**Pl.ÚS 3/14 of 20 December 2016**

**Access to Archival Records of the Former Security Services and Protection of Personal Data**

**CZECH REPUBLIC**
**CONSTITUTIONAL COURT**
**JUDGMENT**

**IN THE NAME OF THE REPUBLIC**

## HEADNOTES

The purpose of the adoption of Act no. 140/1996 Coll., on Making Accessible Files Created by the Activities of the Former State Security Police, was to provide people persecuted by repressive totalitarian state with evidence necessary for the proceedings on judicial and extra-judicial rehabilitations, lustration, property restitution etc. Due to the fact that these proceedings were public, it was necessary to protect the personal data of the persons concerned (not the persecutors themselves) by their anonymization. The purpose of the contested provision of the Act no. 499/2004 Coll., on Archiving and Records Management and amending some laws, as amended by later regulations, (hereinafter "the Archiving Act") is, however, different: it is to make the archival records accessible to researchers for needs of knowledge of the past as a prerequisite for social self-reflection. The requirement of a prior consent of the persons affected to disclose their data, containing this information, generally applicable under § 37 para. 2 and 3 when viewing the archival records less than thirty years old, whose practical implementation can be hardly realistically expected in the present context, is not compatible with that purpose. It would lead in its consequences to the distorted "de-humanization of history", respectively de facto closure of such archival documents. An exception from the requirement of the prior consent pursuant to paragraph 6 (now paragraph 11), therefore, pursues an aim that is legitimate in a democratic society under Art. 8, par. 2 of the European Convention on Human Rights. Both laws operate side by side, there is not a competitive relationship of a special and general provision between them; and the transitional provision of § 82 para. 4 of the Archiving Act regulates their application in the future in favour of the latter Act, while maintaining the effects that occurred previously under the former Act, until the protective period expires.

Under the Archiving Act regime the protection of personal data proceeds to stage of their further processing, in which researchers are required to obtain, especially before the publication of the collected information, the consent of the persons concerned. The proportionality of interference with the right to privacy and informational self-determination, guaranteed by the Constitution Art. 10 of the Czech Charter of Fundamental Rights and Freedoms, which occurs in an open regime under this Act, is ensured, in accordance with Act no. 101/2000 Coll., on Protection of Personal Data (hereinafter the "Law on Personal Data Protection"), by a constitutional interpretation of the term "viewing", which means disclosure of archival materials on the basis of individual request of a researcher for his own needs, ie. only for a single specific case; thus, it is not a "public disclosure". Such a restrictive intervention does not automatically include permissions of the researcher for further processing of the information obtained; it is much less noticeable than their publication for the unknown and unlimited number of users; it does not attain the intensity of damaging human

dignity, honour and reputation and it is balanced with the right to access the information, in the given specific field, it is then also justified in view of the significant social interest in authentic knowledge of their own past. The provision in question of the Archiving Act does not favour any of the affected fundamental rights at the expense of another one in a manner that would be constitutionally unacceptable.

Admissibility of interference with the right to privacy is constitutional; tied (by the European Union and international human rights catalogue) to effective control of compliance with the restrictions associated with it by an independent authority. Thus, if the archive as administrator of personal data breaches its obligation - imposed by § 5 and 11 of the Law on Personal Data Protection – to set in the research order, and during its use, conditions of use of the archival records respecting these restrictions and excluding the unauthorized processing, or when these conditions are violated by the researcher himself/herself, it is primarily the task of the Office for Personal Data Protection to restore the order by their supervisory activities and the application of penalties in case of violations and administrative offenses. The judicial power fulfils the same function - civil action for protection of personality, or criminal responsibility of individuals and legal entities for the unauthorized use of personal data. This applies particularly to protection of the most intimate personal sphere of the individuals concerned, which includes sensitive stigmatizing information about sexuality, mental health condition or a mental disability, minor children or vulnerable persons, whose need to protect their privacy and dignity requires special attention.

**JUDGMENT**

The Plenum of the Constitutional Court, composed of the Presiding Justice, Pavel Rychetský and Justices Ludvík David, Jaroslav Fenyk, Josef Fiala, Jan Filip, Jaromír Jirsa, Tomáš Lichovník, Jan Musil, Vladimír Sládeček, Radovan Suchánek, Kateřina Šimáčková, Vojtěch Šimíček, Milada Tomková, David Uhlíř and Jiří Zemáneka (judge rapporteur) ruled on a petition from the Supreme Court seeking a declaration of unconstitutionality § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect until 30 June 2009, with the participation of the Chamber of Deputies of the Parliament of the Czech Republic and the Senate of the Parliament of the Czech Republic as parties to the proceeding, and the Government of the Czech Republic, as a secondary party to the proceeding, as follows:

**1. The petition seeking a declaration of unconstitutionality of § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect until 30 June 2009, is denied regarding the words "archival records created prior to 1 January 1990 by the activities of the security services under the Act on the Institute for the Study of Totalitarian Regimes and on the Archive of Security Services".**

**2. The remainder of the petition is rejected.**

Reasoning:

I. Recapitulation of the Petition to Open a Proceeding

1. On 4 March 2014 the Constitutional Court received a decision of the Supreme Court of 15 January 2014, file no. 30 Cdo 2951/2012-254, which, under § 109 par. 1 let. c) of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations (the "Civil Procedure Code"), in conjunction with § 243c, suspends extraordinary proceedings on points of law, because the Court believes that § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, as amended by later regulations, is inconsistent with Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and the matter is submitted to the Constitutional Court.

2. In view of the fact that § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, which concerned providing data about an affected person, was amended during the proceedings before the general courts, the Constitutional Court called on the petitioner to expressly state the proposed verdict in the petition. In its submission of 23 June 2015, the Supreme Court supplemented its petition to the effect that it proposes that the Constitutional Court declare unconstitutional § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effecting until 30 June 2009 (the "contested provision").

3. In that matter, the petitioner is deciding, under file no. 30 Cdo 2951/2012 on an appeal on points of law by Vladimír Hartman (also the "plaintiff"), whose complaint, seeking to have the defendant, the Czech Republic – the Security Services Archive (also the "defendant") paid a financial settlement in the amount of CZK 300,000 on the grounds of interference in his personality rights, when it made available to a third party, Zdeňka Kvasnicová, an employee in the Ostrava branch of Czech Television, sensitive personal data related to him from file ZV 442 - MV, kept by the former State Security, was denied by a decision of the Municipal Court in Prague of 10 January 2012, file no. 66 C 109/2011-187. The decision by the court of the first instance was confirmed by a decision of the High Court in Prague of 5 June 2012, file no. 1 Co 28/2012-202. The plaintiff filed an appeal on points of law with the Supreme Court against the decision of the appeals court, together with a petition seeking the annulment of the contested provision.

4. In its petition, the Supreme Court, after stating the content of the relevant provisions of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect until 30 June 2009 (the "Archiving Act"), Art. 10 par. 2 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Art. 8 par. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), submits that generally unlawful use of personal data as a rule leads to interference in personality rights; such unlawful use of personal data includes the publication of sensitive data. According to the Supreme Court, the statutory exception contained in the text of the of contested provision led to removing sensitive data from protection, because protection (in particular, the prior consent of the affected person) does not apply, among other things, to archival records created prior to 1 January 1990 by the activities of the security services under Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive and Amending Certain Acts , as amended by later regulations ("Act no. 181/2007 Coll."). The background report and the preamble to Act no. 181/2007 Coll. indicate that such an exception is justified by reconciliation with one's own past and making historically valuable information as widely accessible to the public as possible. In this regard, the petitioner cites the decision of the European Court of Human Rights (the "ECHR") in the case Niemietz v. Germany of 16 December 1992, Application no. 13710/88, which states that the right to privacy is not a mere establishment of an individual's egocentrism, but also has a social dimension. Under Art. 8 of

the Convention, the right to privacy is not an absolute right; interference with and limitation of this right are permissible, but only if the conditions of par. 2 of the article are met.

5. The petitioner states that it also considered the justification for state interference in private life, protected by Art. 10 par. 2 of the Charter, in its decision of 28 February 2013, file no. 30 Cdo 2778/2011, in which it concluded that it is always necessary to take into account whether particular interference was legal (the legality test), whether it pursued at least one of the legitimate aims (the legitimacy test) and whether it was necessary in a democratic society (the necessity test).

6. The petitioner concluded that in the plaintiff's case it is evident that the defendant acted according to the relevant domestic legislation, i.e. Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect as of 19 March 2008, which was the statutory basis for its official actions. This statute was sufficiently publicly accessible and foreseeable, and does not show any other qualitative defects that would result in the legality of this legal regulation and the contested provision being called into question. The Supreme Court then turned to the legitimacy test, the aim of which is to determine whether the interference carried out in accordance with the Act (i.e. publication of sensitive personal data as part of making accessible a file of the State Security) pursued one of the legitimate aims envisioned in Art. 8 par. 2 of the Convention. Here the petitioner takes as its starting point the preamble to Act no. 181/2007 Coll., and believes that the interference in the plaintiff's privacy was guided by a legitimate aim expressed in the Convention as "protection of morals" and "protection of the rights and freedoms of others." The petitioner then turned to the necessity test, where it cites the interpretation of the ECHR, which understands the term "necessary" as a requirement for proportionality, as it stated that "the notion of necessity implies that interference [in the affected right] corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued" (Olsson v. Sweden, decision in plenary session, 24 March 1998, no. 10465/83, § 67). Here the petitioner poses the question of whether making accessible sensitive personal data, broadly defined by the Act, can really be considered proportional, and whether a more sensitive approach could be selected without thwarting the legitimate aim of the legislature. According to the petitioner it is necessary to also assess whether, with the passage of time, the social need to inform the public at the price of providing all sensitive personal data does not decrease.

7. The petitioner, aware that introducing one of the instruments for protecting personal data, whether anonymization or the requirement of necessary consent from a living individual, could lead to a certain limitation on access to information, but it believes that such limitation de lege ferenda appears proportional and the archived files will not lose their informative value regarding the practices of the communist regime in repressing human and political rights. Also, this met the requirements met of § 10 of Act no. 101/2000 Coll., on Protection of Personal Data and Amending Certain Acts, as amended by later regulations ("Act no. 101/2000 Coll."), which provides that the administrator and processor shall take care that processing personal data is not detrimental to the data subject, in particular his or her right to preservation of human dignity, and shall also take care to ensure protection from unauthorized interference in the data subject's private and personal life. Here the petitioner is of the opinion that disproportion may occur between Act no. 140/1996 Coll., on Making Accessible Files Created by the Activities of the Former State Security Police ("Act no. 140/1996 Coll."), and § 37 par. 6 of the Archiving Act, which can seem to not meet the requirement of proportionality, precisely in view of the fact that sensitive personal data in files about agents and collaborators with the State Security are, under the first cited Act, protected more than

personal data in the archival records of persons persecuted by the former State Security under the latter Act.

I. Statements from the Parties to the Proceeding, Statements from the Office for Personal Data Protection, Archives and Institutions

8. The Constitutional Court, under § 69 of the Act on the Constitutional Court, as amended by later regulations (the "Act on the Constitutional Court") requested statements on the matter from the parties to the proceeding – the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, and statements from the Government of the Czech Republic, the Public Defender of Rights and the Office for Personal Data Protection.

9. In his statement, the Chairman of the Chamber of Deputies stated that the government presented the bill to the Chamber of Deputies on 11 August 2003, and it was assigned Chamber of Deputies publication number 428. The Chamber of Deputies debated the bill in three readings. The third reading of the bill took place at the 31st meeting of the Chamber of Deputies on 11 May 2004. The bill was passed in the wording of a comprehensive amending proposal from the Committee for Public Administration, Regional Development and the Environment, as amended by other amending proposals. In the final vote no. 123 on the bill, out of 173 deputies present 116 deputies voted in favor of the bill, and 49 deputies voted against. The Senate returned the bill to the Chamber of Deputies with amending proposals. The Chamber of Deputies then debated the returned bill on 30 June 2004 at its 33rd meeting. In vote no. 272 out of 182 deputies present 109 deputies voted for the bill, and 15 deputies voted against. The Chamber of Deputies passed the bill in the wording passed by the Senate. The Act was delivered to the President of the Republic for signature on 21 July 2004. The President of the Republic signed the Act on 27 July 2004. After being signed by the Prime Minister, the Act was promulgated in the Collection of Laws on 23 September 2004 as Act no. 499/2004 Coll. In conclusion, the Chairman of the Chamber of Deputies stated that both Chambers of Parliament passed the bill in the constitutionally prescribed manner, the Act was signed by the appropriate constitutional representatives and duly promulgated. It is up to the Constitutional Court to rule on the petition from the Supreme Court.

