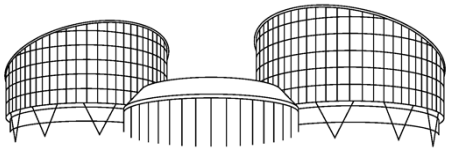

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF ŠEKS v. CROATIA

(Application no. 39325/20)

JUDGMENT

Art 10 • Freedom to impart information • Denial of access, on national security grounds, to classified records relating to a sensitive part of country's recent history, accompanied by adequate procedural safeguards and proportionate • Independent domestic review • Relevant and sufficient reasons • Wide margin of appreciation not overstepped

STRASBOURG

3 February 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Šeks v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Péter Paczolay, *President,*
Ksenija Turković,
Krzysztof Wojtyczek,
Alena Poláčková,
Raffaele Sabato,
Lorraine Schembri Orland,
Ioannis Ktistakis, *judges,*
and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 39325/20) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Croatian national, Mr Vladimir Šeks ("the applicant"), on 26 August 2020;

the decision to give notice to the Croatian Government ("the Government") of the complaints concerning freedom to receive and impart information and the right to a fair hearing and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 14 December 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant requested access to the classified presidential records as part of research for a book he was writing on the founding of the Republic of Croatia. The President of the Republic decided not to declassify some of the documents requested, relying on the need to prevent irreparable damage to the independence, integrity and national security of the Republic of Croatia, as well as its foreign relations. The applicant complains about that refusal of access to documents and relies on Article 10 and Article 6 § 1 of the Convention.

THE FACTS

2. The applicant was born in 1943 and lives in Zagreb. He was represented by Mrs V. Drenški Lasan, a lawyer practising in Zagreb.

3. The Government were represented by their Agent, Mrs Š. Stažnik.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 5 June 2017 the applicant, a retired politician, who had previously held high political functions in the country, lodged a request with the Croatian

State Archive (*Hrvatski državni arhiv* – hereinafter "the State Archive") to be granted access to fifty-six documents that formed part of the archival collection of the Office of the President of the Republic of Croatia for the period between 1994 and 1999. The applicant stated that he needed those records in order to write a documentary history of the founding of the Croatian State.

6. Given that the documents in question were classified as "State secret – strictly confidential" for a period of thirty years, the State Archive requested the Office of the President of the Republic of Croatia, as the owner of those documents, to decide on whether or not they should be declassified.

7. Prior to taking a decision, the Office of the President requested the opinion of the Office of the National Security Council (*Ured vijeća za nacionalnu sigurnost* – hereinafter "the National Security Council"). The National Security Council examined the applicant's request and the contents of the requested records and concluded that, owing to the nature of the contents of certain records, the need to safeguard the values for which those documents had been declared secret in the first place – namely, the independence, integrity and national security of the Republic of Croatia and its foreign relations – still prevailed. The disclosure of the said documents would, in the opinion of the Office of the National Security Council, cause harm to the values protected under section 6 of the Data Secrecy Act (see paragraph 22 below).

8. Subsequently, on 16 August 2017, the Office of the President declassified thirty-one of the requested documents but declined to declassify the remaining twenty-five documents. The documents that remained secret were transcripts from certain sessions held in 1994 and 1995 by the Defence and National Security Council (of which the applicant had been a member), an advisory body to the President of the Republic which at the material time had examined strategic issues of State policy and national security and had coordinated the activities of the highest State bodies and institutions. Certain records of meetings between the then President of Croatia and senior foreign officials and Croatian officials were also left classified by the Office of the President.

9. In the reasoning for its decision not to declassify the latter documents, the Office of the President held as follows:

> "Having taken into account the request submitted by [the applicant], as well as the contents of specific records, the Office of the National Security Council was of the opinion that, owing to the contents of certain records (transcripts), the need to protect the values [in defence of which] those records had originally been classified (independence, the integrity and security of the Republic of Croatia and the foreign relations of the Republic of Croatia) still prevailed ... [therefore,] those individual records (transcripts) should ... not be declassified.
>
> Accordingly, the Office of the National Security Council deemed that the documents listed in this decision contained information the disclosure of which might potentially jeopardise the values listed in section 6 of the Data Secrecy Act.

> In view of the above, [and]..., given that, under section 16 of the Data Secrecy Act, the opinion of the Office of the National Security Council is not binding, but the owner of the information has the exclusive authority to ultimately decide whether [the classification of] certain data is to remain or be changed or [if that data is to] be declassified ..., it has been established that ... [declassifying some of the requested documents] might cause irreparable harm to the values listed in section 6 of the Data Secrecy Act and that the protection of those values prevails over the interest of the public, which is why ... the degree of classification of [the documents listed in this decision] is maintained ..."

10. Following the decision of the Office of the President, on 7 September 2017 the State Archive refused the applicant's request for the declassification of the above-mentioned twenty-five records, which remained top secret, and granted his request to be allowed early access to archival material from that collection with respect to the thirty-one records that had been declassified by the President's decision.

11. On 25 September 2017 the applicant lodged an appeal with the Information Commissioner alleging, *inter alia*, that the contested ruling had been arbitrary, unfair and devoid of any clear criteria because he had been granted access to transcripts of certain meetings but not to other conversations between the same persons.

