



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3154/2018*, **, ***

<i>Communication submitted by:</i>	S.M. (not represented by counsel)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Bosnia and Herzegovina
<i>Date of communication:</i>	11 August 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 23 March 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	8 July 2022
<i>Subject matter:</i>	Access to the survey results of a public university
<i>Procedural issues:</i>	Lack of substantiation
<i>Substantive issues:</i>	Right of access to information
<i>Articles of the Covenant:</i>	2, 14, 19 and 25
<i>Articles of the Optional Protocol:</i>	2, 5 (2) (b)

1. The author of the communication is S.M., a national of Bosnia and Herzegovina born on 24 February 1994. He claims that the State party has violated his rights under articles 2, 14, 19 and 25 of the Covenant. The Optional Protocol entered into force for the State party on 1 June 1995. The author is not represented by counsel.

Facts as submitted by the author

2.1 The author is a freelance journalist. In this capacity, the author made three requests to the University of Banja Luka¹ for specific data relating to its teaching performance. The

* Adopted by the Committee at its 135th session (27 June–27 July 2022).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Yadh Ben Achour, Arif Bulkan, Mahjoub El Haiba, Furuya Shuichi, Carlos Gómez Martínez, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Soh Changrok, Kobayyah Tchamdja Kpatcha, Imeru Tamerat Yigezu and Gentian Zyberi.

*** A joint opinion by Committee members Furuya Shuichi, Imeru Tamerat Yigezu and Gentian Zyberi (dissenting) is annexed to the present decision.

¹ The University of Banja Luka is the largest public institution of higher education in the Republika Srpska – one of the two entities of Bosnia and Herzegovina, the other being the Federation of Bosnia and Herzegovina (article I (3) of the Constitution) – and the second largest in the country. The University is established by law and financed by the State.



requests were made on 31 March 2016 (the first case), on 20 July 2016 (the second case) and on 13 September 2016 (the third case). His aim was to inform the public of the quality of the work of public bodies and the manner and reasoning behind their decision-making.

2.2 On 31 March and 13 September 2016, the author requested the University of Banja Luka to share with him information regarding the results of the surveys that the University carries out every academic year among its students about the quality of the teaching.² In the surveys, students complete standardized questionnaires in which they rate both the performance of the teaching and administrative staff and the overall quality of the teaching, and make suggestions on how to improve those aspects. Among the categories of evaluation are the regularity of classes, consultations and exams, the conduct of academic and administrative personnel towards the students and the availability of textbooks. The results are entered into a unified database from which the University compiles summarized and detailed reports, including the ratings for every teacher and measures taken on the basis of the results.³

2.3 The author invoked the Freedom of Access to Information Act of the Republika Srpska in order to obtain the detailed reports, which the University's Office for Quality Assurance had compiled from the surveys of previous years. On 4 April and 20 September 2016, the Rector of the University refused the author's two requests, invoking article 8 of the Act, which allows for an exemption from disclosure only when the information falls within three categories, one of which being when it is determined that the requested information involves personal interests that relate to privacy of a third person. The Rector also invoked articles 4⁴ and 16 (5)⁵ of the bylaw on student surveys on the quality of teaching.

2.4 The author appealed to the Steering Board on 22 April and 7 October 2016, arguing that the information sought did not involve personal interests connected to the privacy of a third person, as covered by article 8 of the Freedom of Access to Information Act, but concerned the quality of work of public servants at the largest public institution of higher education in the Republika Srpska. The author argued that the Rector had not conducted a test of public interest as prescribed by article 9 of the Act⁶ and that articles 155 (4)⁷, 157 (1)⁸ and 159⁹ of the statute of the University explicitly prescribes that the survey results and information on the University's activities are to be made public. He also argued that article 4

² In his request of 31 March, he referred to the academic year 2014/15. In his request of 13 September, he referred to the academic years 2010/11, 2011/12, 2012/13, 2013/14 and 2015/16. In both requests, he asked for the detailed reports on the student survey, the average rating per class and information on measures taken with regard to employees on the basis of the survey results.

