a claimed violation of a right to information because of a lack of demonstrated interest in the information requested in that case.[94] Such an evolution accords with international standards, which generally provide that applicants should not have to give any reason or justification for making a request for information or demonstrate an interest in the information.[95]

49. The universal nature of the right to information also means that its applicability does not depend on the identity or status of the person requesting the information, including whether or not that person is a journalist or otherwise acting in a traditional 'watchdog' role. While the right is especially important for journalists and activists, the Committee

[85] General Comment No. 34, note 76, para. 18, referring to the definition of public bodies in para. 7. The Committee also noted, at the same place, that this right might also extend to "other entities when such entities are carrying out public functions".
[86] *Ibid.*
[87] Declaration of Principles on Freedom of Expression in Africa, note 75, Principle IV(1).
[88] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 18 January 2000, E/CN.4/2000/63, para. 44 (public bodies have an obligation to disclose information and "every member of the public" has a right to receive that information).
[89] OAS, Inter-American Commission on Human Rights, Declaration on Principles on Freedom of Expression, 108th Session, October 2000, Principle 4.
[90] Council of Europe, Recommendation Rec(2002)2 of the Committee of Ministers to the Member States on Access to Official Documents, Principle III. Available at: https://rm.coe.int/16804c6fcc.
[91] *Toktakunov v. Kyrgyzstan*, note 53, para. 6.3. The Committee notes that these factors may be relevant where a valid Article 19(3) restriction applies.
[92] *Claude-Reyes v. Chile*, note 78, para. 177.
[93] *Toktakunov v. Kyrgyzstan*, note 53, para. 6.3.
[94] *S.B. v. Kyrgyzstan*, note 55.
[95] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), Article 4(1)(a); Council of Europe Recommendation Rec(2002)2, note 90, Principle V(1); Model Inter-American Law on Access to Information, Article 5(d)-(e); Model Law on Access to Information for Africa, Article 13(5) (with narrow exceptions if the requester believes the information is necessary to protect the life or liberty of a person or where the request is made to a private body).

recognised in *Toktakunov v. Kyrgyzstan* that individuals, and not only professional journalists, can exercise a 'watchdog' role on matters of legitimate public concern.[96]

50. The Committee's indication in *Toktakunov v. Kyrgyzstan* that individuals can act in a "watchdog" role also acknowledges the evolving understanding of the way information is communicated and spread in modern society, where simply having a social media account can allow one to communicate public interest information globally. A similar evolution can be seen in the question of whether journalists must register or belong to a professional association. The Committee (and other human rights authorities) now reject this, because "journalism is a function shared by a wide range of actors, including … bloggers and others who engage in forms of self-publication in print, on the internet and elsewhere".[97] This change in the way information is shared means that distinguishing between a person requesting information about persons sentenced to death merely because "it was particularly important to know" such information (the facts of *S.B. v. Kyrgyzstan*)[98] and a legal consultant for a human rights association similarly requesting information about death sentences (the facts of *Toktakunov v. Kyrgyzstan*)[99] is an artificial one that can no longer be sustained. The Committee appears to have acknowledged this in *Toktakunuv v. Kyrgyzstan*, suggesting that the requester's role as an "individual member of the public" was sufficient.[100]

51. To require a person to play a "watchdog" role or to demonstrate a personal interest in the requested information before enjoying the protection of the right to information are both, as a matter of principle, in fundamental conflict with the universal nature of the rights protected by Article 19 of the ICCPR. The expressive rights under that article,for example, does not depend on the speaker having some direct interest in the content of the expression. Similarly, applying it to some persons and not to others would violate the non-discrimination provision in Article 2 of the ICCPR. Permitting governments to engage in distinctions based on their perception of the "interest" of the requester in the information would open the door to abusive denials of rights.

52. The European Court of Human Rights does consider factors such as whether the person requesting information is acting as a public "watchdog" in determining whether the right to information applies. This approach is problematic for the reasons stated above but it also is not applicable to the ICCPR given wording differences between the two conventions and the Committee's clear acknowledgement of the right to information as being applicable to everyone. Article 10 of the European Convention on Human Rights does not cover the right to "seek" information, unlike Article 19 of the ICCPR, which is part of the reason why the European Court has been reticent to extend the right to information to everyone. Instead, the Court conducts a preliminary analysis to determine whether a denial of access would sufficiently impact freedom of expression so as to trigger the right to information.[101] This analysis includes factors such as the role of the person requesting the information. Such an approach is not appropriate under the ICCPR, given that the Committee has clearly established that the right to access information extends universally, without any such preliminary assessment.

[96] *Toktakunov v. Kyrgyzstan*, note 53, para. 7.4.
[97] General Comment No. 34, note 52, para. 44.
[98] *S.B. v. Kyrgyzstan*, note 55, para. 2.1.
[99] *Toktakunov v. Kyrgyzstan*, note 53, para. 6.3.
[100] *Ibid.*, para. 6.3.
[101] *Magyar Helsinki Bizottság v. Hungary*, note 82, paras. 157-179.