12. On 13 July 2018 the Information Commissioner dismissed the applicant's appeal. For the purpose of the appeal proceedings, she directly inspected the documents in question and ultimately accepted the conclusion that their declassification may harm national security and foreign relations, noting in addition that the applicant had failed to provide arguments in his appeal as to why those documents should have been declassified, or why his interest in accessing the information outweighed the public interest in protecting the aims at stake. The Information Commissioner also stated that, under the relevant domestic law and practice, only the owner of the documents in issue – in this case, the Office of the President of the Republic – had the power to alter the classification level of confidential information and that the procedure followed by that body had been lawful.

13. On 14 September 2018 the applicant brought an action for judicial review in the High Administrative Court of the Republic of Croatia (*Visoki upravni sud Republike Hrvatske*), seeking to have quashed the Information Commissioner's ruling, which in his view did not contain any reasoning in respect of why certain records had been declassified while others had not. In her reply, the Information Commissioner stressed that only the owner of the documents in question had the power to declassify them.

14. On 25 October 2018 the High Administrative Court dismissed the applicant's action. It found that the applicant had not contested the facts but only the application of the law, that the Information Commissioner had acted lawfully when she had dismissed his appeal and that she had provided clear and valid reasoning for her decision. It held that:

"In the case at hand, the owner of the information, and the body with the power to classify but also to declassify it, is the President of the Republic ...

When there is a public interest in [the disclosure of] such information, its owner is under an obligation to assess the proportionality between the right of access to information and the protection of the values listed in sections 6, 7, 8 and 9 of the Data Secrecy Act and to decide whether to maintain the degree of classification, amend it or declassify the information [at issue] ...; however, before reaching its decision the owner of the information must request the opinion of the Office of the National Security Council, in line with section 16 (1) of the Data Secrecy Act.

...

It can be seen from the case file that, following [the applicant's] request, the prescribed procedure was followed, given that the first-instance public authority ... requested [the declassification of the documents in question] by the owner of the information, which, after obtaining the opinion of the Office of the National Security Council, decided not to declassify [them] ...; that being so, [the State Archive] was not authorised to provide the requested information.

On appeal, [the Information Commissioner] inspected the opinion of the Office of the National Security Council ... which stated that, owing to the contents of certain documents (transcripts), the need to protect the values [in defence of which] those records had originally been classified (the independence, integrity and security of the Republic of Croatia and its foreign relations) still prevailed and gave the opinion that declassifying certain documents could cause damage to the values listed in section 6 of the Data Secrecy Act.

Given that, under section 16 (1) of the Data Secrecy Act, the owner of classified information has the exclusive power to decide whether to maintain, alter [the level of] the classification or declassify the information in question, in the opinion of this court, the State Archive respected the prescribed procedure, and – in accordance with the opinion of the Office of the National Security Council and the decision of the owner of the information ... – lawfully rejected the request of [the applicant] for access to the information [in question], and [the Information Commissioner] on appeal correctly established that in the present case the protection of the values listed in section 6 of the Data Secrecy Act prevailed over the public interest in the publishing of the protected information and that the decision of the owner of the information ... had been rendered following a lawful procedure.

Therefore, in view of the cited legal provisions on which [the Information Commissioner's] decision is based, as well as the facts established in the proceedings, this court finds that [the Information Commissioner] correctly dismissed [the applicant's] appeal against the State Archive's decision and that it provided clear and valid reasons for that decision, which is entirely upheld by this court.

The objection of [the applicant] that the refusal of his request was not sufficiently reasoned is therefore ill-founded, and his objection relating to 'voluntarism' [*voluntarizam*] in disclosing the requested information is not proven and, in light of the lawful procedure in the present case and the discretionary powers of the owner of the information as regards declassification of classified information, has no bearing on a different outcome of the present case..."

15. On 10 December 2018 the applicant lodged a constitutional complaint with the Constitutional Court (*Ustavni sud Republike Hrvatske*) complaining,

inter alia, of a breach of his right to a fair trial and of his right of access to information.

16. On 10 March 2020 the Constitutional Court, sitting as a bench of twelve judges, dismissed the applicant's constitutional complaint. Having concluded that there had been an interference with the applicant's right of access to information because his academic work had been a matter of public interest and that the interference had been lawful, the Constitutional Court held as follows:

> "6.4. As regards the legitimate aim, the Constitutional Court points out that the impugned judgment – in addition to relying on section 16 of the Data Secrecy Act ... and section 16 (1) of the Access to Information Act... – stated that the opinion of the Office of the National Security Council had been obtained ...
>
> The Constitutional Court considers that a more detailed specification of the legitimate reasons for the denial of access to the information sought in the specific circumstances of the present case (namely, upholding the interests of the State in the areas of independence, integrity, [national] security and the international relations of the Republic of Croatia) would constitute a problem amounting to the disclosure of that protected information.
>
> ...
>
> 6.5 To the extent that the legitimate reasons for denying access to the information sought have been specified in the present case (see subsection 4 of section 6 above), the Constitutional Court considers that the said interference was 'necessary in a free and democratic society' and 'proportionate to the nature of the need'.
>
> 6.6. The Constitutional Court has already explained its previously stated opinion, *mutatis mutandis*, in its decision no. U-III-1267/2015."