³ The reports include information for every teacher and every class. On the basis of the results, the teaching and administrative staff are rewarded or sanctioned. Moreover, when applying to a position in the professional academic staff, the candidates are awarded or deducted points depending on their rankings.

⁴ Article 4 of the bylaw states that the conduct of the student survey on the quality of teaching is based on the principles of voluntarism, anonymity, neutrality and the protection of the dignity of the persons whose work is the object of the evaluation.

⁵ Article 16 (5) of the bylaw states that all data on a conducted survey must be protected from unauthorized procedures by third parties and must be kept in the office for quality.

⁶ When an exemption is claimed, a test of public interest must be conducted under article 9 of the Freedom of Access to Information Act in order to assess whether the information should nonetheless be published: "a competent authority shall disclose the requested information notwithstanding the exemption claimed, if it is justified in the public interest and it shall have regard to any benefit and any harm that may accrue from that. ... In rendering a decision whether disclosure is justified in the public interest, a competent authority shall consider circumstances such as (but not limited to) any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment."

⁷ Under that article, the results of the students' rating of the regularity of classes, consultations and exams and the conduct of academic and administrative personnel towards the students are to be publicly posted in the rooms of the relevant college or academy for no less than 15 days following the day of publication.

⁸ According to that article, information gathered through the yearly tracking and periodic overviews of public programmes is public.

⁹ According to that article, the activities of the University are public.

of the bylaw was meant to protect teachers from inappropriate questions on the questionnaires, and that article 16 (5) could not be applied as it was the Freedom of Access to Information Act that prescribed the authorized procedure of access to information. He also invoked article 19 of the Covenant and article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). On 19 May and 22 November 2016, the Board dismissed both his appeals and upheld the Rector's arguments. The claims of violations of the Covenant and the European Convention on Human Rights were not examined nor mentioned. The author sought to appeal the two decisions before the District Court of Banja Luka, which dismissed his appeals on 16 and 29 May 2017. In the first and third cases, the court deemed the decisions to be correct and legal because they were based on an exemption raised by the administrative organs, which pertained to the privacy of third persons. The Court also invoked article 16 of the bylaw, according to which all data on the conducted survey must be protected from unauthorized procedures by third parties. The Court also disputed that the information sought qualified as "information" in the sense of the Freedom of Access to Information Act, arguing that it did not represent exact data but rather opinions of the students in respect of the quality of their studies. The Court argued that the survey results could not be made public as they could represent part of the information, acquired through yearly and periodic tracking of study programmes, but did not represent in and of themselves the yearly or periodic overview of the study programme. The Court also argued that the individual results could be reviewed only by the managing organs of the University and that even the teachers and associates employed at the University could not necessarily access the survey results. The Court further argued that, in conducting the surveys, the University's objective was to improve the quality of the study programme, that such surveys gave an indication of the opinions of the students and that the results remained of an internal nature. Therefore, there was no reason to share such internal information, in particular in the light of the fact that the High Education Act prescribed academic freedoms and academic autonomy. The Court stated that the University had published cumulative results of the survey by posting them in the rooms of the academy. The Court did not refer to article 9 of the Freedom of Access to Information Act or to article 19 of the Covenant or article 10 of the European Convention on Human Rights.