53. The right to access information therefore extends to everyone. Governments should enact legal frameworks which protect the right to everyone to access information held by public authorities, regardless of the identity ("status") of those persons or their interest in the information.

1.b Article 19 Imposes Positive Obligations on States to Adopt Legal Rules on the Right to Information with Certain Characteristics

54. Legal obligations imposed by the ICCPR can be "both negative and positive in nature"[102], and this is certainly the case for freedom of expression. The right to information is, essentially by definition, a positive obligation for States inasmuch as it requires them to take positive measures to provide information.[103]

55. In General Comment No. 34, the Committee made it clear that practical implementation of the right to information embraces two key mechanisms for accessing information. First, States "should proactively put in the public domain Government information of public interest".[104] This ensures that everyone can easily access this information and so creates a sort of minimum bottom line of access. Second, States "should also enact the necessary procedures, whereby one may gain access to information [which] procedures should provide for the timely processing of requests for information according to clear rules".[105]

56. In general, it is up to States to decide how they wish to meet their human rights obligations, and in many cases various options for doing so are open to them. Most States meet the first right to information obligation (proactive disclosure) in a variety of ways. Often, the general right to information law sets common standards for all public authorities, while other pieces of legislation and sometimes also policy add to these proactive obligations in different areas.

57. When it comes to the second right to information obligation (reactive disclosure or responding to requests), however, there is only one practical way to ensure that this obligation is met in respect of all information held by all public authorities, as is required (see paragraph 46), namely by means of a general right to information law. While other laws may supplement this general rule – for example by establishing particular regimes for accessing information held by particular types of public authorities, such as the courts – it is simply not practically possible to cover all public authorities and all types of information without a general right to information law. Put differently, a piecemeal approach will inevitably leave out certain types of public authorities or certain types of information. This is precisely the situation which pertains currently in Bavaria, and which led to Mr. Keim being denied access to a certain type of information, held by a particular public authority, without any proper procedure being in place to request access to it.

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[102] General Comment No. 31, note 58, para. 6.
[103] As opposed to some of the obligations relating to the expressive elements of Article 19 which, in contrast, call on States not to impose restrictions on the ability of individuals to express themselves, or so-called negative obligations.
[104] General Comment No. 34, note 52, para. 19.
[105] *Ibid.*

58. The need for general right to information legislation is reflected both in authoritative statements on this issue and in the overwhelming practice of States. As of today, 128 States around the world, comprising the large majority of democratic States, with the exception of a number of very small Island States, have adopted national right to information laws.[106] In its General Comment No. 34, the Committee noted that State parties should provide for reactive disclosure "such as by means of freedom of information legislation."[107] In their 2004 Joint Declaration, the special international mandates on freedom of expression put it even more clearly, stating that the right to information, "should be given effect at the national level through comprehensive legislation".[108] In the case of *Claude-Reyes et al. v. Chile*, the Inter-American Court of Human Rights, exceptionally, went beyond ordering Chile to provide the information to the victims and also ordered it to both "adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information" and even to "provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right".[109] The African and Inter-American human rights systems have even adopted model laws on the right to information, to provide guidance to States as to how discharge their obligations in this area.[110]

59. In the alternative, and if the Committee decides that States do not necessarily have to adopt a general right to information law to discharge their obligations to provide for a reactive, or request-driven, disclosure, at a minimum they need to put in place a specific legal framework, even if contained in different pieces of legislation, which establishes clear and appropriate procedures for requesting any of the information covered by the right to information from any of the public authorities which are covered by this right, as described in paragraph 46. As is clear from the below, in Bavaria, Germany has not done this.

60. It is not enough, to meet international obligations in this regard, to have in place any sort of legislation. The legislation must meet the minimum standards established by international law. This includes a number of characteristics in addition to those relating to the scope of the legislation in terms of information and public authorities.

61. First, the legislation should establish procedures for making requests that are clear, simple and accessible. States should be making "every effort to ensure easy, prompt, effective and practical access"[111] to information and requesting procedures are central to this. The "formalities for requests should be kept to a minimum"[112] and "procedures should provide for the timely processing of requests for information according to clear

[106] See https://www.rti-rating.org/country-data/.
[107] General Comment No. 34, note 76, para. 19.
[108] International Mandates for Promoting Freedom of Expression, 2004 Joint Declaration, note 79.
[109] *Claude-Reyes v. Chile*, note 78, paras. 7-8 of the Decision part of the judgment.
[110] OAS, General Assembly AG/RES. 2607 (XL-)/10), adopting a "Model Inter-American Law on Access to Public Information", 8 June 2010, available at: https://www.oas.org/dil/AG-RES_2607-2010_eng.pdf; and African Commission on Human and Peoples' Rights, Model Law on Access to Information in Africa, available at: http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdf.
[111] General Comment No. 34, note 76, para. 19.
[112] Council of Europe Recommendation Rec(2002)2, note 90, Principle V(II).