10. The Chairman of the Senate stated that the bill was submitted to the Senate on 20 May 2004. The Senate Committee on Agenda and Procedure referred the bill, as Senate publication no. 367 (in the 4th term) for discussion to the Committee on Public Administration, Regional Development and the Environment (the guarantee committee) and also to the Committee on Education, Science, Culture, Human Rights and Petitions. The Committee on Public Administration, Regional Development and the Environment, by resolution no. 90 (Senate publication no. 367/1) of 2 June 2004 recommended that the Senate return the bill to the Chamber of Deputies with amending proposals. The Committee on Education, Science, Culture, Human Rights and Petitions, by resolution no. 209 (Senate publication no. 367/2) of 3 June 2004 also recommended that the Senate return the bill to the Chamber of Deputies with amendments. The plenum of the Senate debated the bill at its 16th meeting of the 4th term on 10 June 2004 and adopted resolution no. 467, by which it returned the bill to the Chamber of Deputies in the wording reflecting the adopted amendments. Out of 51 senators present, 49 voted in favor of the resolution and 1 senator was against. One of the adopted amendments concerned the contested provision § 37 par. 6, but involved only a more precise formulation, consisting of replacing the word "published" with the words "publicly accessible." None of the statements made during debate in the Senate on the content of the bill call into question the constitutionality of the contested provision of § 37 par. 6. Act no. 181/2007 Coll., on the

Institute for the Study of Totalitarian Regimes and on the Security Services Archive and Amending Certain Laws, in Part Three, in § 24, amended the contested provision, § 37 par. 6, with effect from 1 August 2008, so that the words "the former State Security" were replaced by the words "security services under the Act on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive." The bill was passed to the Senate on 15 May 2007. The Senate Committee on Agenda and Procedure referred the bill, as Senate publication no. 62 (in the 6th term) for debate to the Committee on Education, Science, Culture, Human Rights and Petitions (the guarantee committee) and also to the Committee on Legal and Constitutional Affairs and the Committee on Foreign Affairs, Defence and Security. All the committees to which the bill was referred for debate recommended that the Senate pass the bill in the wording passed to it by the Chamber of Deputies. The Committee on Education, Science, Culture, Human Rights and Petitions did so by its resolution no. 50 (Senate publication no. 62/1) of 30 May 2007, the Committee on Legal and Constitutional Affairs by its resolution no. 20 (Senate publication no.62/2) of 30 May 2007 and the Committee on Foreign Affairs, Defence and Security by its resolution no. 68 (Senate publication no. 62/3) of 6 June 2007. The plenum of the Senate debated the bill at its 6th meeting of the 6th term on 8 June 2007 and adopted resolution no. 152, which passed the bill in the wording passed to it by the Chamber of Deputies. Out of 50 senators present, 46 senators voted in favor of this resolution and 3 senators were against. None of the statements made during debate in the Senate on the content of the bill call into question the constitutionality of the contested provision § 37 par. 6. In his statement, the Chairman of the Senate also sets for the legislative changes to the provision in question, which were made subsequently by Act no. 190/2009 Coll., which amends Act no. 499/2004 Coll., on Archiving and Records Management and Amending Certain Acts, as amended by later regulations, and by other related statutes, Act no. 227/2009 Coll., which Amends Certain Acts in Connection with the Adoption of the Act on Basic Registers, Act no. 167/2012 Coll., which amends Act no. 499/2004 Coll., on Archiving and Records Management and Amending Certain Acts, as amended by later regulations, Act no. 227/2000 Coll., on Electronic Signatures and Amending Certain Acts (the Act on Electronic Signatures), as amended by later regulations, and other related Acts. The Chairman of the Senate also stated his belief that it is fully up to the Constitutional Court to review the petition to find the contested statutory provision unconstitutional and make a ruling in the matter.

11. The Government of the Czech Republic (the "Government"), at its meeting on 20 August 2015, discussed the material "Statement of the Government of the Czech Republic Regarding the Petition from the Supreme Court of the Czech Republic Seeking a Declaration of Unconstitutionality of § 37 par. 6 of the Archiving Act, file number Pl. ÚS 3/14" and adopted resolution no. 682, whereby it approved its entry into the proceeding, adopted a statement regarding the petition, and assigned the Minister of the Interior to represent the Government in the proceeding before the Constitutional Court.

12. In its statement, the Government noted that the purpose of the provision in question is to make it possible to study, without limitation, the majority of archive collections created by the activities of the former security services, courts, and state prosecutor's offices of the communist regime and to learn as much as possible about the practices of the communist regime in repressing human and political rights and freedoms, carried out through the repressive bodies of the totalitarian state in the years 1948 to 1990, as well as archival records created through the activities of the German occupation administration bodies in the years 1938 to 1945. The framework contained in the contested provision is a reflection of the legislature's attempt at reconciliation with the consequences of totalitarian and authoritarian

regimes in the 20th century. The contested provision thus plays an important role in uncovering the totalitarian past through a study of archive collections created through the activities of former security services and other bodies of totalitarian regimes in the territory of the Czech Republic, which permits the scholarly community, but also the wider public, to learn as much as possible about the practices of these regimes in repressing human and political rights and freedoms. The Government believes that declaring the contested provision unconstitutional would fundamentally limit, or even stop, the accessibility of preserved materials that document the activities or specific persons who represented or collaborated with the totalitarian regimes, which would, as a result, frustrate the purpose that the legislature pursued by adopting Act no. 181/2007 Coll., with which the contested provision is closely related. A situation would arise where archival records containing the personal data of a living person could be viewed only if that person did not make an objection within 30 days after receipt of notice about an application to view the archival records; in the case of sensitive personal data, that person's written consent with the viewing will be necessary. In addition, the limitation on accessibility under § 37 par. 1 of the Act would also apply to archival records created through the activities of bodies listed in the contested provision, i.e. these documents could be made public only 30 years after they were selected as archival records (if they had not been published up to that time). In view of the predominant period when they were selected, which, in many cases, took place only in connection with the creation of the Institute for the Study of Totalitarian Regimes in 2007, this would mean that they would be inaccessible until almost 50 years had passed from the fall of the most recent relevant totalitarian regime, the communist regime, and when, unlike at the present time, there probably will not be as a great social need to inform and warn society. The government believes that the legislature's chosen form and manner of making accessible archival records documenting the activities of totalitarian regimes, or limiting the right to informational self-determination, arising from the wording of the contested provision, pursues a constitutionally approved aim, which is to facilitate learning about historical sources and other testimony about the activities of criminal organizations based on communist and Nazi ideology. The Government considers unrestricted, or "uncensored" access to historical sources and other testimony about the activities of these criminal organizations to be necessary not only for the objective description of their crimes, naming the organizers and actors, but also for the subsequent education of the citizens about these topics and for the strengthening of democratic traditions, development of a civic society, and, last but not least, also for fulfilling the ideal of justice.

13. In her filing of 29 July 2015 the Public Defender of Rights informed the Constitutional Court of her decision not to exercise her right to join the proceeding.

14. The chairwoman of the Office for Personal Data Protection, whom the Constitutional Court asked for a position statement, in her statement points out the need to distinguish between two methods for processing personal data foreseen by the Act, making accessible (providing documents based on an individualized application) and publication of personal data. When the Archiving Act uses the term "view," it is understood as "providing or making accessible upon application," and nothing indicates that it could be subordinated, without anything further, under the broad concept of "publication." From this point of view, according to the Office for Personal Data Protection, the petitioner's reasoning is abbreviated and internally inconsistent where it mentions "the need to inform … the public at the price of providing all sensitive data" or "interference carried out in accordance with the Act (i.e. the publication of sensitive public data as part of making accessible …)." The Archiving Act, in § 34 et seq. governs viewing archival records and obtaining duplicates, extracts and copies from

them, basically upon request, and subject to observance of statutory requirements, which sets limits on the means and methods of this making of personal data accessible, including within the framework, of § 5 par. 1 let. b) of Act no. 101/2000 Coll., on Personal Data Protection and Amending Certain Acts. The Office for Personal Data Protection points to the fact that the need to distinguish between the abovementioned methods of processing personal data also arises from the statutory obligation to define the motive and aim of processing, and in accordance with it to set all the necessary parameters for processing, as set forth in § 5 par. 1 et seq. of Act no. 101/2000 Coll. The provision (individualized access) of personal data under special statutes mostly does not include and does not foresee various related forms of processing personal data – that is the case only with the Archiving Act. Researchers work with the documents obtained as part of the viewing in various, creative ways – however, neither the Archiving Act nor any other directly related regulation regulates responsibility for further handling of the information, and here it is primarily the responsibility of the researcher, who must, under § 10 of Act no. 101/2000 Coll., respect the privacy of the data subject and see to it that processing the data does not interfere in the data subject's private and personal life. The Office for Personal Data Protection points out that in this case it is not publication, but even mere lawful access to data for a certain special group of archival records from the period before 1990 that is considered to be interference in privacy; yet, the description of the matter indicates that in this case there was no publication of data of the affected person, because further processing, which would clearly have been invasive to privacy, was not performed. The Office for Personal Data Protection states that in terms of protection of personal data, the process of making accessible documents relating to the past is considered processing personal data with a specific purpose, which is desirable in view of the significant social interest in reconciliation with the past. Specific information about various persons, who were actors in life and decision making in the totalitarian regime, play a fundamental role in this process. Many personal data were collected by the repressive components of the totalitarian state for political reasons and processed by methods incompatible with the principles of a law-based state; they are thus of a unique nature and are key, and in every detail necessary for understanding the past. In time the sensitivity and potential for misuse of archival records decreases, and that also reduces the risk of interference in the privacy of the affected persons. The fact that some information cannot be reliably verified or refuted, not only because of the passage of time, but also because of the working methods of that time period, is balanced by the democratic legal regime, in which documents and data from the totalitarian regime are treated fundamentally differently from current personal data of citizens, processed by the public administration today. This also applies to data about conviction, which today, in cases of political and politicized crimes, must be viewed through the lens of rehabilitation statutes; such information does not have a value analogous to an extract from the Criminal Register. The Office for Personal Data Protection monitors how the archives, when providing access to archival records to individual interested parties, ensure the protection of the right to privacy of the affected persons. Making accessible data from the period of the totalitarian regime cannot be automatically seen as interference in the privacy of the affected persons.

15. In its next two statements, the Office for Personal Data Protection expressed its evaluation of the EU framework for personal data processing (Directive 2016/679 of 27 April 2016), which leaves room for European Union member states to lessen protection in the area of archives, compared to the standards for regulation in other areas, and also documented the level of its supervisory activity with several decisions imposing penalties in cases of violation of Act no. 101/2000 Coll. and an administrative court decision reviewing one of them, which will be discussed in more detail in section VII. below.

16. The National Archive, on its own initiative, sent an extensive statement regarding the petition; the National Archive is not a party to the proceeding, and therefore the Constitutional Court only took note of its statement. In it, the National Archive stated its belief that if the Constitutional Court annuls the contested provision, it will fundamentally affect the activity of all public archives, and simultaneously make research in modern historical sources de facto impossible. Archives will have no choice but to ask for consent from all persons named in archival records, or to anonymize all personal data. However, that is so demanding financially, staff-wise, and organizationally, that archives will not be able to manage it in a realistic time. The affected collections will become de facto inaccessible to the public, and it will not be possible to use them for research (expert and lay). The National archive also stated that, on the basis of a legal matter that led to opening a proceeding seeking to have the contested provision declared unconstitutional, the archives began a preliminary comparative analysis of activities related to making accessible archival records from the archive collections. For these purposes, the National Archive and the State Regional Archive in Prague described the internal procedure for preparing archival records for researchers from these collections and a variation of that procedure to use in case the contested provision is annulled. In that variation the National Archive worked with the possibility of anonymizing personal data, which, although it does not directly arise from the Archiving Act, can nonetheless be accepted as a possible solution, in view of the requirement of ameliorating the harshness of the Act, which would otherwise assume that archival records would not be submitted or made accessible at all. After consultation with historians and experts in contemporary history, who often do research in these collections, it was determined that maintaining access to archival records would require, even with enormous deployment of an as yet unknown number of new workers, significantly extending the time for preparing archival records for the reading room. The National Archive also points to the increased costs connected with anonymizing data, in particular the costs of copying archival records. Last but not least, in case of more extensive anonymization work by the Archive, the question of storing the anonymized copies would have to be resolved. After pointing out the difficulties already caused to it by Act no. 499/2004 Coll. from an ethical and operating point of view, the National Archive emphasizes the de facto closure of a substantial part of the collections of the Czech national archive heritage, as an unavoidable consequence, would stand against the concept of an open society that is prepared to responsibly come to terms with its past, and with the help of this reflection critically evaluate its own present. In conclusion, the National Archive points out that during years of free research in the modern archive collections, no case occurred in the Czech Republic where an individual exercised his right to protection of personality in this context and succeeded with an action for compensation of non-pecuniary damage. That is also the expression of a certain “politeness” on the part of the researchers, their inner tact and ethics when processing the information obtained. The directors of the State Regional Archive in Prague, the State Regional Archive in Pilsen, the State Regional Archive in Litoměřice, the State Regional Archive in Zámrsek, the State Regional Archive in Třeboň, the Moravian Land Archive in Brno, the Land Archive in Opava, the Archive of the City of Prague, the Archive of the City of Pilsen, and the Archive of the City of Ústí nad Labem agreed with this statement and signed it.