2.5 On 20 July 2016, the author made a request to the Steering Board – invoking the Freedom of Access to Information Act as a freelance journalist – for the minutes of the session at which his appeal against the first Rector's decision had been examined, the audio recording of that meeting and how each of the members of the Board had voted on the issue.¹⁰ On 2 September 2016, the Board dismissed his request by invoking article 6 (1) (v) of the Act, which allows for an exemption when the disclosure of the information may be justly expected to cause substantial harm to the legitimate aims of the decision-making process of a public authority in the giving of an opinion, advice or recommendation by a public authority, employed person in a public authority or any person acting for or on behalf of a public authority and does not involve factual, statistical, scientific or technical information. The author contested this decision before the District Court on 16 September 2016, arguing that article 6 (1) (v) of the Act had been wrongly applied because the decision-making process concerned had already ended and therefore could not have been harmed. The author also invoked articles 19 and 25 of the Covenant and article 10 of the European Convention on Human Rights. The author claimed that disclosing the results of the vote and the minutes would not harm the legitimate process of decision-making in the future and that withholding that information from the public harmed the democratic process of decision-making in the future, depriving citizens of their right to participate in governance and to control it, which was a right guaranteed by article 25 of the Covenant. On 18 May 2017, the District Court upheld the University's reasoning that it was the right of all members of the Steering Board to vote on individual questions on the daily agenda and to express their conclusions and opinions without any pressure on their decision-making and that there was no public interest in the case that would warrant disclosing the information. The Court argued that the University, in accordance with article 25 (2) of the rules of procedure of the Steering Board and article 159 of its statute, was obligated to inform the public, truthfully and in a timely

¹⁰ The author argued that, according to article 25 (2) of the rules of procedure of the Steering Board, the sessions and the votes are public.

manner, about the conduct of its affairs, which it did, by giving out individual verbal notices, publishing periodic and special publications and publishing announcements on bulletin boards and Internet sites.

2.6 On 19 June 2017, the author submitted a complaint to the Constitutional Court about the three court decisions, invoking the same claims as he had made before the District Court, including the right to a fair trial and freedom of expression, respectively, under articles 14 and 19 of the Covenant and articles 6 and 10 of the European Convention on Human Rights. The Constitutional Court decided to merge the three appeals and dismissed his appeals as incompatible *ratione materiae* with the Constitution. With regard to the right to a fair trial, the Constitutional Court concluded that, in the procedure concerning access to information under the Freedom of Access to Information Act, the appellant's civil rights and obligations were not being determined in the sense of article 6 (1) of the European Convention on Human Rights; instead the case concerned the existence of legal conditions for access to information. With regard to the right to freedom of expression, the Constitutional Court concluded that the proceedings in which the existence of legal conditions for access to information were being determined did not enjoy the protection of the appellant's rights to freedom of expression under article II (3) (h) of the Constitution of Bosnia and Herzegovina and article 10 of the European Convention on Human Rights.

Complaint

3.1 The author claims a violation of his rights under article 2 of the Covenant because he was deprived of access to a court and of effective remedies, as he did not have the ability to discuss and respond to opinions on all issues relevant to the outcome of the proceedings before the court.

3.2 The author claims that his right to a fair trial under article 14 has been violated since the decisions and verdicts in relation to his complaints were inadequately explained and suffered from manifestly wrong and arbitrary interpretation of the legislation and because his arguments were disregarded. He argues that the District Court simply repeated unsubstantiated statements made by administrative bodies, without a comprehensive assessment of his lawsuit claims. The author states that the District Court brought into question whether the information sought existed and whether it represented "information" in the sense of the Freedom of Access to Information Act; as that question was only introduced by the District Court at the final verdict, he did not have a chance to respond to the interpretation.

3.3 The author invokes a violation of his right to freedom of expression under article 19, claiming that the State party limited his access to information held by public bodies, without justification. He states that this information concerned the quality of the work and the decision-making processes and reasoning of public bodies. He argues that public bodies must disclose all the information they hold unless they establish an exemption from publication. The author submits that the reasoning of the Constitutional Court is contrary to the established jurisprudence of the Committee,¹¹ because it makes the right of access to information not only difficult, slow, impractical and ineffective, but also purely theoretical, abstract and almost inexistent. He sought the information in his capacity as a freelance journalist, with the intention of informing the public on questions of public interest.