rules that are compatible with the Covenant".[113] Principle 5 of the Inter-American Juridical Committee's Principles on the Right of Access to Information provides one of the most detailed statements on this, indicating that: "Clear, fair, non-discriminatory and simple rules should be put in place regarding the processing of requests for information. These should include clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information".[114] General Comment No. 34 also indicates that fees "should not be such as to constitute an unreasonable impediment to access to information."[115]

62. Second, consistently with the primary guarantee of the right of information, exceptions to this right should conform to the test for restrictions set out in Article 19(3) of the ICCPR. This is addressed in some detail in sections D(3) and (4) of this Communication.

63. Third, the law should require public authorities to provide reasons for refusing to provide access to information. This is central to the basic legality of the right. If no reasons are provided, it is practically impossible for the requester to lodge an appeal against the refusal, taking into account that he or she does not have access to information and so cannot even hazard a sensible guess as to why it may or may not legitimately be secret. Reasons for a refusal thus provide the only basis for a requester to lodge an appeal against a refusal. Absent the possibility of lodging an appeal, the decision to grant or deny access essentially lies at the discretion of the public authority, and one cannot talk of a 'right' to access information. The Committee has clearly recognised this need: "Authorities should provide reasons for any refusal to provide access to information".[116] Such reasons should be "substantive"[117] and include "specific grounds for the refusal".[118] They should also explain how the denial accords with a restriction under 19(3).

64. Fourth, the law should ensure the availability of an accessible and independent appeals mechanism against decisions not to disclose information. As noted above, this is essential to ensure that access really is a right and not merely within the discretion of public authorities. General Comment 34 notes: "Arrangements should be put in place for appeals from refusals to provide access to information".[119] Elsewhere, the Committee has suggested that this should include an independent administrative process. In concluding observations on Italy, it expressed concerns that the Italian right to information law only allowed non-disclosure decisions to be challenged via judicial proceedings.[120] Other international authorities, especially in the Inter-American system,

[113] General Comment No. 34, note 76, para. 19.
[114] Inter-American Juridical Committee, Principles on the Right of Access to Information, CJI/RES.147 (LXXIII-)/08), 7 August 2008.
[115] General Comment No. 34, note 76, para. 19. See also International Mandates for Promoting Freedom of Expression, 2004 Joint Declaration, note 79 (procedures should be "simple, rapid and free or low-cost"); Council of Europe Recommendation Rec(2002)2, note 90, Principles V and VIII; and Aarhus Convention, note 95, Article 4(8).
[116] General Comment No. 34, note 76, para. 19.
[117] Report of the Special Rapporteur, note 88, para. 44.
[118] Inter-American Juridical Committee, Principles on the Right of Access to Information, note 114, Principle 5.
[119] General Comment No. 34, note 76, para. 19.
[120] Human Rights Committee, Concluding observations on the sixth periodic report of Italy, 1 May 2017, CCPR/C/ITA/CO/6, para. 40. See also Concluding observations on the fourth periodic report of Jamaica, CCPR/C/JAM/CO/4, 22 November 2016, para. 47 (expressing concern about the inaccessible access to information complaints procedure).

have stated that after a non-disclosure there must be a right to appeal to an autonomous administrative body as well as to the courts.[121] Both the African and Inter-American model laws on access to information provide for a right to appeal to an independent administrative body (such as an information commissioner).[122]

65. The reason that a right to appeal refusals to provide access to information to an independent administrative body is so important is that legal appeals to the courts are expensive, time-consuming and inaccessible. In many cases, timely access is crucial. In others, requesters simply cannot afford the costs of paying for lawyers and other costs associated with going to court simply to access the information they seek. As such, if courts are the only form of redress, the right will not be respected in practice. This is especially the case given that public authorities, out of self-interest, very often have an institutional reluctance to release information, which is especially true if the information is embarrassing or reveals misconduct or corruption. An accessible form of external independent oversight is necessary to ensure that the public's right to information is realised in practice.

2. Germany Restricted the Right to Information

2.a Germany Restricted the Right to Information by Denying Access to Specific Information

66. Mr. Keim has a right to access information held by public authorities, subject only to the restrictions in Article 19(3) of the ICCPR. As described above, this right is universal. Everyone has a right to request information from public authorities. Any denial of such a request is a restriction on the right to information which must be justified under Article 19(3) of the ICCPR.