17. Three judges of the Constitutional Court dissented. In the dissenting opinion of two of them, judges L.K. and G.S. stated as follows:

> "Firstly, the applicant's right to effective legal protection has been limited in the course of the administrative proceedings ... by the President of the Republic of Croatia, as the first-instance administrative authority, as well as by the Information Commissioner ... and the administrative courts ... In the case at hand, the violation of the constitutional right to effective legal protection is twofold. On the one hand, the violation occurred because the refusal to grant access to the ... documents [in question] by the President was not sufficiently reasoned. On the other hand, the applicant's right ... [was violated], because the Information Commissioner and the administrative courts failed to fulfil their supervisory function and refused to examine the substantive (content) justification for the assessment of the need to deny access (a precisely defined goal, the manner in which the protected aim was jeopardised, the scope of any possible damage, the risk of such damage occurring), but instead limited their assessment to a mere review of the formal reasons given (the citing of legal provisions..., a review of the relevant deadlines and on the inclusion of advisory bodies). ...
>
> Secondly, we consider that there has been a violation of the applicant's constitutionally guaranteed right to freedom of expression. The applicant sought access to a certain number of presidential records with a view to conducting research and analysis for a book covering political events [that occurred] during the period of Croatian history that the records in question concern. ... The denial of access to those records cannot be ... contested if there indeed is a reason on the basis of which it could

be concluded that their publication would cause irreparable harm to the national security, integrity and independence of the Republic of Croatia.

However, the applicant and the public do not know whether their publication would indeed have such an effect because they have been prevented from knowing whether an assessment has been conducted at all, and, [if so,] whether it was sufficiently serious and rigorous. The applicant is supposed to trust the ... State authorities ... without having had a chance to question their assessment or to provide counter-arguments. This has effectively defied the point of the constitutional right to freedom of expression, as one of the constitutional forms of protection from arbitrary abuse of the power afforded to the authorities.

Without [being given] any real opportunity to question the substance of the assessment of the existence of any risk of irreparable harm to the interests of the Republic of Croatia, the applicant has been denied his right to effective legal protection of his constitutionally guaranteed right to freedom of expression. Therefore, in the present case the violation of the constitutional guarantee of effective legal protection in administrative proceedings ... at the same time constitutes a breach of the constitutional freedom of expression in its procedural aspect.

...

... The President of the Republic certainly has the authority to deny access to presidential records. However, that authority is not absolute. It is subject to an assessment of the risk of irreparable harm [being done to] the national interests of the Republic of Croatia.

...

The President adopted [the decision in the present case] in the form of an administrative decision, [which] therefore has to be reasoned. ... The sufficiency of that reasoning is to be assessed in each individual case on the basis of the specific circumstances of the case. The President is not obliged to state the reasons which may jeopardise the aim of classifying the documents in question. But merely stating that 1) the President has the authority to deny access in order to protect secrecy, 2) she requested the opinion of the Council, 3) she received the opinion whereby the National Security Council expresses its view that it is necessary to maintain the existing secrecy classification and 4) she agreed with that opinion ... with the aim of protecting the interests of the national security, integrity and independence of the Republic of Croatia and its international reputation does not satisfy the requirement of sufficiency.

First of all, such reasoning does not indicate that a proportionality test was indeed conducted. Citizens are requested to simply assume that the President of the Republic conducted a proportionality test, as required by the Data Secrecy Act, although on the basis of such reasoning it is possible to doubt whether the decision has been adopted as a result of somebody's subjective impression that the requested documents should not become public – just to be on the safe side.

We do not question that in cases such as the present one it is quite possible for the ... authority from which access to classified information is being requested will not have at its disposal many facts which it [might otherwise be able to] refer to in its reasoning as evidence that its decision to refuse [a request for] declassification is justified, without jeopardising the purpose of the classification by the publication thereof. However, such reasoning cannot boil down to stating general aims which the denial of access [is supposed to] protect, such as the independence, integrity or safety of the Republic of Croatia or of its international relations. Reasoning that does not indicate more specifically the [reasons for arguing that] the publication of the requested information

might jeopardise what are in essence the highest interests of the Republic of Croatia [does not support] the assumption that a proportionality test has actually been conducted. A proportionality test requires the public authority to examine the adequacy of the impugned measure and its necessity. It is not possible to achieve either of those if the goal of the measure in question is set hypothetically and in the abstract. This is particularly applicable under the circumstances of the present case. Indeed, despite [exerting one's] best attempts, it is not easy to understand the reasons that would justify the assumption that the publication of conversations that took place almost a quarter of a century ago between two statesmen who died many years ago about a historical period and events concerning which in the interim much has been discovered ..., could jeopardise the integrity of the Republic of Croatia today. Moreover, were these hypothetical and abstract reasons to constitute sufficient [reason] ... to deny access to records concerning events of such a nature, then they would be sufficient to justify any act of public authority that limits the fundamental rights and freedoms of citizens ..."

18. The applicant's attorney received the Constitutional Court's decision on 7 April 2020.

19. On 15 February 2021, in an interview given to a daily newspaper, the applicant stated that he had finished writing his book and that it would be published in a few months. He also stated that, should the Strasbourg Court find a violation of his rights and should he ultimately be granted access to the classified documents, he would supplement the book with the information so obtained.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

20. The relevant provisions of the Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*, Official Gazette, nos. 56/90 with subsequent amendments) read as follows:

Article 16

"Rights and freedoms may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health.

Any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each individual case."

Article 38

"Freedom of thought and expression shall be guaranteed.

Freedom of expression shall in particular encompass freedom of the press and of other media, freedom of speech and public opinion ...

Censorship shall be forbidden. Journalists shall have the right to freely report and access information.

The right of access to information held by any public authority shall be guaranteed. Restrictions on the right of access to information must be proportionate to the nature of

the need for such restriction in each individual case and [no more than is] necessary in a free and democratic society, as stipulated by law."

21. The relevant provisions of the Act on the Right of Access to Information (*Zakon o pravu na pristup informacijama*, Official Gazette nos. 25/13 and 85/15), read:

Section 15

"...

