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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**FREEDOM OF EXPRESSION AND
FREEDOM OF INFORMATION**

Bosnia and Herzegovina

Comments by
Mr R. Lavin (Sweden)

The Venice Commission has been asked for an opinion on the relation between freedom of expression and freedom of access to information. The request comprises two issues. The first is concerned with the question of whether freedom of expression may be regarded as including freedom of access to information. The second deals with the question of whether a right on the part of any natural or legal person to access information in the control of a public authority and an obligation to disclose information corresponds with the obligation to “ensure the highest level of internationally recognized human rights and fundamental freedoms”. In my view, two entirely dissimilar legal principles are involved here: freedom of access to information and the right of access to official documents or other mediums. The Constitution of Bosnia and Herzegovina provides that the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina, and my views as presented below should be seen in the context of that fact.

To begin with the freedom of access to information, it is clear from Article 10 of the European Convention that the freedom of expression also includes freedom of information (i.e. “freedom ... to receive and impart information and ideas without interference by public authority and regardless of frontiers”). Although the freedom of expression and the freedom of information have been joined together in the European Convention, such a connection is by no means self-evident. The respective content of the two freedoms is not the same, and they fulfil dissimilar purposes. In the Constitution of Sweden, for instance, a distinction is made between freedom of expression and freedom of information. The freedom of expression is defined as a freedom to communicate information and to express ideas, opinions, and emotions, whether orally, in writing, in pictorial representations, or in any other way. The freedom of information is described as a freedom to obtain and receive information and otherwise acquaint oneself with the utterances of others.

As regards the question of the relation between the freedom of expression and the freedom of information that has been referred to the Venice Commission, the most natural response is, in view of the content of Article 10 of the European Convention and the direct applicability of the Convention in Bosnia and Herzegovina, to declare that the freedom of expression also includes the freedom of information. For my part, that amounts to stating that I agree with the conclusion under IV. a) on p. 6 in the drafted statement.

With regard to the right of access to official documents or other official sources of information, the prevailing view, at least in Sweden -- where this principle would seem to originate --, is that this right is distinct from the freedom of expression and the freedom of information. When the principle was introduced in 1766, the basic idea was that if freedom of the press was to be granted to citizens, they should also be provided with public materials to print. Nowadays this right is regarded as an independent democratic right, and it is regulated in a chapter of its own in the Constitution of Sweden. In that chapter, the principle is stated as being aimed to encourage the free interchange of opinion and the enlightenment of the public. In practice, it is held to constitute an essential prerequisite of the press's ability to carry out its duties to inspect and monitor what is happening in society. In addition, the circumstance that the right of a citizen is involved here means that if a public authority has rejected an application for access to an official document, the applicant may appeal against the decision with an administrative court.

Personally, I find it very difficult to read Article 10 of the European Convention as comprising a right of access to official documents or other official sources of information. Nor do I feel convinced that the Article has been the object of an extended case-law interpretation in this respect. On the contrary, as I read the case *Leander v. Sweden*, the European Court of Human Rights has made it clear that Article 10 does not, in principle, create any obligation on the part of

public authorities to disclose certain information. The purport of the freedom of information under Article 10 as regards the obligations of public authorities seems to be -- and the case-law supports this -- that a public authority must not intervene to prevent a person from obtaining information from open sources, or from anybody who may be prepared to provide information.

In view of what has been said above, I find myself unable to agree with the conclusion under IV. b) on p. 6 according to which the right of access to official documents or other sources is held to follow from the established freedom of expression. However, the issue referred to us was formulated as a question of whether the relevant right corresponds with the obligation to “ensure the highest level of internationally recognized human rights and fundamental freedoms”. As I read the European Convention, it never addresses the right of access to official documents etc. at all. Nor am I aware that any other international Bill of Rights recognises that right. (In this context I do not take account of the efforts to promote “openness” that are currently being made within the EU.) In consequence of what has been said above, I would find it impossible to answer “Yes” to the question even when expressed in these terms.