67. As established above, the right to information does not depend on having a direct or personal interest in the information, or that one be acting in a journalistic or official "watchdog" role. Furthermore, even if some sort of "watchdog" role is required, Mr. Keim meets that requirement.[123] He is an activist who serves as a "watchdog" on human rights issues Bavaria, as evidenced by his personal webpage, which is public, where he

[121] Inter-American Juridical Committee, Principles on the Right of Access to Information, note 114, Principle 8; and Office of the Special Rapporteur for Freedom of Expression, The Inter-American Legal Framework regarding the Right to Access to Information, 2010, para. 26, available at: http://www.oas.org/en/iachr/expression/docs/publications/ACCESS%20TO%20INFORMATION%20FINAL%20CON%20PORTADA.pdf. This is also implied in the language of the 2004 Joint Declaration of the Special Mechanisms for Freedom of Expression, note 79, which states that refusals should be appealable "to an independent body with full powers to investigate and resolve such complaints."

[122] Model Inter-American Law on Access to Public Information, Article 47; and African Commission on Human and Peoples' Rights, Model Law on Access to Information in Africa, Article 71, both at note 110.

[123] The Higher Administrative Court of Bavaria spent some time discussing Mr. Keim's status as a "public watchdog", but this was in the context of the question of the applicability of the European Convention on Human Rights, which has a substantially different jurisprudence regarding the scope of the right (see paragraph 52). It is therefore not relevant to the scope of the right under the ICCPR, except to highlight the potential subjectivity of such an approach. The Court suggests that Mr. Keim is too politically interested and emotional to serve as a public watchdog and that his Internet activity cannot be compared to the more formal activities of the press or non-governmental organisations. Given that many persons who expose government misconduct may be described as emotional or politically interested, this is a highly problematic approach. Higher Administrative Court of Bavaria, note 25, para. 1(b)(bb).

regularly posts updates on right to information issues and other matters of public interest.[124] Even the European Court of Human Rights, with its more conservative approach to access to information, has acknowledged that social media users and bloggers can play a "watchdog" role.[125]

68. Similarly, the right to information does not depend on Mr. Keim establishing a direct or personal interest in the information requested. Government documents often address general policy issues in which it would be difficult for any given individual to show a personal interest, especially where the document is secret and the requester, by definition, does not know its exact contents. Mr. Keim requested documents that presumably address matters such as whether to adopt human rights education for public servants and judges; these are matters of general interest and it would be absurd to permit disclosure only where an individual could somehow demonstrate a direct personal interest, for example by showing harm caused by the fact that a government official was not trained in human rights. Furthermore, even if some direct interest in the information were necessary, Mr. Keim meets this requirement. He was requesting information about a petition procedure which he had initiated and which was refused, and the opinions he was seeking would shed light on why his petition was refused. Accordingly he had a direct interest in the information.

69. Mr. Keim therefore had a right to access the information he was seeking, subject only to restrictions in accordance with Article 19(3) of the ICCPR. However, this right was restricted by Germany. The first way his right was restricted was by the decision of the Bavarian Parliament and the relevant ministries not to disclose the ministerial opinions related to Petition 1. All three authorities held the information in question but rejected Mr. Keim's request for access to it.[126]

70. Second, Rule 190(3) of the Parliamentary Rules of Procedure constitutes a general restriction on Mr. Keim's right to information. The rule denies Mr. Keim the right to request information related to petition proceedings. Authorities relied on this rule as justification for not disclosing the ministerial opinions on Petition 1 to Mr. Keim.[127]

71. Third, Mr. Keim's right to information was restricted by the failure of the authorities to provide him with any reasons as to why his request was refused. Third, Bavarian law does not guarantee Mr. Keim a right to be given reasons why he was denied access to the requested information and the relevant Bavarian authorities did not in fact give him any such reasons. In denying his request, Parliament merely stated:

> In response to your letter referred to above, we are informing you that there is no right of access to files during the petition process.

[124] "Freedom of Information (FOI)", Walter Keim's private Homepage, http://wkeim.bplaced.net/. Last accessed 10 June 2019.
[125] *Magyar Helsinki Bizottság v. Hungary*, note 82, para. 168.
[126] Letter from the Bavarian Parliament to Walter Keim, 25 August 2008, available at Annex 5; Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available in at Annex 8; and Letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available at Annex 9.
[127] Letter from the Bavarian Parliament to Walter Keim, 25 August 2008, available at Annex 5, Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available at Annex 8; Letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available at Annex 9.

> Statements from the government are only forwarded to the petitioners if the committee that decides about a petition rules that this should be done. As this was not the case in your situation, we cannot comply with your request.[128]

Similarly, the response of the ministries simply referred to the fact that this was a parliamentary procedure and that they accordingly deferred to the decision of the Bavarian Parliament.[129] These are procedural, not substantive, reasons for denying the request. They also provide no indication of any possible harm that could result from disclosing the information.