2. Public authorities may restrict access to information:

1) if the information has been categorised under a classification level, pursuant to the act governing classified information ...

...

7. Information referred to in subsections 2 and 3 of this section shall become publicly available once the reasons for which the public authority restricted access to such information cease to be valid."

Section 16

"l. The public authority responsible for responding to requests for access to information referred to in section 15, subsection 2, points 2, 3, 4, 5, 6 and 7 and sections 3 and 4 of this Act, is obliged, prior to issuing a decision, to conduct the proportionality and the public interest test. The information owner referred to in section 15, subsection 2, point 1 of this Act, having first obtained the opinion of the Office of the National Security Council, is obliged, prior to issuing a decision, to conduct the proportionality and the public interest test.

2. When conducting the proportionality and the public interest test, the public authority shall determine: whether access to information may be restricted in order to protect any of the protected interests referred to in section 15, subsections 2,3 and 4 of this Act; whether granting access to requested information in each individual case would seriously violate these interests; and whether the need to protect the right to restrictions prevails over the public interest. If the public interest prevails over the harm [that would be] caused to protected interests, the information must be made available."

Section 18

"1. The beneficiary shall exercise the right of access to information by submitting an oral or written request to the relevant authority...

4. The beneficiary is not obliged to submit reasons for wishing to access the information in question, nor is he or she obliged to rely on the provisions of this Act..."

Section 25

"1. An appeal may be lodged with the [Information] Commissioner against a ruling issued by a public authority within fifteen days of the day of serving of that ruling.

...

4. In proceedings regarding an appeal against a ruling on the restriction of information, as referred to in section 15, subsections 2 and 3 of this Act, public authorities are required to allow the [Information Commissioner] to inspect the

information [in question] subject to the proceedings. In respect of information referred to in section 15, subsection 2, point 1 of this Act, the Commissioner shall request the opinion from the Office of the National Security Council, pursuant to the Act regulating the secrecy of information.

...

7. When he or she determines that an appeal is well-founded, the [Information] Commissioner shall order the public authority to provide the beneficiary with access to the requested information, or to decide on the beneficiary's request, and shall set an appropriate time-limit for the public authority to provide access or issue a decision."

Section 26

"l. There is no appeal against the Commissioner's ruling, but an administrative dispute may be brought before the High Administrative Court of the Republic of Croatia. ...

...

3. In [administrative] proceedings, the public authorities are required to allow the High Administrative Court of the Republic of Croatia to inspect such information as is referred to in section 15, subsections 2, 3 and 4 of this Act that is subject to the proceedings."

22. The relevant provisions of the Data Secrecy Act (*Zakon o tajnosti podataka*, Official Gazette nos.79/2007 and 86/2012) read as follows:

Section 6

"The classification level 'TOP SECRET' shall be used to classify data whose unauthorised disclosure would result in irreparable harm to national security and vital interests of the Republic of Croatia, and especially to the following values:

- the foundations of the structure of the Republic of Croatia, as laid down by the Constitution,
- the independence, integrity and security of the Republic of Croatia,
- the foreign relations of the Republic of Croatia,
- defence capability and the intelligence security system,
- public security,
- the foundations of the economic and financial system of the Republic of Croatia,
- scientific discoveries, inventions and technologies that are of great significance for the national security of the Republic of Croatia."

23. Section 22 of the Archival Material and Archival Institutions Act (*Zakon o arhivskom gradivu i arhivima*, Official Gazette, nos. 105/1997 with subsequent amendments) reads as follows:

Section 22

"If justified scientific or other reasons require the use of archival material prior to the expiry of the availability periods prescribed by this Act (hereinafter "early use"), the director of an archival institution may approve the use of archival material even though

the requirements referred to in sections 20 and 21 of this Act have not been met, in a manner and under conditions that guarantee the protection of the public interest or the privacy, rights and interests of third parties.

If early use of public archival material classified under one of the classification levels is requested, the director of the archival institution shall approve its use if the owner of the archival material declassifies the material in a procedure prescribed by a special regulation governing data security classification.

...

An appeal may be lodged with the Information Commissioner against a ruling refusing a request for the early use of public archival material ..."

II. RELEVANT INTERNATIONAL LAW

24. The Council of Europe Convention on Access to Official Documents, which came into force on 1 December 2020 (not signed by Croatia), insofar as relevant, provides as follows:

Article 2 – Right of access to official documents

"1. Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.

2. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention...."

Article 3 – Possible limitations to access to official documents

"1. Each Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

a. national security, defence and international relations;

b. public safety;

...

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

..."

Article 8 – Review procedure

"1. An applicant whose request for an official document has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.

2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1."

25. The relevant part of Recommendation Rec(2002)2 of the Committee of Ministers to the member States on Access to Official Documents of 21 February 2002 reads as follows:

IX. Review procedure

"1. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Principle VI.3 should have access to a review procedure before a court of law or another independent and impartial body established by law.

2. An applicant should always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1 above."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that the refusal to declassify the documents that he had tried to access had amounted to a breach of his right to receive information and that the domestic courts had failed to properly scrutinise the refusal in the light of the Convention criteria provided in Article 10 of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

1. *Compatibility* ratione materiae

(a) The parties' arguments

(i) The Government

27. The Government maintained that Article 10 of the Convention did not guarantee the right of individuals to seek information owned or restricted by the State, nor did it impose an obligation on the State to make such information available. The right of access to classified data had to be interpreted narrowly due to the very nature of such information, and to the right of each State to make sovereign decisions regarding restrictions on

availability of information of national interest. The issue of access to official documents was regulated by the Council of Europe Convention on Access to Official Documents of 18 June 2009, and not by the European Convention on Human Rights.