17. The Archive of the Security Services, the Institute for the study of Totalitarian Regimes, the Institute for Contemporary History, and the History Institute of the Academy of Sciences of the Czech Republic (the “Institutes”) also sent a joint statement to the Constitutional Court on their own initiative. In their statement, they point out that if the contested provision were annulled, submitting archival records to researchers would be very complicated. All archival

records would have to be read in advance, and persons for whom only personal data is given and person for whom sensitive personal data are given would have to be selected out. Subsequently, the registries would have to be contacted with requests to determine whether a particular person is living – and if so, where. Living persons with personal data would then be contacted, probably through an official notice board (if it were possible) and the archives would wait to see whether they state lack of consent by the statutory deadline; in the case of living persons with sensitive personal data it would be necessary to wait for express written consent. Because the overwhelming majority of archival records contains data concerning tens of persons (an in the case of, e.g. extensive subject files, even hundreds), one cannot assume that all of them would consent to making their data accessible. Therefore, the archive would have to resort to anonymization, i.e. digitalizing or making analog copies of archival records and blacking out data for which a person refused consent to give access or did not give written consent. Professional archivists, who studied for a number of years in order to practice their profession, would be degraded to technical workers, spending their working hours coping archival records and blacking them out instead of processing the collections. The considerable administrative burden which these procedures would bring, and which neither the Security Services Archive nor other archives absolutely do not have sufficient personnel for, would be joined by several problematic points, those being incomplete registers, burdening the Administration Activities Department of the Ministry of the Interior, the identification and location of persons who are foreign citizens. They also dispute the conclusion stated in the petition that archival records will not lose their informative value about the practices of the communist regime through the anonymization of personal and sensitive personal data. According to the Institutes this "de-humanization of history" would lead to gross distortion and lack of understanding of context, because it is precisely the knowledge of personal connections that allows understanding of the stories of anti-communist resistance and opposition. During the period of the current legislative framework, under which all written materials of the former State Security and other sources are accessible to all interested persons virtually without any limitation whatsoever, thousands of researchers in the entire country were given access to hundreds of thousands of archival records, which they could photograph for free with digital cameras, or they could take away digitalized copies. In this situation, it is impossible for the archives to determine which archival records (and thus which personal and sensitive personal data) had already been made accessible and thus protecting them ceases to make sense. At the same time, they point out that – except for unusual situations – no serious abuse of these data occurred, or the archives have no knowledge of such abuse. In this regard the Institutes object that the contested provision does not allow a researcher to disseminate and publish anything that he read in the archival records presented for him to view. The research list that every researcher fills out and signs expressly states that he is, in accordance with the appropriate legislative regulations, fully aware of his personal responsibility for handling the information that he obtained by viewing the archival records. In conclusion they state that annulling the contested provision would be a step backwards that would deeply affect both our archives and all of modern Czech historiography, which it would ultimately also damage in international competition, when Czech historians would not be able to respond to certain current themes in the world simply because the resources for research would be closed, and certain fundamental monographs and syntheses, e.g. relating to extraordinary people's courts, could not be created, and grant projects in modern history could not be completed.

18. Another statement that the Constitutional Court only took note of was provided, on its own initiative, by Post Bellum, o. p. s., with its registered address at Sněmovní 174/7, Prague 1, self-described as a non-governmental non-profit organization that documents the memories

of people who lived through important historical events of the 20th century. Post Bellum, o. p. s. claims that the Supreme Court did not have active standing to submit a petition seeking the annulment of § 37 par. 11 (the contested provision, as original identified by the petitioner) of the Archiving Act, because it appears from the decision of the Municipal Court in Prague, file no. 66 C 109/2011-187, and the related decision of the High Court in Prague, file no. 1 Co 28/2012-202, that the damage that was alleged in the proceeding and proved on the basis of documentary evidence was not damage in a direct causal relationship with the making accessible of a file by the Security Services Archive, but with the fact that a person who received sensitive data about the appellant from the Security Services Archive handled them further without having consent to do so from the appellant. The result of the proceeding before the Constitutional Court would thus have no effect on the proceeding before the general courts. In the case itself, Post Bellum, o. p. s. emphasizes that the contested provision interferes in the right to protection of privacy in a manner that is consistent with the requirements of the Convention and of the Charter, i.e. in a legitimate public interest, on the basis of the law, and in accordance with the requirement of proportionality, including, among other things, taking into account the fact that protection of the right to privacy is sufficiently secured in Czech legislation through other effective legal instruments (protection of personality, etc.). In its filing, Post Bellum, o. p. s. extensively reviewed the conflict of these rights using the proportionality test, and concluded that the contested provision meets all the criteria of the proportionality test, i.e. the criteria of suitability and necessity, and the criterion of proportionality in the narrow sense. Post Bellum, o. p. s. also states that annulling the contested provision would, in practice, suppress research activity and partially render it impossible, and there by cripple not only the scholarly work of professional historians, but also the documentary activity of other researchers from the ranks of journalists and the wider professional public focusing on modern Czech and Czechoslovak history, not only for the period of non-freedom in the years 1948-1989, but also the years 1939-1945, that is, from the period of persecution of the population of the Czech lands by the Nazi regime, including the events of the holocaust. In conclusion, Post Bellum, o. p. s. points out that annulling the contested statutory provision would very probably cripple the ordinary activity of archive institutions, because it would burden them with obligations that would not be able to fulfil, from an organizational, staff, or economic perspective. In conclusion, Post Bellum, o. p. s. presents statistical and material information and concludes that annulment of the contested provision would mean closing the opportunity for the current generation to do effective research in archival records that were created in the last hundred years.

II. Conditions for Petitioner's Active Standing

19. The Constitutional Court first reviewed whether the formal prerequisites for substantive review of the petition were met, and also considered the question of whether the petitioner in this case has active standing to submit the petition.

20. Under Art. 95 par. 2 of the Constitution of the Czech Republic (the "Constitution"), if a court concludes that a statute that is to be applied in resolving a case is inconsistent with the constitutional order, it will submit the matter to the Constitutional Court. This is known as specific review of the constitutionality of a statute, where the submitting court must certify that there is a connection between the contested statutory provision and its decision making activity under § 64 par. 3 of the Act on the Constitutional Court, i.e., that it is forced to directly apply this statutory provision in the matter which it is called on to decide; otherwise it will not have active standing to this procedural petition, and its petition will be rejected as having been submitted by a clearly unauthorized party. This conclusion also arises from the

Constitutional Court's settled case law, for example, judgment file no. Pl. ÚS 34/10 of 24 July 2012 (N 130/66 SbNU 19; 284/2012 Coll.), according which "a court may request a decision through this procedure only in the case of statutory provisions which it must unavoidably apply in a matter being adjudicated before it." Thus, it is not enough to have only hypothetical application or a wider connection, because that concept would lead the court to the possibility of questioning the statutory provision beyond the framework of the purpose pursued by this constitutional institution, because as a rule there is a certain chaining of applied regulations, and de facto the legislative regulation is always applied as a whole [regarding this, see judgment file no. Pl. ÚS 39/2000 of 23 October 2000 (U 39/20 SbNU 353)]. Here the Constitutional Court said, regarding protection of constitutionality through ensuring the internal consistency of the legal order, that the purpose of the constitutional procedural institution of specific review of norms is to avoid a situation in which "[B]y rejecting the petition the Constitutional Court would betray its role in the constitutional dialogue and would force the general court to conduct a proceeding which that court was convinced was unconstitutional."

21. The Constitutional Court finds that in the adjudicated case the contested provision will be applied to the specific matter, but only in part. With its petition, after supplementing it with further submissions of 20 June 2014 and 23 June 2015, the Supreme Court seeks annulment of the contested provision, which the Municipal Court in Prague applied in the case of the plaintiff Vladimír Hartman in its decision of 10 January 2012, file no. 66 C 109/2011-187, where it denied the complaint seeking to have the defendant, the Czech Republic - the Archive of Security Services, pay the plaintiff a financial settlement in the amount of CZK 300,000 on the basis of unjustified interference in his personality rights, which was alleged to have occurred by the defendant making accessible to a third party, Zdeňka Kvasnicová, an employee of the Ostrava branch of Czech Television, sensitive personal data related to file ZV-442-MV, maintained by the former State Security on the defendant [Sic – plaintiff], and providing that data to other parties. The first-level court stated that although it was proved in the proceeding that the defendant made accessible to a third party without the plaintiff's consent, the archival record in question (an investigation file from the activities of the former State Security), which contained sensitive personal data on the plaintiff's conviction, including data on the criminal proceeding, but the defendant's conduct was justified conduct because the special protection for sensitive personal data under § 37 par. 3, on the basis of the exception in par. 6 (now par. 11) of the same provision of the Archiving Act, does not apply to archival records from the activities of the security services. The High Court in Prague agreed with these conclusions, and confirmed the decision of the first-level court by its decision of 5 June 2012, file no. 1 Co 28/2012 - 202. However, for evaluating the petitioner's active standing it is irrelevant that the damage alleged and proved by the plaintiff could have occurred only as the consequence of further handling of the plaintiff's sensitive personal data by a third party, because that party would not have the ability to handle the data further without the previous granting of access to these data by the defendant under the contested provision of the Act.

22. Because the interference in the appellant's personality rights was claimed to have occurred through unauthorized granting of access to sensitive personal data relating only to archival records created before 1 January 1990 through the activity of the former State Security, as a security service under the Act on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive, and not from the activities of other components of the state- and political- social structure identified in the contested provision, then to the extent to which the petitioner seeks a finding that viewing of archival records

created from the activities of these other components of the totalitarian state under the contested provision is unconstitutional, we must reject the petition as being submitted by a party that clearly lacks standing to do so. The determination of whether the contested provision is consistent with the constitutional order is directly related to evaluation by the extraordinary appeals court, in the original proceeding, of the plaintiff's entitlement to a settlement, only in the scope of viewing archival records created by the activities of the security services; and only on the basis of that determination can the extraordinary appeals court assess whether the decision of the appeals court regarding the actions of the Security Services Archive, as the defendant, were correct. Only in that scope will the result of review of the contested provision by the Constitutional Court then have a direct influence on the result of the proceeding on the merits, which is also a condition for according the petitioner active standing.

IV. Text of the Contested Provision of the Legislative Regulation

23. The text of § 37 of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect at the decisive time, i.e. at the time that the file in question was made accessible, reads:
(1) Only archival records older than thirty years are available for viewing in the archives, unless provided otherwise hereunder.
(2) Archival records relating to a living natural person that contain sensitive personal data (footnote no. 13) can be viewed only with the prior consent of that person. The archive shall inform the person in question about the application and ask him for consent.
(3) For purposes of informing the person concerned, the archive may ask the appropriate administrative authority in the sector of archiving and records management to retrieve necessary data from the information system of the registry of inhabitants.
(4) Administrative offices in the sector of archiving and records management may, on the basis of an application from an archive under paragraph 3, obtain and use from the information system of the registry of inhabitants (footnote no. 14) data about the person in question, being
a) first name or names and last name,
b) date of birth, place of permanent residence, or type and address of residence in the case of a foreigner,
c) date, place, and district of death, or date of death and country where the death occurred, in case of the death of a citizen of the Czech Republic,
d) the date that was listed as the date of death in a court decision declaring someone dead.
The administrative offices in the sector of archiving and management of file services shall provide the data thus obtained to the archive that requested them.
(…)
(6) Paragraphs 1 to 4 do not apply to archival records created before 1 January 1990 by the activities of security services under the Act on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive, as well as social organizations and political parties associated in the National Front, to archival records that were already publicly accessible before the application to view them was submitted, or to archival records that were publicly accessible as documents before being selected as archival records. (footnote no. 15)
(…)

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footnote no. 13) § 4 let. b) of Act no. 101/2000 Coll., as amended by later regulations.

footnote no. 14) Act no. 133/2000 Coll., on the Register of Citizens and Birth Identification Numbers, as amended by later regulations.
footnote no. 15) E.g., Act no. 140/1996 Coll., on Making Accessible Files Created by the Activities of the Former State Security Police, Act no. 128/2000 Coll., on Municipalities, Act no. 129/2000 Coll., on Regions (Regional Establishment), Act no. 130/2000 Coll., on the Capital City of Prague.