72. Fourth, Germany failed to provide Mr. Keim with an independent administrative appeals mechanism by which he could challenge either the Bavarian Parliament's denial or the denial of the Bavarian state ministries. Bavaria has not established an information commissioner or other oversight body on access to information matters. A more general administrative appeal mechanism was unavailable because Mr. Keim's request related to a parliamentary procedure and because the relevant administrative laws did not extend a right to information to Mr. Keim. By failing to ensure Mr. Keim had access to an administrative appeal against the non-disclosure decision, Germany restricted Mr. Keim's right to information.

73. Finally, Germany's failure to clearly establish a legal right to information held by Bavarian authorities, as well as its failure to fulfil other positive obligations necessary to realise Mr. Keim's right to access information, constituted a restriction on his rights under ICCPR Article 19(2). This is discussed in detail in the next section.

2.b Germany Breached it Obligation to Ensure the Existence of a Legal Regime for the Right to Information in Bavaria

74. As noted above, Article 19(2) of the ICCPR imposes an obligation on States to put in place a comprehensive legal framework for the right to information, presumptively in a general right to information law. Germany did not meet this positive obligation in relation to Bavaria. This was a failure to protect Mr. Keim's right to information which prevented him from accessing information related to his petition procedure which he had sought. It also meant that he had limited legal recourse for asserting his right to information. The lack of a legal framework accordingly had a specific impact on Mr. Keim both in relation to his original requests for the information and in his subsequent attempts to challenge the denial in the courts.

75. It is clear that Germany has not discharged its obligation to ensure that a general law on the right to information applies in relation to Bavarian public authorities. This is by the Ministry of Interior's own admittance. In responding to Mr. Keim's Petition 2, the ministry accepts that Bavarian law does not establish a general right to information right but, instead, argues that it "comes close to a universal right".[130] However, this characterisation is significantly over-generous. Current opportunities for requesting information are limited to a highly specific circumstance and/or require substantiating a

[128] Letter from the Bavarian Land Parliament to Walter Keim, 25 August 2008. Available at Annex 5.
[129] Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available at Annex 8; Letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available in English and German at Annex 9.
[130] Bavarian Ministry of Interior Opinion, note 39, para. 2.4.2.

clear and direct interest in the information.[131] In the context of administrative procedures, this must be a legal interest related to one's participation in administrative proceedings.[132] The Ministry of Interior suggests that a broader right is available under general rule of law principles, according to which the requisite interest might be substantiated by a "mere ideological interest".[133] However, this seems largely theoretical. In any case, for Mr. Keim this was not a reality. The Administrative Court in Munich refused to grant him a right to access information under rule of law principles because it determined that a desire to communicate the information to the Council of Europe Human Rights Commissioner did not constitute a sufficient interest in the information.[134] The lack of a general right to information law accordingly denied Mr. Keim the right to information.

76. Bavaria's new Data Protection Law, adopted after the facts of this complaint, does not cure this problem. It requires a credible demonstration of a direct and legitimate interest in the information, posing the same problems as other existing Bavarian laws. It also exempts a large number of public bodies from its remit, including the Bavarian Parliament (meaning it would not have aided Mr. Keim), as well as the courts, the police, tax authorities, research institutions and the public prosecutor's office, among others. Furthermore, it fails to establish any procedural framework for making and processing information requests, which is a key element of any right to information law.[135] Finally, as noted above, it provides for an extremely broad and highly discretionary regime of exceptions. As such, cumulatively, it completely fails to demonstrate the minimum characteristics of a right to information law noted above, as required under international law.

77. Germany also did not provide Mr. Keim with any other procedure by which he could request access to information held by Bavarian authorities. Bavarian law does not establish a general procedure for making requests for information and Mr. Keim was not eligible for any of the limited existing options for making such requests. Under the parliamentary procedure, he had no right to access files due to Parliamentary Rule of Procedure 190(3). The administrative procedure rules require involvement in an administrative procedure and a legal interest in the information. Mr. Keim, accordingly, had no clear, simple or accessible procedure for requesting access to information.

3. Restrictions on the Right to Information Must Satisfy the Article 19(3) Test

3.a Restrictions Must be Provided by Law

78. Restrictions on the rights protected by Article 19(2) of the ICCPR must, in accordance with Article 19(3), be "provided by law". This also requires that they must "be

[131] See paragraphs 21-25.
[132] Bayerisches Verwaltungsverfahrensgesetz (Bavarian Administrative Procedure Law), Article 29. Available at: http://www.gesetze-bayern.de/Content/Document/BayVwVfG. Unofficial translation at Annex 27.
[133] Bavarian Ministry of Interior Opinion, note 39, para. 2.4.2.
[134] Administrative Court in Munich, note 14, para. 3.
[135] Bayerisches Datenschutzgesetz (Bavarian Data Protection Act), Article 39. Available at: https://www.gesetze-bayern.de/Content/Document/BayDSG-39.

formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly".[136]

79. A restriction on the right to information – such as a refusal to disclose information in response to a request – must therefore have a legal basis. Exceptions should be narrowly drawn, clearly defined and precisely elaborated in the law.[137] The aim of this is to prevent public authorities from being able to decide, on a discretionary or arbitrary basis, whether or not to disclose information. For a restriction to be provided by law, the law "may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution."[138] Put differently, exceptions cannot be left to individual public authorities to determine via their own rules or procedures.