3.4 The author refers to general comment No. 34 (2011), in which the Committee confirmed that the right to freedom of expression protected by article 19 encompassed the right to access information held by public bodies and the authorities' obligation to provide reasons for any denial of access. The limitations of that right must be: (a) prescribed by law; (b) envisioned by article 19 (3) (a) or (b); and (c) satisfy a strict test of necessity and proportionality. The author argues that the first condition has not been met as the domestic laws do not allow for a denial of access to information in this case. The author argues that article 8 of the Freedom of Access to Information Act can be invoked only if it is established that the information sought involves personal interest that relates to the privacy of third

¹¹ The author refers to *Toktakunov v. Kyrgyzstan* (CCPR/C/101/D/1470/2006) and *Rodríguez Castañeda v. Mexico* (CCPR/C/108/D/2202/2012).

persons (first and third cases) or when its disclosure may be expected to cause substantial harm to the legitimate aims of the protection of the decision-making process of a public authority (second case). The author argues that, in the first and third cases, the information relates to the quality of the work of public servants in a public institution, and not to someone's privacy or personal interests, and that, in the second case, the information concerned a decision-making process that had already ended, and therefore could not be harmed. As for the second condition, the author argues that, in the first and third cases, if the right to information could be limited out of respect for the rights or reputations of others (article 19 (3) (a)), the State party did not explain or state how the publication of the information sought would harm the rights or reputations of others. In addition, only a negative evaluation of a public servant's work could theoretically lead to that person's reputation being harmed, in which case the public interest would rather require the information to be published, as it would indicate neglect in the conduct of public duties. As for the second case, if it could be argued that right to access to information could be limited for the protection of national security or of public order (*ordre public*) or of public health or morals (article 19, (3) (b)), the State party has not explained how. As for the test of necessity and proportionality, the author argues that the University has only claimed that it conducted the test in response to the lawsuit but has not demonstrated it. In addition, the University based its decision on unforeseen circumstances, meaning that a direct and immediate connection between the right to information and the specific and individualized threat has not been established. As the District Court and the Constitutional Court only confirmed the University's arguments, they did not demonstrate further how the test of proportionality and necessity was respected.

3.5 Finally, the author alleges a violation of his rights under article 25 of the Covenant because he has been prevented from participating in a well-informed manner in the democratic process and from achieving his journalistic right and obligation to inform the public on issues of public interest. The author argues that the District Court arguments on the second case, that it was the right of all members of the Steering Board to vote on individual questions on the daily agenda and to express their conclusions and opinions without any pressure on their decision-making, contradicts article 25, which safeguards the right of the public to exert influence over public organs through open debate, which is conditioned by the free access to information, as confirmed by the Committee in its general comment No. 25 (1996).

State party's observations on admissibility and the merits

4.1 On 18 October 2018, the State party submitted its observations on admissibility and the merits. The State party recalls that the Constitutional Court found the applications to be inadmissible as *ratione materiae* incompatible with the Constitution. The State party also recalls that, in relation to the author's allegations that his right to a fair trial (European Convention on Human Rights, art. 6) and right to freedom of expression (European Convention on Human Rights, art. 10) and the principle of non-discrimination (European Convention on Human Rights, art. 14) were violated, the Constitutional Court also decided to dismiss the application as inadmissible on the grounds that it was incompatible *ratione materiae* with the Constitution. The State party argues that the Court expresses its legal views through the explanation of decisions and, in accordance with its rules of procedure, the Court does not provide subsequent legal explanations and interpretations of final and binding decisions.

4.2 With regard to the merits of the communication, the State party submits that the University of Banja Luka correctly applied the Freedom of Access to Information Act, the statute of the University of Banja Luka and the rulebook on student surveys on the quality of teaching of the University of Banja Luka, which was confirmed by the District Court of Banja Luka and the Constitutional Court in the decision-making process on the lawsuits.