V. Constitutionality of the Legislative Process

24. Under § 68 par. 2 of the Act on the Constitutional Court, the Constitutional Court – apart from reviewing whether a contested provision is consistent with the constitutional order – determines whether a statute was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

25. In view of the fact that the petitioner did not allege a defect in the legislative process, nor that the legislature exceeded its constitutionally provided competence, with regard to the principles of procedural economy it is not necessary to review this question further, and it will suffice, apart from taking into account the statements submitted by the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, to formally verify the course of the legislative process from the publicly available source of information at http://www.psp.cz.

26. The Archiving Act was approved by the Chamber of Deputies at its 33rd meeting on 30 June 2004 by a majority of 109 deputies, was signed by the appropriate constitutional officials and promulgated on 23 September 2004 in the Collection of Laws in part 173. Thus, the Constitutional Court states that the Act was adopted and issued within the bounds of constitutionally provided competence and in a constitutionally prescribed manner.

27. After this determination the Constitutional Court turned to reviewing the content of the contested provision in terms of its consistency with the constitutional order of the Czech Republic [Art. 87 par. 1 let. a) of the Constitution].

VI. Waiver of Hearing

28. The Constitutional Court, in accordance with § 44 of the Act on the Constitutional Court, concluded that it was not necessary to conduct a hearing in the matter. It would not in any way contribute to further or deeper clarification of the matter than the Court obtained from the file materials and the written submissions from the parties to the proceeding. Not ordering a hearing is also justified by the fact that the Constitutional Court did not consider it necessary to conduct presentation of evidence, given that the factors relevant for its decision came from public sources.

VII. Access to Archive Information on the Activities of the Security Services of Former Non-democratic Regimes in Selected Countries

29. The Constitutional Court also obtained comparative documentation concerning protection of personal data when making accessible archive information created by the activities of the security services of former totalitarian regimes in Europe. The models of the approaches

reflect both the features of the methods of suppressing human rights and freedoms in the individual countries at that time and the differences in the intensity of current societal demand for reconciliation with the past. Therefore, it is not easy to generalize the conditions under which access to this archive information in a given societal context can function conflict-free, i.e. while preserving a sustainable balance between the degree of permissibility of interference in the protection of the data of affected persons and the degree of fulfillment of the fundamental right of every member of the society to information, or the freedom of scholarly research, which, in the aggregate represent the public interest in understanding one's own past as a prerequisite for reconciliation with it. In general, a very open regime for access applies in relation to persons who worked with the security services or held public office under the previous regimes, and likewise when obtaining information about one's self. Viewing the archival records of third parties is generally subject to the passage of a protection period, which can be waived by the affected person giving consent or by redacting personal data (anonymization), or enumerating data that cannot, after being made accessible, subsequently be published without anything further; the regime for handling sensitive personal data is usually stricter. The administrative body (the head of the archive) is required to weigh conflicting rights and interests when evaluating an application to view materials. As a rule, the applicant must state the reason for viewing materials and sign a declaration that he will observe the limitations imposed, among other things, handle the obtained information in accordance with protection of personal data. Differences between the legislative frameworks for access to archive information about the activities of the security services of former non-democratic regimes must also be placed in context with the different personnel and material-technical resources of archives in individual selected countries, which are to varying degrees capable of providing persons interested in the information such services as make fulfillment of the purpose of access to archival records realistic.

30. Under the German law on freedom of access to information, it is possible to provide personal data only if the interest of the applicant for information outweighs the protected interest of the third person; with sensitive data (e.g. about race and ethnic origin, philosophical or religious belief) that person's express consent is required. The Archiving Act permits shortening the protective period (30 years from the person's death), among other reasons for scholarly research or for private needs without a right to publish, confirmed by signing a formal commitment to ensure protection of the personal data. Under the Act on Materials of the State Security Service of the former DDR, which is a lex specialis to the foregoing, the Office of the Federal Deputy for Stasi Materials first sorts the archive information, assembles it thematically, and delivers it in a uniform regime, but differentiated according to various categories of users and the stated purposes for using them, whereby it eliminates the risks that would arise from a blanket approach. The publication of personal data for purposes of political or historical reconciliation with the past is subject to the consent of the affected persons (the "victims" of persecution) or third persons, not the "perpetrators" (Stasi collaborators), or anonymization of these data, which, however, does not eliminate the responsibility of the data processor (the research workplace, publication author, etc.) under general regulations of civil, administrative, or criminal law. However, these limitations do not apply in cases of clarifying the historical roles of famous persons, politicians or public officials. Considerable attention is paid in this centralized system to individual evaluation of specific cases and effective means of protecting persons from unauthorized handling of archive information. The corrective element of applying these rules is the principle of the impermissibility of using personal data to burden the affected person or a third person, as well as the Federal Constitutional Court's ban on providing information to the media that was acquired by the former Stasi through violation of privacy or means of espionage (the Helmut

Kohl matter). This court, in the matter of the List of Unofficial Collaborators of the Stasi, also recognized the special significance of the publication of this list for public discussion about the nature of the former regime, which was still going on, and although the court considered the obligation imposed by the general court on the plaintiff (the association "Neues Forum") to cross out the name of the plaintiff (in the original proceeding) to overestimate the gravity of interference in the plaintiff's right to protection of personality and to inadequately take into account the plaintiff's right to freedom of expression, because the list did not contain any intimate or similar information, but only information that it was possible to obtain through other legal means, the court did not annul that obligation. This special framework is expected to be introduced into the regime of general archive law in the year 2020, when the 30-year protection period generally applied by the archives will also expire, and there will not be any objective reason for further special treatment (see Becker, S.; Oldenhage, K. Bundesarchivgesetz. Handkommentar. 1. Aufl. Baden-Baden: Nomos, 2006, p. 73).

31. The Polish Act on the Institute for the Memory of the Nation permits everyone, upon application, to view documents of bodies of the former state security that concern him, including providing data about persons who provided information about him to those bodies. However, broad access to data concerning persons holding public office, as well as other persons, provided they were not employees of state securities bodies, does not apply to sensitive information (about ethnic and racial original, religious persuasion, etc.). The Polish Constitutional Court's case law in the matter of Access to the Archive of the Institute for the Memory of the Nation (file no. K 2/07, P 37/07), concerning application of the lustration law is based on the principle of balancing (practical concordance), under which the specification of prerequisites that govern access to the archive must unambiguously and effectively protect both values – freedom of information and speech and protection of privacy – to a degree that ensures the optimal balance between them without disproportionate damage to either of them; granting authorization to access based on a blanket, unclear, or unverifiable statement of its intent is not permissible. The Court clearly distinguished the unconstitutionality of this law's procedural provisions, which disproportionately limited access to information about one's self and thereby, among other things, nullified the right of the affected person under Art. 51 par. 4 of the Constitution to demand correction of untrue or incomplete data or information obtained in violation of the law (e.g. by extortion using compromising materials) from the legality of a provision that, in a manner necessary in a democratic, law-based state, limits access for purposes of research and journalistic activity on the basis of strict purposefulness.

32. Austria is a model case of a country where archive information containing personal data is practically practice an object of interest only for the purposes of research, which is indirectly indicated by the lack of current case law. In view of the fact that more years have passed since the Nazi period than the statutory 50-year protective period, a special framework for access to information created by the activities of the former repressive elements of the occupation regime is no longer necessary. The federal law on archives governs exceptions from the general obligation of archives to provide personal data upon application in case of a preponderance of the justified interest of a third person or the public interest. Stricter rules apply to further dissemination of the data, e.g. for commercial, research or statistical purposes, but also for private and family processing; sensitive date are subject to a special regime (a statutory duty of confidentiality, verifying the reliability of the information processors). Archives have considerable discretion when evaluating the relevance and priority of the interests concerned.

33. However, for evaluating the constitutionality of the contested provision, experience from regulations governing access to files of the former security services in countries that also had their experience with totalitarian regimes in the past can also be useful. An overview of the similar or different features of these regulations outlines a context in which it is easier to see the true dimension of the issues that are to be resolved by constitutional review of the contested provision. The following can be considered the main features of the archiving laws in other countries in relation to documents of the security services of a former non-democratic regime:

34. In the Slovak republic, according to the statement from the Office for Personal Data Protection, provisions of the Act on the Memory of the Nation have precedence before the general regulation of the Act on Personal Data Protection, among other things in the question of sensitive data concerning a third person, and it is appropriate for the Institute for the Memory of the Nation to educate a user of accessed data of the affected person that he can process this data only for his own use, exclusive in the framework of personal or domestic activity; according to the explanation from the Institute for the Memory of the Nation from 2004, sensitive data of a third person must be redacted before being made accessible, in order to prevent their misuse and the creation of new injustices, but the Institute may leave some of the data non-anonymized, even from this category, if it considers this to be proportional for fulfilling the purpose of the Act; the constitutionality of the Act has not been questioned thus far, nor has its application, in terms of protection of personal data; the case law of the general courts concerns only the truthfulness of the records, not directly the protection of the fundamental rights of the individual. In Slovenia the accessibility of these documents is ensured without any limitation whatsoever, with the exception of sensitive data of third persons; there is not directly difference between the right to access and the right to publish the documents obtained, with a limitation for research and official purposes. The Hungarian constitutional Court (file no. 60/1994) annulled the absolute secrecy of data about persons who held public office or worked for the secret services during the non-democratic regime; however, the relevant amendment to the law that established the Historic Archive of the Hungarian state security, was declared unconstitutional at the petition of the president of the republic (file no. 37/2005). Spain, similarly to Austria, is also – in view of the time that has passed since the fall of the Franco regime – among the countries with “standard” legislation on archiving; if, in view of the circumstances of the given case one can proportionately rule out the possibility of damage to privacy or a security risk for the affected person, then those who demonstrate direct legitimate interest, always of course in accordance with the rules for protection of personal data, can be afforded access to the data of third persons that serve to identify them. The Ukrainian law (2015) on access to the archives of the repressive services of the totalitarian communist regime from the years 1917-1991, is removed from the jurisdiction of the law on personal data protection. It defines broadly the fundamental principles of state policy in the area of making this archive information accessible, including making copies, points to the independent responsibility of the processor for violation of protection of the personal data of third persons when handling them, and defines the actors of documented cases. Access to information about collaborators of repressive bodies, including those who were originally “victims” of persecution, cannot be limited by citing protection of personal data. The “victims” of persecution can, within 1 year from the law going into effect, define the circle of information about themselves to which free access is to be limited (for a maximum of 25 years); for family members of the “victim” the possibility of such limitation applies only to sensitive data.

35. A comparative overview shows that making accessible the files of the security services of former non-democratic regimes containing personal data is generally subject to strict conditions where the legislative framework does not separate the individual levels of processing archival records according to fulfillment of the purpose pursued by the given legislation, i.e. [distinguishing] merely making accessible for the purposes of the individual applicants seeking to view files from publication or other forms of dissemination of the information to the public. The high level of protection of personal data contained in the files of the former Stasi in Germany reflects the fact that these files, intended primarily for lustration purposes, were not evaluated under the regime of archive law. Therefore, their use for other purposes (research, etc.) requires, before granting access to authorized applicants, various forms of centralized processing, which makes considerable demands on the personnel and material-technical resources of this agenda. In countries where the state archives do not provide services in that scope, and leave on the users a certain responsibility for further processing of personal data, granting access to archival records of a given type is generally subject to the prior consent of the subject of the personal data contained in the archival records. The archives, as administrative bodies, have variously defined competences in weighing justified interests between the researchers and the affected personal data subjects.