28. In the Government's view, if the right of access to classified information owned by the State were to be one of the rights guaranteed under Article 10 of the Convention, the Court would be assessing the justification of such classification and of the denial of access to information, and the proportionality of these rights, which was not its task. Nor could the State be deprived of that right by a broad interpretation being taken of the Convention. Moreover, in the circumstances of the present case, the Court would need to apply Article 10 of the Convention beyond what was prescribed by domestic law, as well as what was decided by domestic courts, which was not its task either.

29. The Government furthermore claimed that there had been no justified purpose for the applicant to access the classified documents because accessing their contents had not been necessary for him to exercise his freedom to receive or impart information. In particular, he had never explained why those specific documents had been necessary for the writing of his book, and nor had he shown their potential importance and connection to its topic. Moreover, in his recent newspaper interview he had clearly shown that the records had been entirely unnecessary for his book, since he had managed to finish and was about to publish the book in question, even without having gained access to the documents.

30. Nor did the documents pertain to matters of important public concern or affect the well-being of citizens or the life of the community. At the same time, they were not matters capable of giving rise to considerable controversy, concerning an important social issue, or involving a problem about which the public would have an interest in being informed. More than twenty-five years had passed since the end of the war in the former Yugoslavia, numerous books and articles had previously been written on the topic, and it was no longer relevant or at the centre of public attention.

31. The Government furthermore pointed out that the applicant was a retired politician who had requested access to the classified documents to conduct research on his own initiative and in his own interest. Unlike the media and NGOs, his task had not been to report on matters of public interest. Nor could it be considered that access to the documents sought had been crucial to fulfilling that purpose. Lastly, the documents sought by the applicant had not been ready and available, as they had been placed at the highest classification level in the State.

(ii) The applicant

32. The applicant maintained that Article 38 § 4 of the Constitution guaranteed the right of access to information held by the public authorities.

Although this was not an absolute right, the State could not arbitrarily refuse access to such documents. In the present case, the applicant's rights had not been breached owing to the fact that he had ultimately not been granted access to classified documents, but by virtue of the fact that the impugned decision of the President of Croatia did not demonstrate that an adequate proportionality analysis had been carried out in his case.

33. It clearly transpired from the circumstances of his case that he had requested access to the classified records for the purposes of writing a scientific publication on the creation of the Croatian State and that he had consequently sought to exercise his right to freedom of expression. The applicant furthermore stressed that under domestic law, he had not been required to state the reasons for requiring access to the requested information.

34. Lastly, the applicant submitted that the information sought had constituted a matter of public interest. He maintained that the process of the creation of the Croatian State and the war had been (and still was) a topic of strong public interest and was incessantly being used in political campaigns. Although he was not a journalist or a member of an NGO, the applicant considered that as a retired politician involved in scientific research on the issue of the "great battle for the freedom of Croatia" he had proved that his work had not been motivated by personal gain. Also, the information at issue had been ready and available.

(b) The Court's assessment

35. The Court notes that the question of whether the situation of which the applicant complained falls within the scope of Article 10 is to a large extent linked to the merits of his complaint. At the same time, the Court has held that the question of the applicability of a Convention provision is an issue falling under the Court's jurisdiction *ratione materiae* and that the relevant analysis should be carried out at the admissibility stage, unless there is a particular reason to join this question to the merits (see *Denisov v. Ukraine* [GC], no. 76639/11, § 93, 25 September 2018). It has also adopted this approach in cases involving complaints under Article 10 concerning the refusal of information requests (see *Studio Monitori and Others v. Georgia*, nos. 44920/09 and 8942/10, § 32, 30 January 2020, and *Centre for Democracy and the Rule of Law v. Ukraine*, no. 10090/16, § 48, 26 March 2020). Given that there are no particular reasons to join this question to the merits in the present case, the Court shall examine the issue of the applicability of Article 10 to the present case before going into the merits of the complaint.

36. The Court reiterates that Article 10 does not confer on the individual a right of access to information held by a public authority or oblige the Government to impart such information to the individual. However, such a right or obligation may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in

particular, "the freedom to receive and impart information", and where its denial constitutes an interference with that right (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 156, 8 November 2016).

37. In determining this question the Court will be guided by the principles laid down in *Magyar Helsinki Bizottság* (cited above, §§ 149-80) and will assess the case in the light of its particular circumstances and having regard to the following criteria: (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information was ready and available.

38. The Court firstly notes that the applicant sought access to the classified documents in order to use the information obtained for the purposes of writing a book about the creation of the Croatian State. Under domestic law, he was not under the obligation to state the reasons for which he was requesting access to the documents in question (see section 18(4) of the Act on the Right of Access to Information cited at paragraph 21 above). In the Court's view, it is not strictly relevant whether the documents were indeed crucial for his book; what is sufficient is that the applicant sought access to them in order to provide his readers with a full and detailed chronology of the events that took place during the period referred to.

39. Turning to the nature of the information sought, the Court reiterates that information to which access is sought must meet a public-interest test, which, according to its general definition, exists where disclosure provides transparency on the manner of the conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the general public. What might constitute a subject of public interest will, moreover, depend on the circumstances of each case (see, for instance, ibid., § 162).