80. The Inter-American Court of Human Rights has noted that a restriction on a fundamental right must be based in a "law" in a formal sense, meaning one passed by a legislature and promulgated by the executive pursuant to the law-making procedure of the State in question.[139] In the context of access to information, the Human Rights Committee has specifically found that restrictions encoded in regulations are not appropriate, determining that by-laws restricting access to information about death sentences could not be considered to be a "law" within the meaning of Article 19(3).[140] In other words, to qualify as a "law", a norm must not be subject to alteration except through processes which reflect the principle of separation of powers and ensure that ultimate decision-making vests in the legislative branch. If restrictions on rights can easily be changed or imposed by the very public authority which is responsible for delivering those rights, this is not a sufficient protection for the rights.

3.b Restrictions Must Pursue a Legitimate Aim

81. Restrictions on the rights protected by Article 19(2) of the ICCPR may, in accordance with Article 19(3), only be imposed to protect certain legitimate interests, namely the rights or reputations of others, national security, public order, or public health or morals. Any refusal to disclose information should, accordingly, be grounded in the aim of protecting one of these legitimate interests. Other grounds for refusing to disclose information, such as protecting the government from embarrassment or concealing wrongdoing, can never be valid.[141]

82. State parties are responsible for demonstrating the legal basis for restrictions on the right to information.[142] If a State does not provide a reason for rejecting a right to information request, absent another justification, it cannot claim that it has restricted it to protect a legitimate interest. In *Claude-Reyes v. Chile*, for example, the Inter-American Court of Human Rights noted that the "State did not prove that the restriction responded to a purpose allowed by the American Convention, or that it was necessary in a democratic

[136] General Comment No. 34, note 76, para. 25.
[137] Declaration of Principles on Freedom of Expression in Africa, note 75, Principle IV(1); Council of Europe Recommendation Rec(2002)2, note 90, Principle IV(1); and Report of the Special Rapporteur, note 88, para. 44.
[138] General Comment No. 34, note 76, para. 25.
[139] Advisory Opinion OC-6/86 of 9 May 1986, The Word "Laws" in Article 30 of the American Convention on Human Rights, para. 27. Available at: http://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf.
[140] *Toktakunov v. Kyrgyzstan*, note 74, para. 7.6.
[141] Report of the Special Rapporteur, note 88, para. 44.
[142] General Comment No. 34, note 76, para. 27.

society, because the authority responsible for responding to the request for information did not adopt a justified decision in writing, communicating the reasons for restricting access to this information in the specific case."[143]

3.c Restrictions Must be Necessary

83. Article 19(3) also requires any restriction on the right to "seek, receive and impart information" to be strictly necessary to protect one of the legitimate interests listed in that article. Public authorities must therefore disclose requested information unless keeping it confidential is necessary to protect an interest that cannot be protected by less restrictive means. A key consideration here, in many cases, is whether a partial redaction of only some of the information would provide the necessary protection.

84. The requirement of necessity incorporates a proportionality analysis, as the Human Rights Committee has noted: "[R]estrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".[144] Restrictions must also not be overbroad.[145] In other words, in the context of the right to information, the law must set out a narrow, clear and carefully-tailored set of exceptions to the general obligation to disclose information.[146]

85. A first aspect of this is that it is only where disclosing the information would cause harm to the legitimate interest that this may be refused, sometimes called the 'harm test'. Clearly, if this would not cause harm, it could not be necessary to refuse to disclose the information.

86. A second aspect is that even if there is a risk of harm from disclosure of the information, that harm should be assessed against the overall public interest in accessing the information. As indicated in the 2004 Joint Declaration of the special international mandates on freedom of expression: "Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information."[147] In other words, a restriction on the right to information is only proportionate if the risk of harm to an interest protected by Article 19(3) of the ICCPR outweighs the public interest in accessing the information, sometimes called the 'public interest override'.

4. The Restrictions Did Not Satisfy the Requirements of Article 19(3)

[143] *Claude-Reyes v. Chile*, note 78, para. 95.
[144] General Comment No. 34, note 76, para. 34 (quoting General Comment No. 27).
[145] General Comment No. 34, note 76, para. 34.
[146] Model Inter-American Law on Access to Public Information, note 95, Introduction; Report of the Special Rapporteur, note 95, para. 44; International Mandates for Promoting Freedom of Expression, 2004 Joint Declaration, note 79.
[147] International Mandates for Promoting Freedom of Expression, 2004 Joint Declaration 2004 Joint Declaration, note 79.