36. In view of these examples, the model for access to archival records about the activities of former security services chosen by the Czech legislature is the most open. However, the comparison is somewhat deceptive, because it attempts to compare the incomparable, and does not clearly express the appropriateness of each particular model in relation to the nature and length of application of instruments for persecuting those who resisted totalitarian regimes. This experience is simply completely non-transferable, and the methods and means of understanding it must correspond to that fact.

VIII. Definition of the Statutory Framework for Access to Documents of the Former State Security

37. Although the petitioner seeks constitutional review only of the contested provision, and therefore the task of the Constitutional Court is not to review the constitutionality of the process that led it to apply the Archiving Act as such, nevertheless, the Constitutional Court also reviewed the opinion expressed by the petitioner that there could be a disproportion between higher protection of third persons appearing in documents that are made accessible under the regime of Act no. 140/1996 Coll., under 10a of which the Security Services Archive must redact this data before making a copy accessible, unlike personal data which, when one views archival records under the regime of the contested provision of the Archiving Act, are not subject to any protection in advance. It is appropriate to clarify the relationship between the two Acts in terms of applicability before the Constitutional Court turns to review the contested provision itself, because the cited opinion can tempt one to doubt whether there was even room for application of the contested provision during the decisive period. If this doubt were confirmed, the Constitutional Court would have to reject the Supreme Court’s petition as having been submitted by someone clearly unauthorized, under § 43 par. 1 let. c) of Act no. 182/1993 Coll., on the Constitutional Court.

38. According to the original ideas of the government, as the sponsor of the bill, files created by the activities of the State Security, understood as part of the Unified Archive Fund (The National Archive Heritage) of the Czech Republic, were to be made accessible on the basis of an extensive amendment of Act no. 97/1974 Coll., on Archives, then in effect. Although it was meant to be a framework only for a transitional period, serving the need for reconciliation

with the past under the Acts on judicial and extra-judicial rehabilitation, lustration, and restitution of private and church property (it was to affect about 60 thousand persons, and another 120-150 thousand persons could be told only the content of a registration entry, as personnel documentation maintained on them was not preserved), removing an extensive set of documents from the general archive regime and subjecting it to a special regime would be serious and inorganic interference in the concept of archive law. The rights and obligations of both the administrator of archival records and applicants for access would have to be newly and more precisely defined (e.g. as regards protection of the security interest of the state and the right to privacy of affected living persons, including the requirement of partial anonymization of personal data, leaving only their first and last names and the cover names of persons registered as collaborators of the State Security, removal of the thirty year protective period, etc.).

39. Therefore, it was decided not to implement giving access to files through the amendment of the Archiving Act then in effect, and to propose a separate law to apply only for the limited period of operation of the file information system, i.e. until 31 December 2000. After that, this information system was to be cancelled and subsequently sorted out under archive regulations (see the background report to the bill of Act no. 140/1996 Coll., on Making Accessible Files Created by the Activities of the Former State Security). The time-limited nature of the new framework was also testified to by the proposal that an application for giving access to a file could only be submitted within six months after the Act went into effect.

40. The purpose of the original wording of Act no. 140/1996 Coll. was to make accessible, on the basis of an application, to persons who were citizens of the Czech Republic persecuted by the repressive forces of the totalitarian state, documents about their persecution, i.e. to provide applicants information about whether there was a file with personal data about them in the information system, or to provide a copy of that file (§ 1), and thus to have evidentiary material for purposes of a proceeding under the abovementioned laws. During presentation of evidence, information obtained from the files became part of court files in these proceedings and was thus made public. At the same time it was necessary to protect data about third persons who appeared as “other persons” in the subject files of applicants, or as “persons outside the service and public activity of a member” of a security service in his personnel file, and redacting, at the very beginning – before making the file accessible to the applicant (§ 6). The scope of the redacting, imposed on the Minister of the Interior, as the documentation administrator, was based on Act no. 256/1992 Coll., on Protection of Personal Data in Information Systems, then in effect, and was guided, in particular, by concerns about an increase in court cases, if the courts, when reviewing administrative decisions connected with rehabilitation and other proceedings, did not consider this documentation to be reliable documents, if it was not possible to verify their truthfulness for objective reasons. However, for the purposes set forth, it would be able to fulfil the basic function even in this edited form.

41. With the aim of making progress in the process of reconciliation with the totalitarian past, the previous limited approach to the file agenda of the former State Security was found by the legislature – of course, without a broad society-wide discussion taking place beforehand – to be insufficient implementation of its original intent. This failing was removed by the adoption of Act no. 107/2002 Coll., which amends Act no. 140/1996 Coll. (further, “Act no. 107/2002 Coll.”), whose purpose was (§ 1) “the broadest possible uncovering of the practices of the communist regime when repressing political rights and freedoms,” and which, in addition to the pressure to break down the stereotype of an expansive approach to confidential facts, expanded the right to access to files, previously limited only to that part of a file that directly

concerns the applicant, to anyone (natural persons over the age of 18, regardless of citizenship, § 5), including data about the perpetrators of persecution, contained in the personnel files of the officers and in the files of persons registered as collaborators of the State Security.

42. The requirement of anonymizing the personal data of third parties was preserved in the same scope; per the methods of redacting documents of the Security Services Archive, only serious deviations from the ordinary social norms of behavior are subject to being redacted (including in cases of already deceased persons) while protecting private and family life. It also applies to documents that prove the status of a member of the resistance or opposition under Act no. 262/2011 Coll., which are also subject to publication in the relevant proceeding. This change was guided by the legislature's belief that "the social interest in uncovering and making accessible the preserved materials documenting the activity of particular persons in creating and maintaining the criminal, illegitimate, and contemptible communist regime is higher than protection of data (quasi-personal data) on the service activity of members of the State Security and (…) its secret collaborators" (see the background report to Act no. 107/2002 Coll.); natural persons on whom a personal file is maintained, got an opportunity to attach to the content of the file or to the fact of registration in the information system their own statement, which became an integral component of the document that was made accessible to potential other interested parties, together with the records of registration.

43. This amendment included a partial change of Act no. 97/1974 Coll., on Archives, which permitted viewing the archival records of the Communist Party of Czechoslovakia (but not other organizations established on its ideology) less than thirty years old without the consent of the head of the archive and other conditions.

44. It was only with the adoption of the new Archiving Act and establishment of the Security Services Archive by Act no. 181/2007 Coll., i.e. eleven years after Act no. 140/1996 Coll. went into effect, that the legislature's original idea to integrate the file information system into the regime of general archive law was fulfilled. Thus, in the decisive period, the Security Services Archive functioned, and still functions, when making accessible information from the files of the former security services that were selected as archival records, i.e. selected and registered, in two regimes existing in parallel [§ 13 par. 1 let. a) of Act no. 181/2007 Coll.]: one under Act no. 140/1996 Coll., one under the Archiving Act. These regimes' different approaches to protection of personal data, which is (generally in the first case) or is not directly (in the second case) connected to the publication of obtained information leads to differences in providing protection for the personal data of third persons through their being redacted (or not) by the Archive.

45. However, these are not mutually competing procedures, because under the transitional provision of § 82 par. 4 of the Archiving Act, which, there can be no doubt, is of defining importance for the mutual delimitation of the application of both regulations, in view of the submitted outline of the development of the legal framework, and which applies to all archives in the Czech Republic, "Archival records less than thirty years old that were made accessible before the date this Act went into effect under special legal regulations are subject to the accessibility regime under legal regulations in effect before the date this Act goes into effect." The footnote to this provision names as a special regulation, e.g. Act no. 140/1996 Coll.

46. The Constitutional Court took into consideration the decision of the Municipal Court in Prague of 27 November 2013, file no. 3A 86/2011-89, the Czech Republic – Archive of Security Services v. the Office for Personal Data Protection, which states the legal opinion that Act no. 140/1996 Coll., requiring anonymization of personal data of affected persons has, as a lex specialis, priority in application over the Archiving Act, which, as a lex generalis, does not require anonymization. The court justified this conclusion on the grounds that "[O]nly this interpretation is able to guarantee protection of the personal data of third persons" under Art. 10 of the Charter. The court found the interpretation that drew the existence of two different regimes for making accessible archival records from the fact of whether the archival record in question was made accessible before the Archiving Act went into effect to be irrational and illogical, stating that the transitional provision of § 82 par. 4 of the Archiving Act "pro futuro does not even rule out application of Act no. 140/1996 Coll. to archival records less than 30 years old, if they were not made accessible". It considers absurd the possibility that the applicant himself would determine in which regime archival records were to be made accessible.

47. Of course, the Constitutional Court does not agree with this legal opinion. If the mutual relationship of the two regulations were defined by the principle of lex specialis (Act no. 140/1996 Coll.) derogat legi generali (the Archiving Act), § 82 par. 4 of the Act would then, after the abovementioned, lack normative significance and would be inconsistent with the postulate of a rational legislature. "Making accessible" personal data is understood to be "acquainting an authorized applicant with copies of documents" (§ 10 par. 2 of Act no. 140/1996 Coll.), or "passing them on for use" (cf. Maštalka, J. Osobní údaje, právo a my. [Personal Data, the Law, and Us] Prague: C. H. Beck, 2008, p. 27). The regime for archival records not made accessible until that time (1 January 2005) on the basis of an individual application is, under the contested provision, subject to an exception from the requirement of prior consent of the affected person, just like archival records containing data on perpetrators of persecution that were published (made "publicly accessible") under § 7 of Act no. 140/1996 Coll. before filing an application to view them, or before being selected as archival records (the contested provision in fine). The purpose of the Archiving Act is different from the purpose of Act no. 140/1996 Coll.; both function side by side and the relationship between them is not that of a general and special regulation.

48. The framework chosen by the legislature was based on the assumption that the period defined by the cited date was sufficient for the purposes of rehabilitation and other proceedings in which the data of other persons obtained from archival records were potentially exposed to direct access of an uncertain number of official or other persons, comparable in its effects with publication. Therefore, it was necessary to anonymize these archival records under § 10a of Act no. 140/1996 Coll., and even if the proceedings did not end even after the cited date, it was appropriate to maintain that status for them in the proceedings still ongoing, until they lost the status by the passage of the thirty-year protective period. Thus, the transitional provision of § 82 par. 4 of the Archiving Act respects the level of protection provided to personal data made accessible for purposes of the cited proceedings, while viewing archival records for other purposes, e.g. research, which were not directly connected to a risk of publication, was and is possible from the date the Archiving Act went into effect, i.e. from 1 January 2005, only in the regime of the contested provision, i.e. without anonymization or consent of the affected person, and no longer under Act no. 140/1996 Coll.

49. The normative purpose of the transitional provision of § 82 par. 4 of the Archiving Act pursues the aim of ruling out the possibility that personal data protection already provided would be rendered useless because of the risk of publication. Thus, whether the plaintiff's personal data not more than thirty years old contained in the material were subject to anonymization in the decisive period, when the Security Services Archive allowed an employee of the Ostrava branch of Czech Television to view the archival record in question, i.e. on 19 March 2008, depended on whether this archival record already had been or had not yet been made accessible before 1 January 2005.

50. The differences in submitting applications to view archival records containing information from the files of the former security services and procedures in processing the applications under § 8 a 9 of Act no. 140/1996 Coll., resp. § 34 an. of the Archiving Act also point to the differences between the two regimes. Information on the activity of the former security services are, apart from the archival records in the file collections of the Security Services Archive, often also contained in the archival records of "non-file" collections of "ordinary" archives (e.g. notices for district secretaries of the Communist Party, the state attorney's investigation files, and court files). The scope of making accessible personal data in the regime of one or the other of the two regulations in the decisive period was, and continues to be, determined by distinguished their application according to the time period in accordance with § 82 par. 4 of the Archiving Act, which the Security Services Archive confirms on the basis of an application to view, or a court, in a case of review of the Archive's decision. Thus, a possibility for the applicant for access to choose his regime at his own discretion does not come into consideration.

51. Thus, the scope of making accessible personal data is not defined by the relationship of the relationship of Act no. 140/1996 Coll. to the Archiving Act, as a law subsidiarily applicable, but follows from the fundamental equality of both regimes. The obligation to generally anonymize personal data of third persons under § 10a of Act no. 140/1996 Coll. would deny the purpose of the transitional provision of § 82 par. 4 of the Archiving Act and would come into conflict with the principle of a rational legislature.