40. In the present case, the Court notes that the Constitutional Court concluded that a scientific monograph about the creation of the Republic of Croatia was a matter of public interest (see paragraph 16 above). It sees no reason to hold otherwise.

41. Furthermore, the Court has accorded a high level of protection to academic researchers (see *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, §§ 61-67, ECHR 1999-IV; *Kenedi v. Hungary*, no. 31475/05, § 42, 26 May 2009; and *Gillberg v. Sweden* [GC], no. 41723/06, § 93, 3 April 2012) and authors of literature on matters of public concern (see *Chauvy and Others v. France*, no. 64915/01, § 68, ECHR 2004-VI, *Karsai v. Hungary*, no. 5380/07, § 35, 1 December 2009 and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 48, ECHR 2007-IV).

42. Lastly, despite the fact that any declassification of the documents may have been a laborious process involving several different authorities, there is nothing to show that the requested records had not been ready or available

(compare and contrast *Saure v. Germany* (dec.), no. 6106/16, § 37, 19 October 2021).

43. In sum, the Court is satisfied that the applicant, as a former politician intending to publish a historical monograph, exercised the right to impart information on a matter of public interest and sought access to information to that end under Article 10 of the Convention.

2. No significant disadvantage

44. Article 35 § 3 (b) of the Convention, as amended by Article 5 of Protocol No. 15 to the Convention[1], provides:

> "3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits."

45. The Government submitted that the applicant had not suffered any significant disadvantage. In particular, he had been granted access to thirty-one out of fifty-six classified records. Moreover, he had meanwhile finished his book and had stated in an interview that the book would soon be published (see paragraph 19 above), which meant that the refusal of access to the remaining documents had not prevented him from carrying out his scientific work. Lastly, the applicant's case did not concern an important matter of principle and had already been thoroughly examined by the domestic authorities, including the Constitutional Court.

46. The applicant maintained that the damage that he had suffered could not be considered insignificant. He had not had at his disposal all the information that he had required in order to be able to write his book. This had caused him significant delays and had meant that he had had to conduct further research, which had proved futile because he had been unable to find a substitute for the twenty-five documents to which had had been denied access. It was true that he had already published his book (owing to the importance of the topic and the interest of the public); however, as he had already stated in the interview (see paragraph 19 above) submitted by the Government, a second (updated) edition of his book would be published if he were ever to gain access to the above-mentioned classified records. Finally, the judicial review of his case had been limited solely to procedure and not the substance of the decision on the denial of access.

47. Inspired by the general principle *de minimis non curat praetor*, the criterion of no significant disadvantage hinges on the idea that a violation of a right, however real from a purely legal point of view, should attain a

[1] See Article 8 § 4 of Protocol No. 15 and paragraph 24 of the Explanatory Report to Protocol No. 15.

minimum level of severity to warrant consideration by an international court. The assessment of this minimum level is, in the nature of things, relative and depends on all the circumstances of the case. The severity of a violation should be assessed taking account of both the applicant's subjective perceptions and what is objectively at stake in a particular case (see *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010). However, even should the Court find that the applicant has suffered no significant disadvantage, it may not declare an application inadmissible if respect for human rights, as defined in the Convention and the Protocols thereto, requires an examination on the merits, or (prior to the entry into force of Protocol No. 15) if the matter has not been "duly considered" by a domestic tribunal (see *Juhas Đurić v. Serbia*, no. 48155/06, § 55, 7 June 2011). Following the entry into force of Protocol No. 15, on 1 August 2021 (see paragraph 43 above), the latter criterion is no longer required, and the Court may declare an application inadmissible on the ground of non-significant disadvantage, even if it has not been duly considered by a domestic tribunal (see *Bartolo v. Malta* (dec.), no. 40761/19, § 22, 7 September 2021).

48. The Court has already held that in cases concerning freedom of expression, the application of the admissibility criterion contained in Article 35 § 3 (b) of the Convention should take due account of the importance of this freedom (see *Gachechiladze v. Georgia*, no. 2591/19, § 40, 22 July 2021) and be subject to careful scrutiny by the Court.

49. Turning to the present case, the Court does not consider the fact that the applicant ultimately published his book decisive for an assessment of whether he had suffered significant disadvantage. As he explained, the denial of access to the classified documents had caused him further research and delays in publishing his book. Moreover, he considered his published work to be incomplete and was resolved to update it if he were ever to be granted access to the classified documents (see paragraphs 19 and 46 above).

50. In any event, in the Court's view the domestic authorities' application of the Data Secrecy Act concerns important questions of principle regarding access to documents classified under domestic law and goes beyond the scope of the applicant's case. The Court therefore concludes that given what was at stake for the applicant, as well as considering the important questions of principle arising in his case, it is not appropriate to dismiss the present application on the basis of Article 35 § 3 (b) of the Convention.

51. Consequently, the Government's objection in this respect must be dismissed.

3. Conclusion

52. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' observations

53. The applicant did not question the lawfulness of the interference with his right to freedom of expression. However, he could not discern which legitimate aim justifying the impugned interference had been pursued by the authorities' refusal to declassify the specific restricted documents.

54. The applicant maintained that the domestic authorities had failed to perform a proportionality analysis in his case. Not having been granted access to the documents in question, he could not have substantiated further why his interest in publishing his book would override the national security interest of maintaining classified data. He further stressed that the Information Commissioner and the High Administrative Court had limited their respective subsequent reviews to verifying the lawfulness of the procedure, without assessing the substance of the argument that it was necessary to deny access to the documents which he had requested. In other words, the domestic authorities simply assumed that the Office of the President of the Republic had performed a proper proportionality test.