87. It may be noted that the issue of restrictions on a right do not arise in relation to Germany's general failure to fulfil its positive obligation to establish right to information legislation governing all of its component parts, since this is not, strictly speaking, a restriction but a failure to fulfil a positive obligation. The analysis below, therefore, applies only to the failure of the Bavarian authorities to provide Mr. Keim with access to the information he had requested and not the more general failure to establish an overall legal regime for the right to information in Bavaria.

4.a The Restrictions Were Not Provided by Law

88. Parliament's decision not to disclose the information Mr. Keim requested was not provided by law. The Parliamentary Rules of Procedure, in providing for a blanket exclusion of a right to access files related to petition matters, allow the Committee evaluating the petition to decide on an entirely arbitrary basis whether or not to disclose information related to their decision. Thus, parliament gave Mr. Keim access to the reasoning behind the denial of Petition 2 but not the denial of Petition 1, giving no reasons for the different response in each case. Laws which allow authorities to make restrictions on fundamental rights on an entirely arbitrary basis, without even requiring them to provide reasons, are not "provided by law".

89. In addition, the Parliamentary Rules of Procedure cannot be considered a "law" within the meaning of Article 19(3). Restrictions on access to information must be established by a law which applies to all public authorities and not by by-laws or other subsidiary legislation. Authorities should not have complete discretion to set their own rules regarding whether and how they disclose information. Under the Bavarian Constitution, parliament sets its own rules of procedure.[148] In contrast, enacting a law in Bavaria involves a number of formalities and the engagement of the State Government, reflecting key separation of power principles.[149] There are very good reasons, founded in fundamental interests relating to the separation of powers, to grant parliament the power to set its own rules of procedure and we are not in any sense criticising this. However, this becomes highly problematical when it extends to the case of a parliament being able to set its own rules relating to its own performance in terms of respecting a fundamental human right. In such cases, leading courts in different countries have often stepped in and overruled the approach taken by parliaments. Unfortunately, in this case the courts failed to do so, thus leaving the human rights failure unresolved domestically.

90. It is true that, in some contexts, the Committee has accepted that the law of parliamentary privilege constitutes a "law". Thus, in *Gauthier v. Canada*, the Committee accepted that a restriction was "arguably, imposed by law" in that it "follows from the law of parliamentary privilege."[150] The issue in that case, however, was access of journalists to the premises of parliament. Nothing could be more central to the idea of the separation of powers, as reflected in the fact that, in many countries, even the police may not enter parliament without first obtaining permission from that parliament. If parliament cannot control its own physical premises, separation of powers is indeed at

[148] Constitution of Bavaria, Article 20(3). Available in English at: https://www.bayern.landtag.de/fileadmin/Internet_Dokumente/Sonstiges_P/BV_Verfassung_Englisch_formatiert_14-12-16_neu.pdf.
[149] Constitution of Bavaria, *ibid.*, Articles 71, 72, 74 and 76.
[150] *Gauthier v. Canada*, Communication No. 633/1995, 5 May 1999, para. 13.5.

risk. The same cannot be said of the framework of rules governing access to information (albeit those rules will, subject only to oversight by regulatory bodies and the courts, be applied by parliament). This is reflected in the fact that the legislative branch of government is included in a large number of the 128 national right to information laws around the world.[151]

91. The decision of the Bavarian state ministries to deny Mr. Keim access to the opinions they prepared was also not provided by law. This denial was not based in any law governing administrative responses to access to information requests. Rather, the ministries simply deferred to the Parliamentary Rules of Procedure.[152] The reason they were able to do this was because they were not under any primary general obligation to provide access to this information, and hence had essentially unfettered discretion to refuse to provide access to it.

4.b The Restrictions Did Not Aim to Protecting a Legitimate Aim

92. Germany did not establish that it had a legitimate interest the protection of which justified restricting Mr. Keim's right to information. The relevant authorities did not give Mr. Keim any reason for denying his request for information.[153] This in itself is a failure to establish a legitimate interest justifying the decision not to disclose any of the contents of the two ministerial opinions.

