In our “Case Watch” reports, lawyers at the Open Society Justice Initiative (/about/programs/open-society-justice-initiative) provide analysis of notable court decisions and cases that relate to their work to advance human rights law around the world.

On April 3, the top body of the European Court of Human Rights upheld the right of two social science researchers to access research data held by a public university. This is the first time that the Grand Chamber of the court, its top adjudicating body, has recognized a self-standing right of access to information held by public authorities.

Interestingly, the case, Gillberg v. Sweden (http://www.bailii.org/Regs/ECHR/2010/1676.html), did not come to Strasbourg as a pure access case – in fact, it involved the refusal of a university administrator to comply with a Swedish court order granting the two independent researchers access to methodological data related to a study on child hyperactivity (for a more detailed summary of the facts and other aspects of the case see this blog by Prof. D. Voorhoof). Mr. Gillberg, who had overseen the study, argued that making the data public would breach confidentiality promises made to the parents of the participating children.

The welcome Grand Chamber ruling represents a significant, if incomplete, reversal of its earlier approach on the right to know. For much of its history, the European Court has refused to recognize a general right of access to state-held information, which is not explicitly provided for in the court’s treaty.

The court had only accepted limited access rights where denial of information by the government affected another fundamental right, such as the right to health, personal integrity, or a family life. As recently as October 2005, the Grand Chamber held that it saw “no reason” to depart from the interpretation that the convention did not impose on state parties any “positive obligations to … disseminate information of [their] own motion” (Roche v. UK).

In the last three years, however, that timid approach has been upended by several sections of the court, which have entertained and, in some cases, upheld “pure” access to government information claims, unrelated to corollary violations of other convention rights.

Most significant are two 2010 cases against Hungary, known as Tarsasag (or the Hungarian Civil Liberties Union case) and Kenedi, in which the same section of the court held that a civil rights group and an individual historian, acting in the public interest, were entitled to access government records.

The recent Gillberg judgment marks the beginning of a possible turnaround by the Grand Chamber itself, which found that the university administrator’s withholding of the records “impinged on [the two requesters’] rights … to receive information in the form of access to the public documents concerned.” While the court has yet to fully and expressly embrace a general and unconditional right of access, the three noted cases would appear to create a presumption under Article 10 of the convention that state-held information of clear public interest must, in principle, be disclosed.

One curious aspect of the three cited cases is that they all involve different branches or parts of government: a national court required to release a petition filed by a member of parliament (Tarsasag); an intelligence agency asked to provide access to its historical files from the Communist era (Kenedi); and a public university holding research data (Gillberg). In the last two cases, the local authorities had refused to comply with disclosure orders issued by national courts.

There was no indication that the Strasbourg Court was prepared to grant any special deference in these cases, despite the sensitive nature of intelligence activities or the internal autonomy of a court of law or public university. This suggests that the nature of the requested information and its relation to the public
interest are the main elements the court will consider. It also confirms recent trends in the development of right to know laws toward the inclusion of the broadest possible range of public authorities within the scope of FOI.

The conclusion of confidentiality agreements between public authorities and private parties, which seek to shield information from public scrutiny, can be a major obstacle to transparency and accountability, e.g. in the procurement or natural resource exploitation context. Such secrecy carve-outs are usually defended as necessary to protect legitimate private or even public interests, but can be easily abused to cover up corruption, favoritism or insider dealing.

The Gillberg case involved similar, if more benign, confidentiality promises made by the university to the children’s parents. The European court found, on the facts, that Mr. Gillberg was not bound by professional ethics to maintain confidentiality and was not entitled to the kind of privileges enjoyed by doctors in relation to their patients or journalists to their sources. Furthermore, the researchers requesting the data had agreed to certain measures to preserve the children’s privacy.

As a result, the European Court upheld the finding of Swedish courts that any confidentiality promises made by public authorities must be subject to the application of the national FOI regime, and as such cannot be absolute. Private parties who do business with the state must assume the risk that a court of law may lift the veil of confidentiality in the name of a greater public interest in transparency.