55. The applicant was aware that the nature of the classified information did not allow the domestic authorities to give all the reasons that had led them to deny him access to the classified documents. However, in his opinion, that denial could not be justified hypothetically and by using abstract reasoning. When limiting an individual's rights, the State had to show convincingly that it had examined in detail all requested information and had weighed the conflicting interests. This could only be demonstrated if the subsequent decision clearly stated which specific aim had been pursued by restricting access to each of the documents at issue. The authorities should also explain why it was necessary to restrict access to the entire documents and not only to parts thereof.

56. Lastly, the applicant submitted that one of the documents that had not been declassified by the President had already been made public in another book published in 2005. He deemed it odd that the State did not know that its classified documents had been leaked or had not investigated the issue further.

57. The Government maintained that the interference with the applicant's freedom of expression had had a basis in domestic law – namely section 22 of the Archival Material and Archival Institutions Act, read together with section 6 of the Data Secrecy Act. They furthermore argued that the interference had also pursued the legitimate aim of protecting the independence, integrity and security of the country.

58. The Government also stressed that all the domestic authorities had weighed the conflicting interests of the applicant in being allowed to access the requested information against the interests of the State in maintaining the highest classification level for certain documents. As in the case of *Bédat*

v. Switzerland ([GC], no. 56925/08, 29 March 2016), the respondent State could not *ex post facto* provide proof that the disclosure of confidential information would have caused actual and tangible harm to the stated values protected by the classification of such information. Such a requirement would deprive the classification of such information of any meaning.

59. As regards the applicant's statement that the classified documents had already been made public in another book in 2005, the Government stressed that the Office of the President had never declassified those records; the Government thus wondered how the applicant could have concluded that the documents that had been made public in 2005 were the same as those to which the applicant had sought access. If the applicant had information that the publication in 2005 of the above-mentioned records had been the result of unlawful conduct, he was obliged to report it to the prosecution authorities.

2. The Court's assessment

60. In view of its findings above (see paragraphs 38-43 above), the Court considers that by denying the applicant access to the requested documents, the domestic authorities interfered with his rights protected by Article 10 § 1 of the Convention. Such an interference with the applicant's right to freedom of expression must be "prescribed by law", pursue one or more legitimate aims in the light of paragraph 2 of Article 10, and be "necessary in a democratic society".

61. The parties agreed that the interference in the present case had been in accordance with the law – namely section 22 of the Archival Material and Archival Institutions Act. The Court can also agree that it pursued the legitimate aims of protecting the independence, integrity and security of the country and its foreign relations, although the applicant pointed out that it had been unclear which aim had been protected by refusing to declassify each of the restricted documents (see paragraph 53 above).

62. The general principles concerning the question whether an interference with freedom of expression is "necessary in a democratic society" are well established in the Court's case-law and have been summarised as follows (see, among many other authorities, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013, and *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, ECHR 2015):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' ... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

63. Unlike a number of previous cases examined by the Court which involved access to personal information relating to the applicant or other persons, and the balancing of the right to freedom of expression against the rights of others (compare *Magyar Helsinki Bizottság*, cited above, § 188; *Centre for Democracy and the Rule of Law*, cited above, § 113), the present case concerns classified information relating to a sensitive part of Croatia's rather recent history which, as the applicant maintained himself, still formed part of considerable public debate (see paragraph 34 above). National security being an evolving and context-dependent concept, the States must be afforded a wide margin of appreciation in assessing what poses a national security risk in their countries at a particular time (see, *mutatis mutandis*, *Liu v. Russia* (no. 2), no. 29157/09, § 88, 26 July 2011, and *Leander v. Sweden*, 26 March 1987, § 59, Series A no. 116). At the same time, the Court points out that the concepts of "national security" and "public safety" should be applied with restraint, interpreted restrictively and brought into play only where it has been shown to be necessary to suppress the release of the information for the purposes of protecting national security and public safety (see *Stoll v. Switzerland* [GC], no. 69698/01, § 54, ECHR 2007-V).

64. The Court has recognised that it was not well-equipped to challenge the national authorities' judgment concerning the existence of national security considerations (see, in the context of Article 38 of the Convention, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, § 213, ECHR 2013). However, even when national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision (ibid., see also *Yam v. the United Kingdom*, no. 31295/11, § 56, 16 January 2020). If there was no possibility of

challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention (see *Liu v. Russia*, no. 42086/05, §§ 85-87, 6 December 2007, and *Al-Nashif v. Bulgaria*, no. 50963/99, §§ 123-24, 20 June 2002).

65. The Court has further stressed that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016). In cases such as the present one, involving national security concerns resulting in decisions restricting human rights, the Court will therefore scrutinise the national decision-making procedure to ensure that it incorporated adequate safeguards to protect the interests of the person concerned (see *Yam*, cited above, § 56; see also, *mutatis mutandis*, *Janowiec and Others*, cited above, § 213; *Fitt v. the United Kingdom* [GC], no. 29777/96, § 46, ECHR 2000-II; *Regner v. the Czech Republic* [GC], no. 35289/11, § 149, 19 September 2017; and the relevant Council of Europe materials cited at paragraphs 24 and 25 above).

66. Turning to the present case, the Court notes that the applicant complained that none of the domestic authorities reviewing his case had conducted a detailed proportionality analysis, weighing his interests against the public interest sought to be protected, or, at least, that they had not demonstrated that such an analysis had been conducted. The applicant further criticised the limited nature of the judicial review in his case.