52. Based on the annual reports of the Security Services Archive, one can conclude that in the years 2014-2015 a total of 10,728 archival records were prepared for study; of those, 190 (1,771 %) with information for the researcher that they can be made accessible only in the regime of § 10a of Act no. 140/1996 Coll., and only 28 (0,261 %) actually were made accessible in that regime. The Security Services Archive does not keep official statistics on the number of archival records made accessible in anonymized form on the grounds of their first being made accessible before the Archiving Act went into effect.

IX. The Referential Framework for Constitutional Review of the Contested Provision

53. In a number of its judgments [e.g. file no. IV. ÚS 154/97 (N 17/10 SbNU 113)], the Constitutional Court stated that the conflict of the right to information and its dissemination with the right to protection of personality and private life is a conflict of fundamental rights standing on the same level, and its resolution is primarily a matter for the general courts, who must, taking into account the circumstances of each case, weigh whether the adoption of a statutory measure that is necessary in a democratic society for protection of the rights and freedoms of others or for protection of a public interest approved by the constitutional order did not unjustifiably give one right priority over the other right. Evaluation of the compatibility of the contested provision of the Archiving Act with the constitutional order and

the international treaty obligations of the Czech Republic in the area of human rights, which the Supreme Court asked the Constitutional Court for, must be guided by aspects that aim to achieve a fair balance between the two fundamental rights by applying only such limitation of one or the other of them without which the conflict between the rights could not be resolved. The limitation applied must preserve the essence and significance of the affected fundamental right, and may not be misused for a purpose other than that for which it was established (Art. 4 par. 4 of the Charter). Thus, the imperative of finding a fair balance does not rule out a justified leaning in favor of one of the protected rights, provided that safeguards against misuse of restrictions imposed to the detriment of the other of the rights will function effectively enough.

54. Although the criteria used for specific review of the contested provision relate to the decisive period defined by the petitioner, the result of this review will also be relevant in the future, as the contested provision (§ 37 par. 6 of the Archiving Act, in the wording in effect until 30 June 2009) – only differently placed in the system – continues to be part of the legal order (par. 11).

IX. a) Persona data protection as part of the right to privacy

55. As the Constitutional Court pointed out in judgment file no. Pl. ÚS 24/10 of 22 March 2011 [popular name Data retention (N 52/60 SbNU 625)], Art. 1 par. 1 of the Constitution contains the normative principle of a democratic, law-based state. A fundamental attribute of the constitutional concept of a law-based state, and a condition for its functioning, is respect to the rights and freedoms of the individual, which is expressly stated in that provision. The Constitution follows a material concept of legal statehood, which is characterized by respect of the state authority for the free (autonomous) sphere of the individual defined by the fundamental rights and freedoms in which the public authorities fundamentally do not interfere, or interfere only in cases that are justified by the need to resolve conflict with other fundamental rights or a constitutionally approved and statutorily clearly defined public interest, on the assumption that a statutorily foreseen interference is proportional both in view of the aim that is to be achieved by the interference and in view of the degree of limitation on the fundamental right or freedom.

56. The central human rights demand on individual autonomy is the requirement of respect for individual organization of one's life, one of the primary functions of which – apart from protection of the traditional sphere or privacy and undisturbed formation of social relationships – is a guarantee in the form of the right to protection of personal data. The right to respect for private life is not guaranteed in the Charter in one all-encompassing article (as in Art. 8 of the Convention). On the contrary, as the Constitutional Court stated in the cited judgment, protection of an individual's private sphere is divided in the Charter into several provisions and supplemented with other aspects of the right to privacy, stated at various places in the Charter. The core of this framework is the individual's right to decide in his own discretion whether, or in what scope, in what manner, and under what conditions the facts and information from his private sphere are to be made accessible to other subjects. The component attributes of that right, expressly guaranteed in Art. 10 par. 3 of the Charter, are the right to protection from unauthorized collection, publication, or other processing of data about one's person [cf. Constitutional Court judgment file no. IV. ÚS 23/05 of 17 July 2007 (N 111/46 SbNU 41) or file no. I. ÚS 705/06 of 1 December 2008 (N 207/51 SbNU 577)], in connection with Art. 13 of the Charter, which, apart from the confidentiality of correspondence, also protects the confidentiality of other documents and records, whether

stored in private or sent through means of communication, with the exception of cases and methods provided by law. The list in the Charter of what must be included within protection of privacy cannot be considered exhaustive and final.

57. The Constitutional Court also stated in its judgments, e.g. file no. I. ÚS 321/06 (N 229/43 SbNU 595) and II. ÚS 517/99 (N 32/17 SbNU 229), that the right to protection of one's private life is an irreplaceable human right, and can be limited in a democratic, law-based state only for purposes of protecting the fundamental rights of other persons or protecting a public interest that is contained in the constitutional order in the form of a principle or value [cf. Constitutional Court judgment file no. IV. ÚS 412/04 (N 223/39 SbNU 353)]. The standard aspect with which the Constitutional Court evaluates the conflict of fundamental rights and freedoms, or their conflict with another constitutionally protected value, is the aspect of proportionality. In doing so, it is necessary to take care to achieve the greatest possible degree of harmony between them, i.e. the optimal application of both protected values.

58. Of course a subgroup of personality rights, i.e. the right to preservation of human dignity, personal honor, good reputation and name, which form the "hard core" of protection of privacy in the wider sense of the word (Art. 10 par. 1 of the Charter), and are classified with suprapositive values as the very basis and highest purpose of fundamental rights [cf. judgment II. ÚS 2268/07 (N 45/48 SbNU 527)], somewhat escape limitations. While the normative content of the right to personal honor and a good reputation changes depending on the cultural, spatial and time context, human dignity is – in particular in the constitutional doctrine of Germany, as a state that went through a period of totalitarian regimes in the past – an unquestionable constitutional value that cannot be limited by statute or case law, or balanced by other rights and interests; the ECHR also works with in its case law, even though the European Convention on Human Rights does not expressly mention it.

59. In judgment file no. IV. ÚS 23/05 (N 111/46 SbNU 41) the Constitutional Court did not consider legitimate the publication of defamatory information affecting the dignity of another person active in public life if there were no demonstrable reasonable grounds to rely on the veracity of that information, or if the source of the information even had grounds to call into question the veracity of the information, but did not verify it, not to mention if the publication was motivated merely by a desire to damage the affected person. In the cited judgment, the Constitutional Court also considered the fundamental right to personal honor and a good reputation, which is exercised in multiple dimensions. This involves the private sphere and the sphere of social, civil, and professional ties, which can be described as social. The first sphere actually concerns protection of privacy in the narrow sense, within which it is fundamentally a matter only for each person's autonomous decision, what, and to what degree, with regard to his personal honor and good reputation, he releases from this sphere as information for the surrounding world. In other words, in this segment, as a rule, complete self-determination concerning information applies.

60. The sphere of social, civil and professional ties reflects the social aspect of the fundamental rights, or reflects the actual state in which an individual lives in society and enters into various forms of interaction and communication with its other members; through his behavior, even though his mere existence, he influences other members of society. In this second sphere, the absolute protection of privacy no longer applies; in other words, this sphere can be intervened in, under certain conditions, even without the consent of the rights subject, because facts that are the object of public interest may appear in it. Thus, the social

sphere can be disrupted by proportional intervention by the public authorities for purposes of protecting the interests of society. The outer edge of an individual's private sphere is thus formed by the "public" sphere. This is that segment of human life that everyone can perceive or take note of (Löffler/Rickler, Handbuch des Presserechts, [Handbook of Press Rights] 4th ed., 2000, chap. 42, marg. no. 7). In this sphere there are practically no limitations on dissemination of true facts.

61. Because the right to preservation of human dignity, personal honor, and good reputation, guaranteed in Art. 10 par. 1 of the Charter is not limitable by sub-constitutional laws, the purpose of which the Charter would specify in the form of public goods (as the case, e.g. in Art. 17 par. 4 with freedom of expression and the right to seek and disseminate information for the benefit of statutory measures necessary in a democratic society for the protection of rights and freedoms of others, the security of the state, public security, public health or morals), and the ability to exercise this right is not expressly subject even to implementing regulations (as with some economic, social and cultural rights in Chapter Four of the Charter), it is necessary to seek authorization for interference – if we permit it – in the category of constitutionally immanent limitations, i.e. limitations arising directly from the constitutional order itself. The legitimacy of such interference by the public authorities into fundamental personality rights of the affected person may be justified by the requirement of respect for a comparably intensive need for protection of the personality rights of another, whose human dignity, personal honor, or good reputation would suffer if, e.g. he were denied access to certain information concerning his person.

62. Thus, if two entitlements of the same nature and intensity stand against each other, it is always necessary to weight the urgency and level of the competing values and interests in view of the specific factual basis so that both values will be preserved in the greatest possible degree. If that requirement cannot be met, it is necessary to justify, all the more convincingly, wider interference in one of these values while applying the principle of proportionality. These constitutional principles, which are applied when reviewing measures of the public authorities limiting the fundamental rights of the individual, must also be applied in an appropriate manner to cases of conflict between the rights of private subjects on a horizontal level.

63. In interpreting the right to privacy in its various dimensions, as captured in the Charter, it is necessary to keep in mind the purpose of this dynamically developing right as such, that is, it is necessary to think about the right to privacy in its temporal entirety. Therefore, the right to protection of personal data guaranteed in Art. 10 par. 3 of the Charter is also to be interpreted, on one hand, not only in connection with Art. 7 (inviolability of the person and his privacy), Art. 8 (personal freedom), Art. 12 (inviolability of dwelling) and Art. 10 par. 1 (preservation of human dignity, personal honor, good reputation and name) and par. 2 (protection from unauthorized interference in private and family life), which, by their nature and significance, form the private sphere of an individual and his individual integrity as an absolutely necessary condition for the dignified existence of a person and citizen and development of human life in general.

64. On the other hand, interpretation of the right to protection of personal data, if it is subjected to the requirement to balance competing interest, is affected by the current social and political context: "[I]deas about what belongs in the private sphere and what belongs in the public sphere also change very dynamically … the line between private and public … is shifting fluidly, in favor of expanding the public sphere … every individual is understood as a

person with social ties existing within a civil society, and as a person who realizes his responsibility toward the whole … everyone must accept the generally justly required (statutory) conditions that are valid for all persons and limitation of his freedom implemented in the private sphere, but always on the assumption that, generally speaking, room for the individual's unique existence is preserved." (Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. and collective of authors. Listina základních práv a svobod. Komentář. The Charter of Fundamental Rights and Freedoms. Commentary.] Prague: Wolters Kluwer, 2012, pp. 278-279).

IX. b) The Right to Access to Information

65. The provision of the Archiving Act contested by the petition evokes a conflict between the fundamental right of protection of personal data as part of the privacy of a person affected by information in archival records on the activity of security services of the former totalitarian regime and the freedom of expression and the right to information, which include expressing one's opinions, freedom to seek out, receive, and disseminate ideas and information under Art. 17 par. 1 and 2 of the Charter, of Art. 10 par. 1 of the Convention and are closely related to the freedom of scholarly research under Art. 15 par. 2 of the Charter. The defamatory potential of freedom of expression and the right to information can be limited by statutory measures necessary in a democratic society for protection of the rights and freedoms of others, the security of the state, public security, protection of public health and morality under Art. 17 par. 4 of the Charter, or Art. 10 par. 2 of the Convention. The individual attributes of freedom of expression and the right to information are independent of each other: seeking out and receiving information creates realistic prerequisites for effective fulfillment of freedom of expression, but is not tied to dissemination of the obtained information by publication or other disclosure. Thus, seeking out and receiving information is an independent fundamental right, the exercise of which cannot be conditioned by later publication. It is also significant in and of itself as a prerequisite for freedom of thought and conscience under Art. 15 par. 1 of the Charter, or Art. 9 par. 1 of the Convention. Therefore, requirements can be imposed on potential limitation of that right for the abovementioned reasons that are different from the requirements for limitation of the right to disseminate information, if, e.g. the interference in the privacy of the affected person will be less intensive and more easily justifiable than interference caused by dissemination of information.

66. In a democratic society, access to relevant information is a general prerequisite for the exercise of everyone's right to active participation in public life based on equal participation under Art. 1 of the Charter, as the Constitutional Court pointed out in judgment Pl. ÚS 2/10 (N 68/56 SbNU 761), citing decisions of the ECHR in the cases Campos Damaso v. Portugal and The Sunday Times v. The United Kingdom (cf. also Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. and collective of authors. Listina základních práv a svobod. Komentář. [The Charter of Fundamental Rights and Freedoms. Commentary.] Prague: Wolters Kluwer, 2012, p. 431). One of the pillars of a democratic society is open discussion of the exercise of state power and its effect on the individual in the past, present, and future. The ideal of a true democracy rests on a society where everyone sees himself as a part of the whole. A fundamental element of such a society is the citizen who actively seeks to understand himself in the context of understanding the fate of others ("how would I probably behave?"). An elementary component of the belief that it is impermissible to allow any kind of recurrence of the totalitarian regime is internalizing the stories of persons who were persecuted by that regime in the past.