93. The Administrative Court in Munich suggests that a right to inspect files in petition cases would circumvent the right to petition procedure and "impair the fundamental ideal of popular sovereignty and separation of powers".[154] Even assuming that these issues fall within the scope of the rights of others and/or public order, the only relevant grounds listed in Article 19(3) of the ICCPR to which they might relate, which is very far from clear, there would appear to be no justification whatsoever for this claim. Instead, a lack of transparency in the process would seemingly vitiate the democratic aspects of the petition procedure by preventing petitioners from knowing whether their concerns are taken seriously and the merits of their suggestions debated. This would discourage use of the procedure and encourage arbitrary behaviour on the part of those running it. Indeed, better practice is that "reports created by parliament or that are requested or required to be submitted to parliament and its offices…shall be made public in their entirety, except in narrowly defined circumstances identified by law."[155]

94. In any case, if there were cases where openness in this procedure might undermine legitimate interests, the human rights compliant approach to addressing this would be to set out in law clear rules identifying those interests and allowing for refusals of access

[151] Detailed information on this precise issue can be found for the 124 of the 128 countries that are on the RTI Rating at: https://www.rti-rating.org/country-data/by-indicator/8/.
[152] Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available at Annex 8; and Letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available at Annex 9.
[153] Letter from the Bavarian Parliament to Walter Keim, 25 August 2008, available at Annex 5; Letter from the Bavarian State Ministry of Justice to Walter Keim, 17 September 2008, available in at Annex 8; and Letter from the Bavarian State Ministry of Interior to Walter Keim, 19 September 2008, available at Annex 9.
[154] Administrative Court in Munich, note 14, para. 3.
[155] Declaration on Parliamentary Openness, Principle 22. Available at: https://openingparliament.org/static/pdfs/english.pdf.

only where those interests were at risk. It is clear that this is not always the case, based on the fact that the parliament granted access to the relevant opinions in relation to Mr. Keim's Petition 2, by providing him with the Ministry of the Interior's opinion.[156] Under the current rules, even if legitimate interests might in some cases warrant a refusal to disclose information, there is nothing to limit parliament to refusing disclosure only in those cases.

4.c The Restrictions Were Not Necessary

95. Since relevant authorities did not provide Mr. Keim with a reason for denying his request, they failed to establish that there was any risk of harm from disclosing the ministerial opinions. At the same time, it seems very likely that there was considerable public interest in giving Mr. Keim access to at least some of the contents of those opinions. Specifically, the public has a considerable interest in knowing the views of ministries in relation to the human rights and democratic issues that Mr. Keim raised in his petition, such as the independence of the judiciary, access to information and the practices of youth welfare offices.[157] The opinions likely also offered ministerial views on the implementation of the recommendations of the report of the Council of Europe Human Rights Commissioner, again a matter of considerable public interest. To the extent that this was true, there was a human rights obligation on the authorities to undertake a public interest balancing, and yet there is no evidence that they did so.

96. The necessity rule also means that the authorities should take the least restrictive option available when restricting a right. Thus, even if part of the ministerial opinions requested by Mr. Keim was sensitive, the appropriate approach on the part of the authorities would have been to redact that part and disclose the rest of the information. It seems most unlikely that the entirety of both opinions was so sensitive, even taking into account the important public interest in providing access to them, that they could not be released. Again, there is no evidence that the authorities considered redacting the opinions. Indeed, the record suggests that the both parliament and the ministries refused to disclose simply because they could and that redaction was never contemplated.

97. More generally, Bavarian Parliamentary Rule of Procedure 190(3) is not a proportionate restriction on Mr. Keim's right to information. Rules which create exceptions to a government obligation to disclose information should be narrowly tailored and only permit non-disclosure when it is strictly necessary. Rule 190(3), by permitting non-disclosure of any information relating to petition proceedings, is clearly too broad. Importantly, it does not require authorities to consider the harm which may result if the information is disclosed or the overall public interest in disclosing the information, both considered by international law to be key to achieving an appropriate balance between protecting legitimate interests and the right to information.

E. REMEDIES REQUESTED

Mr. Keim requests that the Committee provides the following remedies:

[156] Letter from Bavarian Parliament to Walter Keim, 4 November 2009, available at Annex 12; Bavarian Ministry of Interior, Opinion on Petition of Mr. Walter Keim, 25 June 2009, available at Annex 13.
[157] Petition 1, note 7.

1) Declare Germany to have violated his rights under Article 19 of the ICCPR.

2) Declare that Rule 190(3) of the Rules of Procedure of Bavaria is not a justified restriction on the right to information.

3) Declare that Germany has an obligation either to disclose the opinions of the Bavarian Ministry of Justice and the Bavarian Ministry of Interior which were prepared in response to Mr. Keim's Petition of 25 October 2007 or to justify any non-disclosure in accordance with Article 19(3), namely by indicating the legitimate interest which needs to be protected by secrecy, by indicating the risk of harm to that interest from disclosure and by showing that this harm would outweigh the public interest in having access to those opinions.

4) Declare that Germany is under an obligation to ensure that a general legal regime for the right to information is put in place in Bavaria which meets the standards required of such legislation, including by:

- applying broadly to information and public authorities;
- putting in place appropriate procedures for requesting information;
- establishing a limited and human rights compliant regime of exceptions to the right of access;
- requiring public authorities to provide reasons for any refusal to disclose information; and
- establishing a right to appeal refusals to disclose to an independent administrative appeals body.

ANNEXES

Annexes containing supporting documentation are enclosed in a second file attached to this communication.