67. The Court has previously criticised the national authorities for their failure to conduct a thorough proportionality analysis in refusing to allow an individual access to classified documents (see *Yuriy Chumak v. Ukraine*, no. 23897/10, § 47, 18 March 2021). However, unlike in that case, the applicant did not claim that the withholding the classified information in the present case had lacked any legal basis. Nor has there been any disagreement between the authorities as to the reasons for refusing his request.

68. In the present case, the applicant requested access to fifty-six documents from the State Archive, which had been assigned the highest level of classification under domestic law for a period of thirty years. Having consulted the documents in issue, the Office of the National Security Council advised the President of the Republic to declassify thirty-one of them, while it deemed that the declassification of the twenty-five remaining documents may harm the independence, integrity, national security and foreign relations of the country. The documents requested by the applicant had thus been carefully reviewed by the owner of the information, assisted by a specialised advisory body, and, for the most part, the applicant's request to access the documents in question had been granted.

69. The Court further observes that, on appeal, the Information Commissioner – as an independent body in charge of protecting, monitoring

and promoting the right of access to information – also had the benefit of direct access to the classified documents (see paragraph 12 above) and thus was able to review the substantive criteria contained in the executive's order. While it is true that only the owner of the documents in issue, that is to say the Office of the President, had the power to alter the classification level, the Court notes that the Information Commissioner at no point disagreed with the opinion of the Office of the National Security Council or sought to argue otherwise. To the contrary, she agreed with the President's conclusion that the declassification of the documents in issue may harm national security and foreign relations of the country (see paragraph 12 above) and found no abuse of discretion by the executive. In addition, she also noted that the applicant had failed to explain in his appeal why his interest in accessing that information would outweigh such crucial public interests (ibid.).

70. In the Court's view, nothing in the case file suggests that the competent authorities in the present case failed to perform a proportionality analysis, it being a requirement under the domestic law (see paragraph 21 above). Moreover, the applicant's request for information had been carefully assessed by five different national authorities; the requested documents were directly inspected by at least two of them, the Information Commissioner having been able to review the substantive criteria of the decision to deny access (see paragraph 69 above). According to section 26(3) of the Act on the Right of Access to Information, the High Administrative Court could have also been granted access to the documents in question (see paragraph 21 above). The Court further notes that the President's decision refusing to declassify some of the requested documents was based on an opinion of a specialised body for dealing with national security issues and was ultimately reviewed and upheld by the Information Commissioner, the High Administrative Court and the Constitutional Court. In such circumstances, the Court does not find that the manner in which the domestic authorities assessed the applicant's request had been fundamentally flawed or devoid of appropriate procedural safeguards.

71. That being said, the Court is cognisant that in the context of national security – a sphere which traditionally forms part of the inner core of State sovereignty – the competent authorities may not be expected to give the same amount of details in their reasoning as, for instance, in ordinary civil or administrative cases. Providing detailed reasons for refusing declassification of top-secret documents may easily run counter to the very purpose for which that information had been classified in the first place (see, *mutatis mutandis*, *Regner*, cited above, § 158). Taking into consideration the extent of procedural safeguards provided to the applicant in the present case (see paragraph 70 above), the Court is satisfied that the reasons adduced by the national authorities for refusing him access to the documents in question had not only been relevant but also, in the circumstances, sufficient.

72. In view of the foregoing, the Court considers that the interference with the applicant's freedom of access to information had been necessary and proportionate to the important aims of national security relied on and that the subsequent independent domestic review of his request in the circumstances had not been outside the State's wide margin appreciation in this area.

73. There has accordingly been no violation of Article 10 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

74. The applicant complained that he had not had a fair hearing, as provided in Article 6 § 1 of the Convention. However, having regard to the facts of the case, the submissions of the parties and its above finding under Article 10 of the Convention, the Court considers that it has examined the main legal questions raised in the present applications and that there is no need to give a separate ruling on the admissibility and merits of the remaining complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 10 of the Convention;

3. *Holds* that it is not necessary to examine the complaint under Article 6 of the Convention;

Done in English, and notified in writing on 3 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener Registrar	Péter Paczolay President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Ktistakis is annexed to this judgment.

P.P.C.
R.D.

CONCURRING OPINION OF JUDGE KTISTAKIS

I voted in favour of no violation of Article 10 of the Convention in this case, but on the basis of reasoning that differs from that of the majority of the Court. In particular, firstly, the applicant did not explain to the national authorities (or to the Court) why, while he had succeeded in declassifying thirty-one of the requested documents, the twenty-five documents which had remained secret were so important for the documentary history he was preparing (see paragraph 5). All the more so since he has announced the publication of his book in the near future without these secret documents (see paragraph 19). The reasons for the significance of the secret documents could in fact be easily identified by the applicant because they were transcripts from sessions held in 1994 and 1995 by the Defence and National Security Council, of which the applicant had been a member (see paragraph 8). Furthermore, and secondly, the applicant did not ask the High Administrative Court, as permitted by national legislation (see paragraph 21), "*to inspect such information*" in order to assess whether there were substantial reasons justifying the refusal to declassify the secret documents because they might harm national security and foreign relations. In more general terms, I consider that, in the light of Article 53 of the Convention, the Court should not be prevented from assessing, in addition to procedural safeguards, the substantive reasons for a State's refusal to declassify documents, in so far as national legislation provides for this, albeit to a limited extent, as is the case with Section 26 of the Croatian Act on the Right of Access to Information.