Author's comments on the State party's observations on admissibility and the merits

5. On 25 December 2018, the author submitted his comments on the State party's observations. The author states that the State party has not argued anything of relevance that might refute any part of his communication and does not raise objections with regard to the admissibility or the merits of his communication. The author argues that the State party only

informed the Committee of the Constitutional Court's stance of not commenting on its verdicts, which are final and binding, and that the University of Banja Luka believes that it acted in accordance with domestic laws.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claim that he has exhausted all reasonable domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee takes note of the author's allegation that he did not have access to an effective remedy in violation of article 2 because he did not have the ability to discuss and respond to opinions on all issues significant to the outcome of the proceedings before the court. The Committee recalls its jurisprudence in this connection, which indicates that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.¹² Consequently, the Committee declares this part of the communication to be incompatible with the provisions of the Covenant and inadmissible under article 2 of the Optional Protocol.

6.5 With regard to the author's claim of a violation of article 14, the Committee notes the author's argument that his right to a fair trial has been violated because the District Court inadequately explained its decisions and simply repeated unsubstantiated statements made by administrative bodies. The Committee considers that the author has failed to sufficiently substantiate this claim for the purposes of admissibility and therefore declares it inadmissible under article 2 of the Optional Protocol.

6.6 With regard to the alleged violation of article 25 of the Covenant, the Committee considers that the author's claim that he has been prevented from participating in a well-informed manner in the democratic process and from achieving his journalistic right and obligation to inform the public on issues of public interest is insufficiently substantiated for the purposes of admissibility and is thus inadmissible under article 2 of the Optional Protocol.

6.7 With regard to article 19, the Committee takes note that, concerning the second case, the author claims that the Steering Board's refusal to provide him with the minutes, the audio recording and the detailed voting results of his first appeal to the Rector resulted in a violation of his right to seek and receive information, guaranteed by article 19 (2) of the Covenant. The Committee notes that the author argues that he asked for this material as a freelance journalist, invoking the Freedom of Access to Information Act and article 25 (2) of the rules of procedure of the Steering Board, which states that the sessions and the votes are public. The Committee also notes that, even if the author has argued that the State party has not explained how his right to access to information could be limited by article 19 (3) (b), the author has not substantiated, in the first place, how the information sought is of public interest in order to comply with the scope of article 19. Therefore, the Committee considers that this claim is insufficiently substantiated for the purposes of admissibility and is thus inadmissible under article 2 of the Optional Protocol.

6.8 With regard to the first and third cases, the Committee notes that the author claims that the refusal by the State party's authorities to provide him with information in respect of

¹² *Millis v. Algeria* (CCPR/C/122/D/2398/2014), para. 6.5; *Rodríguez Castañeda v. Mexico*, para. 6.8; and *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5.

the results of the surveys that the University carries out every academic year among its students resulted in a violation of his right to seek and receive information, guaranteed by article 19 (2), of the Covenant. The Committee recalls its general comment No. 34 (2011), in which it stated that the right of access to information held by public bodies included records held by a public body, regardless of the form in which the information was stored, its source and the date of production,¹³ and that it is the responsibility of the States parties to make every effort to ensure easy, prompt, effective and practical access to such information.¹⁴ The Committee also recalls that the right to seek, receive and impart information enshrined in article 19 includes the right to access to information for journalists.¹⁵ The Committee notes that the requests made by the author in relation to the first and third cases were refused on the basis of article 8 of the Freedom of Access to Information Act, which allows for an exemption from disclosure only when the information falls within three categories, one of which being when it is determined that the requested information involves personal interests that relate to the privacy of a third person, and on the basis of the bylaw, according to which surveys are based on principles such as voluntarism, anonymity, neutrality and the protection of the dignity of persons whose work is the object of the evaluation, and that all data on a conducted survey must be protected from unauthorized procedures by third parties. The Committee also notes that, in this case, the Court stated that, as the surveys' objective was to improve the quality of the study programme, by giving an indication of the opinions of the students, it remained of an internal nature. The Committee further notes that the University has published cumulative results of the survey by posting them in the rooms of the academy. In view of the elements available on file, the Committee cannot conclude that the detailed and specific information requested by the author, including with regard to the result of the students' surveys, which involved personal and protected data, was of a public nature. The Committee therefore considers that the author has not provided sufficient information to substantiate his claim regarding the first and third cases under article 19 and finds this claim inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

¹³ Para. 18

¹⁴ Paras. 7 and 19.

¹⁵ General comment No. 34 (2011), para. 11.

Annex

Joint opinion of Committee members Imeru Tamerat Yigezu, Furuya Shuichi and Gentian Zyberi (dissenting)

1. We are unable to agree with the Committee's finding of this communication as inadmissible. Our concern is with the first and third cases, which relate to the author's request for information about the annual student surveys concerning the quality of the teaching conducted by the University of Banja Luka, which is the main public university in the Republika Srpska (Bosnia and Herzegovina) (see paras. 2.1 and 2.2).
2. In the Views, the Committee considers that the author has not provided sufficient information to substantiate his claim regarding the first and third cases under article 19 because he has not explained the purpose of the information he requested and how such a detailed and specific information on the result of the students' surveys involving personal and protected data was of public interest.
3. Article 19 (2) embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.¹ However, no provision in article 19 requires a person exercising this right to explain the purpose of the information requested or to demonstrate its public interest. While the right of access to information is also subject to the restrictions provided for in article 19 (3), the onus is on the State party to demonstrate that the restrictions imposed on the right to access to information are permissible.
4. In the present case, the author claims that the refusal by the State party's authorities to provide him with information in respect of the results of the surveys that the University carries out every academic year among its students resulted in a violation of his right to seek and receive information guaranteed by article 19 (2). We therefore consider that the author has sufficiently substantiated his claims for the purpose of admissibility.
5. As stated by the Committee in its general comment No. 34 (2011), States parties must make every effort to ensure easy, prompt, effective and practical access to information of public interest.² Any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in article 19 (3) of the Covenant, which allows certain restrictions but only as provided by law and necessary for: (a) respect of the rights or reputations of others; and (b) the protection of national security or of public order (*ordre public*), or of public health or morals.³ Whether and to what extent the denial of access to information constitutes an interference with an author's freedom of expression must be assessed in each individual case and in the light of its particular circumstances, having regard to the relevant criteria, including the purpose of the information request, the role of the author, the nature of the information sought and the availability of the information.⁴
6. The author is a freelance journalist. He requested access to the report of the yearly survey because it concerned the quality of work of public servants at the largest public institution of high education in the Republika Srpska (Bosnia and Herzegovina) and wanted to inform the public on issues of public interest, namely, the quality of teaching.
7. The State party asserts that restriction of access to information was justified by the application of article 8 of the Freedom of Access to Information Act. However, it has failed to invoke any specific grounds to support the necessity of the overbroad restrictions imposed on the author as required under article 19 (3) of the Covenant, and by article 9 of the Act. Nor did the State party demonstrate that the measures adopted by the authorities were the least intrusive in nature or proportionate to the interest that they sought to protect.⁵ In the

¹ Human Rights Committee, general comment No. 34 (2011), para. 18.

² Para. 19. See also *Rodríguez Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para 7.4.

³ *Rodríguez Castañeda v. Mexico*, para 7.5.

⁴ See, among others, European Court of Human Rights, *Guide on Article 10 of the European Convention on Human Rights: Freedom of Expression* (Strasbourg, Council of Europe, 2022).

⁵ Human Rights Committee, general comment No. 34 (2011), para. 34.

circumstances of the case, the restrictions imposed on the author, although purportedly based on domestic law, were not justified pursuant to the conditions set out in article 19 (3) of the Covenant.

8. Under these circumstances, we have to conclude that, by limiting the author's access to information held by public bodies without adequate justification, the State party violated article 19 (2) of the Covenant.