67. In light of the reference in the preamble of the Charter to bitter experience of periods when human rights and fundamental freedoms were suppressed in our land, we can place on conditions for access to the stories documenting the practices of the security services of the former totalitarian power only such statutory limitations as are proportional, i.e. do not exceed the framework of what is suitable for understanding those practices, necessary, and also, consistently with Art. 4 par. 2 of the Charter, least damaging to the essence and significance of the right to information [cf. e.g. judgment file no. II. ÚS 517/99 (N 32/17 SbNU 229)]. If the exercise of the right to information by a person leads to making accessible the data of other persons exclusively for that person's own personal use, this form of personal data processing, where, by the nature of the matter, publication of the data does not come into consideration, is not subject to Act no. 101/2000 Coll. (§ 3 par. 3). In contrast, exercise of the right to information and freedom of scholarly research by a professional researcher, the final aim of which is to publish the information obtained by viewing archival records in a processed form, places different demands on the conditions for personal data protection compared to mere viewing, because disseminating such information with personal data is qualitatively completely different, more intensive interference in privacy.

68. Setting stricter conditions for access to archival records only for the group of these professional researchers would violate the principle of equal standing before the law, whereas setting stricter conditions for both groups would mean a disproportionate limitation of the right to information for the first group. Therefore, the least damaging and constitutionally compatible solution appears to be to set conditions for viewing archival records in the Archiving Act for all researchers on the same level, with the provision that the administrator of personal data (the archive) shall bind the professional researcher to obtain consent of the affected persons under Act no. 101/2000 Coll. (§ 7 in conjunction with § 5 par. 2, § 9) for further processing of the data (publication, in particular). The same applies for researchers who are natural persons, if they want to pass on the data they obtained from archival records to another person for further processing (e.g. to the media for publication), beyond the scope of their personal needs. Thus, the separation of the legal regimes for viewing and publication is fully justified.

69. On a general level, the right to access to archival records with information about the activities of the security services of the former totalitarian power is a prerequisite for direct understanding of the past. Here we quote the words of Karl Jaspers, written shortly after the end of World War II, from the book Otázka viny [The Question of German Guilt] (Prague: Academia, 2006), which Eliška Wagnerová also cites in her dissenting opinion to Constitutional Court judgment Pl. ÚS 25/07 of 13 March 2008 in the matter of a petition seeking the annulment of Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Archive of the Security Services: "(...) we want to ask ourselves, relentlessly clarify for ourselves: where did I feel falsely, think falsely, act falsely – we want to seek guilt as much as possible, in ourselves, and not only in things or in others …." To that E. Wagnerová only adds: "Everyone must answer the question of why for himself, because according to Jaspers the only court for resolving moral guilt is one's own conscience …."

70. This individualized understanding of the past also reflects the social dimension of the right to access to information, on the basis of which an individual is able to live relatively conflict-free in the society that surrounds him, enter into various forms of interaction and communication with other members of society, and, through his behavior, even through his very existence, to have an effect on other members of society. His behavior or existence is also determined by the level of authentic reconciliation with the stories of the non-democratic

regime. If the legislature enters into this unique sphere of information, its interference, limiting the right to privacy of one group (the persecuted, and perhaps other persons connected to their stories) is justifiable only to the extent that it is capable of making it possible for others (other members of society) to acquire otherwise inaccessible knowledge about the nature of the totalitarian regime, which will provide them an opportunity for better self-knowledge based on comparison with the fate of the victims of persecution.

71. A referential viewpoint for constitutional review of the contested provision is also the imperative of the constitutional order which, in the specific context, requires that we respect the right of other interested persons from the circle of the persecuted person (family members, other relatives, friends, survivors) to access to archival records containing his personal data, without knowledge of which these persons would be forced to remain in a state of undignified lack of awareness about their own fate. Understanding one's own position is a matter of constitutionally approved public interest in every democratic society.

72. The recognition of such imperatives in the Constitutional Court's case law is still open: "In the Czech context, the right to self-determination concerning information is a Pandora's box. In particular, databases containing often sensitive information from the private lives of individual persons obtained primarily by state security bodies in the period before November 1989, which the state still holds, may need to be addressed … and we can only express amazement that the Constitutional Court has not yet handled such a case" (Wagnerová, E.; Šimíček, V.; Langášek, T.; Pospíšil, I. and collective of authors. Listina základních práv a svobod. Komentář. The Charter of Fundamental Rights and Freedoms. Commentary. Prague: Wolters Kluwer, 2012, p. 285).

73. The more palpable the interference in the personal integrity of the affected person, caused by the exercise of another person's right to access to information, the more effective guarantees of constitutional law protection against misuse of the obtained information must be provided to the affected person. The proportionality of the interference must be evaluated both by the intensity of its effect on the personal sphere of affected persons, and by the number of these persons (e.g. the blanket and preventive nature of the collection and storage of operational and localization data about electronic communication was the main reason why the contested provision of the Act in question did not pass the test of proportionality, see judgment file no. Pl. ÚS 24/10). Guarantees of the proportionality of interference consist not only in the equal and transparent setting of rules for access to archive information, but also the realistic enforceability of these rules and availability of independent and impartial judicial review. Moreover, when viewing the documents and data from the files of the communist secret services, both researchers and the public must be aware of the fact that these files may contain half-truths or lies, and therefore they cannot assume that they are credible.

IX. c) The international and European dimension of constitutional review

74. The ECHR concluded that Art. 8 of the Convention, which guarantees the right to respect for private and family life, also means a right to self-determination concerning information, when it repeated emphasized that the collection and storage of data concerning an individual's private life fall within the scope of this article, because the phrase "private life" cannot be interpreted restrictively [in particular, the decision in the case Malone v. The United Kingdom (no. 8691/79) of 2 August 1984]. In its case law concerning Art. 8 of the Convention, the ECHR also considered the following to be interference in the privacy of individuals: interference in the form of review of data, content of mail, and listening to telephone

conversations [cf. the decision in the case Klass and others v. Germany (no. 5029/71) of 6 September 1978, the decision in the case Leander v. Sweden (no. 9248/81) of 26 March 1987, the decision in the case Kruslin v. France (no. 11801/85) of 24 April 1990 or the decision in the case Kopp v. Switzerland (no. 23224/94) of 25 March 1998], determining the telephone numbers of persons making telephone calls [cf. the decision in the case P.G. and J.H. v. The United Kingdom (no. 44787/98) of 25 September 2001], or storage of data about individuals' DNA in a database of accused persons [cf. the decision in the case S. and Marper v. The United Kingdom (no. 30562/04 a 30566/04) of 4 December 2008]. In the decision in the case Rotaru v. Romania (no. 28341/95) of 4 May 2000 the ECHR drew from the right to a private life manifesting itself in the form of a right to self-determination concerning information the positive obligation of the state to destroy data that it collected and processed about a person from the person's private sphere.

75. As the ECHR stated another time, a broad interpretation of the term "private life" is consistent with the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (in effect in the Czech Republic since 1 November 2001, published as no. 115/2001 Coll. of International Treaties), the purpose of which is to "secure in the territory of each Party for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy life, with regard to automatic processing of personal relating to him (Art. 1), where these are defined as any information relating to an identified or identifiable individual (Art. 2)" [cf. the decision in the case Amman v. Switzerland (no. 27798/95) of 16 February 2000 and the case law cited therein]. In contrast, the ECHR interprets narrowly exceptions to the prohibition of state interference in the right to a private life, necessary in a democratic society and in accordance with the law on the grounds of the enumerated values of the public interest or protection of the rights and freedoms of others. Actions of the public authorities that interfere in the right to a private life may not take place outside any direct (preventive or subsequent) judicial review [cf. e.g., the decision in the case Camenzind v. Switzerland (no. 21353/93) of 16 December 1997].

76. When deliberating between the right to protection of privacy and freedom of expression in the form of publication in the media, the ECHR requires observing the requirement for a fair balance between two conflicting private law entitlements that fundamentally have the same value. Publishing information about the private life of public figures, although it takes place more for purposes of entertainment than education, does draw on protection of freedom of expression, but that can cede to the right to respect of private life, when the information is of a personal and intimate nature and there is no public interest in disseminating it. Nonetheless, the court found an obligation on the publisher to announce in advance the intent to publish sensitive information, so that the affected person could apply to a court for an injunction preventing the publication to be an excessive restriction on the freedom of expression, as penalties for interference in the right to privacy already exist, and, in view of the various practices in the European states, national courts must be allowed sufficient discretion [the decision in the case Mosley v. Great Britain (no. 48009/08) of 10 May 2011]. Transferred into the context of Czech law, the general court reviews whether a publisher, or a professional researcher, met its obligations arising from Act no. 101/2000 Coll. – to obtain the affected person's consent before publishing personal data – or whether the state, through the Office for Personal Data Protection, properly exercised its supervisory or penalizing function.

77. In its case law, the ECHR defined the term "most intimate aspect of private life" (un aspect des plus intimes de la vie privée), e.g. in its decisions [Dudgeon v. Great Britain (no. 7525/76), Stübing v Germany (43547/08), Mosley v. Great Britain, (no. 48009/08), Y.F. v.

Turkey (no. 24209/94)]. This most-protected sphere includes information about an individual's sexuality or stigmatizing information about his state of health or physical or mental damage suffered. It is also necessary to provide extraordinary protection to stigmatizing information about minor children or similarly vulnerable persons (persons with mental or intellectual disabilities). The need for protection of privacy and dignity is greater in relation to the most intimate sphere of an individual or the protection of the privacy and dignity of especially vulnerable persons. This indicates that the general courts and other bodies of the public authorities (e.g., the Office for Personal Data Protection or criminal prosecution bodies) are required to pay greater attention to information belonging to an individual's most intimate personal sphere, compared to other personal data, and to provide much stronger protection to it.

78. The Charter of Fundamental Rights of the European Union (the "EU Charter"), as a modern human rights catalog, expressly states in Art. 8, that "(1) Everyone has the right to protection of personal data concerning him or her. (2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (3) Compliance with these rules shall be subject to control by an independent authority."

79. However, Article 8 of the EU Charter will not be applied as part of the referential framework for constitutional review of the contested provision of the Archiving Act, because application of the EU Charter is, under Art. 51 par. 1, tied exclusively to implementing EU law in a member state, and cannot extend the field of application of Union law beyond the powers of the Union (par. 2); the regulation of archives does not fall without the powers of the EU. The fundamental right to protection of personal data under Art. 8 of the EU Charter, which is also guaranteed in Art. 16 of the Treaty on the Functioning of the European Union (the "TFEU"), and under EU regulations adopted for the implementation of that Treaty is exercised under the conditions and within the limits set forth in it (Art. 52 par. 2 of the EU Charter EU), is a source of criteria for interpretation (in accordance with EU law) of the legal regulations of member states in the area of protection of personal data, which fundamentally affect the application of domestic norms lying outside the direct application of EU law, precisely the situation in the case of the contested provision of the Archiving Act.

80. These criteria are the rules issued on the basis of the authorization in Art. 16 of the TFEU and contained in the harmonization Directive 95/46/EC of 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the "Directive"), specifying and expanding the principles of the right to privacy that arise for the member states from the Convention of the Council of Europe (no. 108) for the Protection of Individuals with regard to Automatic Processing of Personal Data. This Directive has the status of an implementing regulation to Art. 8 of the EU Charter, but in fact it was one of its normative sources, and therefore it can be ascribed "constitutional" significance within EU law, and it was also the model for the adoption of Act no. 101/2000 Coll. [cf. § 1, footnote 1)]. Under it member states have considerable discretion to set conditions under which the processing of personal data is lawful (Art. 5). Among other things, "Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards" [Art. 6 par. 1 let. b)], and if this processing, without meeting the requirement of unquestionable consent from the data subject, is "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the

controller" (Art. 7). In contrast to the prohibition on processing sensitive personal data without the express consent of the data subject, then, among other things, "Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition ... either by national law or by decision of the supervisory authority. (Art. 8 par. 2 [sic, should be 4]). An important exception to application of this Directive is the processing of personal data "carried out by a natural person in the exercise of activities which are exclusively personal or domestic." Such processing is generally seen as part of the individual's freedom to obtain information (see Handbook on European data protection law, published by the European Union Agency for Fundamental Rights and the Council of Europe, 2014, p. 19).

81. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (the "Regulation"), which is valid as of 4 May 2016 and when it goes into effect on 25 May 2018 will replace Directive 95/46/EC, partly forms – as a component of the legal order of the Czech Republic – the interpretive framework for the regulation of protection of personal data, which is authoritative for archive law in the future.

82. With processing for archiving purposes in the public interest or for scientific or historical research purposes, Art. 89 of the Regulation permits the law of a member state to provide for derogations from the rights to standard protection of personal data set forth in the Regulation, such as, e.g., the right to obtain from the controller restriction of processing if the data subject contests their accuracy, or based to an objection by the data subject, pending the verification whether the legitimate grounds of the controller override those of the data subject (Art. 18), which can be seen as an easing of domestic regulation to the benefit of personal data administrators in an area equal to the one that the Constitutional Court is examining in connection with review of the contested provision.

83. Recital 73 of the preamble to the Regulation states: "Restrictions concerning specific principles ... may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society ... for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes (...) Those restrictions should be in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms." Recital 158 states: "Member States should also be authorised to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes (...)."

84. The Regulation generally conditions the lawfulness of processing personal data on the consent of the data subject [Art. 6 par. 1 let. a)], unless the processing is "necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller" [let. e)]. Processing of sensitive personal data is prohibited, unless it is "necessary for reasons of substantial public interest (...) which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject" (Art. 9). Like the Directive, the Regulation does not apply to processing of personal data carried out by a natural person in the course of a purely personal or household activity [Art. 2 par. 2 let. c)].

X. Review of the Constitutionality of the Contested Provision

85. The model of a specialized and concentrated constitutional judiciary under Art. 83 of the Constitution requires the Constitutional Court to thoroughly respect the rules of the separation of powers. The subsidiary nature of its review authority in relation to the general judiciary and the state administration leads the Court to only resort to annulling their decisions that damage, in a fundamental, constitutionally incompatible manner, the fundamental rights of persons, when effective correction through other means is not possible. In relation to legislative acts, this restraint by the Constitutional Court manifests itself through the Court's self-limitation on intervening in matters that should primarily be addressed by the democratically elected legislature. That leads it to limit the constitutional review of norms to review of the legality of the legislature's procedures (observance of the rules of the legislative process and respecting the bounds of legislative discretion given by the constitutional order) and the proportionality of the possible interference of its chosen solution in the fundamental rights of persons. Wherever it is sufficient in order to renew compliance with the constitutional order, it is necessary to give priority to a constitutionally confirm interpretation of the contested provision over annulling it, which would, as a rule, have a more destructive effect on the participants of legal relationships and undercut the foreseeability of the future effects of correcting the constitutional deficit.

86. After the Constitutional Court reviewed the petitioner's arguments and compared them with the contested provision, it states that the petition, in the parts for which the petitioner has active standing, is not justified.

87. The Constitutional Court considers the starting point for reviewing the compatibility of the contested provision with the constitutional order to be a constitutional interpretation of the terminology used. In the context of archiving law it is necessary to thoroughly distinguish between the two methods of processing personal data enumerated, in parallel and mutually independently, in § 4 let. e) of Act no. 101/2000 Coll.: the archive administrator merely making archival record "accessible" on the basis of an individual application from a researcher who is a natural person or a professional researcher, and its "dissemination" or "publication' by a professional researcher through publication or another form of dissemination, which the archive administrator does not take part in.

88. The background report to the Archiving Act states that among of legal regulations forming the constitutional order of the Czech Republic, Art. 2 par. 3 and Art. 79 par. 1 and 3 of the Constitution, and Art. 2 par. 2, Art. 7 par. 1, Art. 15 par. 2 and Art. 34 par 2 apply to the area in question. The proposed legal framework fulfills the requirements placed on the reservation of statutory limitation to the state power (Art. 2 par. 3 and Art. 79 par. 1 and 3 of the Constitution and Art. 2 par. 2 of the Charter) by establishing the competence of the relevant administrative offices in the archive sector (§§ 42-62, Chapter IV of the Archiving Act), the requirement of limiting the inviolability of privacy only by statute (Art. 7 par. 1 of the Charter) is taken into account by § 37 par. 2 of the Archiving Act, in the wording in effect in the decisive period, which ties viewing archival records relating to a living person and containing sensitive personal data of the living person to the prior consent of that person. At the same time Art. 7 par. 1 of the Charter is the constitutional basis for proportional limitation of the freedom of scholarly research, guaranteed in Art. 15 par. 2 of the Charter and the right to access to cultural heritage under Art. 34 par. 2 of the Charter, which is implemented by the same provision of the proposed legislative framework. Archives and records management are

not governed by EU law. As stated further, the legislative framework for this area is left in the competence of the national bodies of the individual countries. The cited background report emphasizes that the statutory framework for archiving expresses the fact that the care of archives is carried out in the public interest as an expression of care for the resources for understanding the history of the state and the nation and for documents serving as documentation or information for citizens, public law institutions and other legal entities. Archival documents have not only historical-cultural significance, but also as legal evidence, as was proved in past years by the entire process of rehabilitation, property restitution, payment of damages, transformation of ownership, etc. The background report does not expressly address the exception from limiting access to archival records containing the personal data of living persons under the contested provision of § 37 par. 6 of the Archiving Act.

89. The Archiving Act, in § 34 et seq., uses the term "view," by which it means only familiarizing one's self with the content of archival record, or its specific provision by the archive administrator to a particular researcher – a natural person – for his personal use, or to a professional researcher for possible further processing. According to the Constitutional Court, nothing indicates that "viewing" archival records should automatically also include "publication". Even repeated (parallel) individual viewing by several researchers does not change its nature, and does not become publication because it does not serve the information needs of an unlimited number of addressees of such disclosure, as in the case of book or electronic publication. Directive no. 95/46/EC is not as terminologically precise as Act no. 101/2000 Coll. ["dissemination or any other giving of access," Art. 2 let. b)], because it binds the member states of the European Union only as regards the result that is to be achieved in connection with processing the personal data, and leaves to them the choice of means suitable to reach the result (Art. 288 of the Treaty on the Functioning of the European Union), including adaptation in view of the normative significance of the legal terminology used. Some of the commentary literature is also indebted to the wider meaning of the term "access," also including familiarizing third persons with the personal data of another person (Kučerová, A. and collective of authors. Zákon o ochraně osobních údajů. Komentář. [The Act on Personal Data Protection. Commentary.] C. H. Beck, 1st ed.. 2012, p. 70).

90. The Constitutional Court considers it quite obvious that interference in the fundamental right to protection of the privacy of the affected person whose data the archival record contains is, in the case of mere viewing only for the personal use of the individual researcher, incomparably less palpable than publishing personal data obtained by a professional researcher for an unknown and unlimited circle of recipients.

91. The Constitutional Court does not share the interpretation taken by the petitioner, which erases the difference between the two terms ["the need to inform … the public at the price of providing all sensitive data" or "interference performed in accordance with the law (i.e. publication of sensitive personal data within the framework of giving access …)"]. In the adjudicated case from which the question about the constitutionality of the contested provision of the Archiving Act arose, the petitioner poses the question of whether constitutionally questionable interference in privacy is not only the possible publication of sensitive data without the plaintiff's consent, but even the granting of access to the archival record to an employee of Czech television; the description of the case indicates that in this case publication of the data in fact did not take place, because further processing of the data (preparation of a program and its broadcasting) dropped due to the lack of consent of the affected person.

92. In its petition, the petitioner seeks a declaration of unconstitutionality of the contested provision with the justification that after its review, in which the provision successfully passed the test of legality and legitimacy, it has doubts about the necessity for the statutorily broadly defined access to sensitive personal data. In this regard it poses the question of the proportionality of the contested provision, i.e. whether it is not possible to select a more sensitive approach, without the legitimate aim of the legislature being thwarted. Here the petitioner, aware of a certain limitation of access to information after implementation of an instrument for protection of personal data, whether anonymization of data or the requirement of necessary prior consent of a living natural person, believes that such a limitation is de lege ferenda proportionate, when the archival record in question even so does not lose its informative value about the practices of the communist regime in suppressing human and political rights.

93. The Constitutional Court subjected the contested provision to the test of legality and concluded that the exception in this provision does not deviate from the framework of the statutory reservation, both as regards cases, limits and methods of exercising state power under Art. 2 par. 3 of the Constitution, and as regards limitation of the right to privacy under Art. 7 par. 1 of the Charter and protection of personal data under Art. 8 of the EU Charter, and that it was adopted by a constitutional legislative process. [One can add to this the newer requirement of the ECHR, usually applied in the requirement of proportionality (cf. Kmec, J.; Kosař, D.; Kratochvíl, J.; Bobek, M. Evropská úmluva o lidských právech. Komentář [The European Convention on human Rights. Commentary. 1st ed.. Prague: C. H. Beck, 2012, p. 882), for sufficient guarantees against arbitrary application of the limitation of the fundamental right (Gillan and Quinton v. United Kingdom, Application no. 4158/05 of 12 January 2010)].

94. The Archiving Act, in § 34 et seq. permits viewing archival records on the basis of an application and with the observance of conditions provided by the Act and the research rules of the archive, which provides the limits for the means and methods for processing personal data, required of the administrator of personal data by § 5 par. 1 let. b) of Act no. 101/2000 Coll. By itself, providing access to archival records does not include or in any way imply possible related forms of further processing of personal data contained in the archival records. The substitution of the term “access” with “publication” in the sense of the phrase “making accessible to the public” is therefore deceptive. The only constitutionally consistent meaning of the term “view” used in § 34 et seq. of the Archiving Act, is thus “individual access” on the basis of an application and only for the personal use of the individual researcher or for the use of a professional researcher, which, however, does not automatically mean authorization for further processing or publication of the personal data.

95. A researcher whose application to view archival records or make extracts, duplicates or copies was not granted by the archive may submit a filing to the National Archive, as the relevant administrative office in the sector of archiving and records management [§ 38 par. 2 in conjunction with § 46 par. 1 let. g) of the Archiving Act], whose decision is reviewable by the administrative judiciary. An archive cannot refuse a researcher access, even if the affected person objected to viewing of archival records containing his personal data, if the matter falls within the exception under the contested provision [§ 38 par. 1 let. c)]. The same applies in the case of sensitive personal data contained in archival records from the activities of the security services of the totalitarian regime, if the affected person did not give consent to viewing under let. d) of that section; by systematic interpretation one can conclude that if,

under the contested provision, the requirement of prior consent (imposed generally in § 37 par. 3) is missing, not giving consent, as a reason for refusing access to the archival record, also ceases to make sense. Such an interpretation is consistent with the abovementioned evolutively developed principle of open access to archival records from the activities of the repressive bodies of the totalitarian regime, which has priority in cases of uncertain interpretation. Corresponding to this is the inclusion of the Security Services Archive in the National Archive as of January 2030 (§ 17 of Act no. 181/2007 Coll.). In this proceeding to the relevant bodies must take into account the need to protect the most intimate sphere of the individual (cf. point 77).

96. Under § 10 of Act no. 101/2000 Coll., an archive is required to take care that through a researcher receiving access to archival record with data about a person, that person does not suffer detriment to his rights, that his human dignity is preserved, and unjustified interference in his private and personal life does not take place. An archive must, above all, adopt necessary measures against unauthorized data processing (§ 11). An archive accommodates this requirement by causing the applicant, by signing a research form referring to the research rules (for an example, see Decree no. 645/2004 Coll.), to declare that he – as a researcher – will be fully aware of the responsibility connected with possible further handling of the personal data obtained, in particular with publishing them, for which he must request the prior consent of the affected person (§ 7 in relation to § 5 par. 2 first sentence of the Act).

97. The Constitutional Court did not find the contested provision to be incompatible with protection of the fundamental right to privacy as regards the guarantees for processing personal data under § 5 par. 2 of Act no. 101/2000 Coll., because that exempts the administrator from the obligation to obtain the consent of the affected person before making archival records accessible "in a case of processing exclusively for purposes of archiving under a special law". This provision is inspired by the Directive, which considers further processing of personal data for historical, statistical, and scientific purposes to be permissible, if the member states provide appropriate protective measures. This exemption applies to processing personal data that are the content of archival records. (Kučerová, A. Zákon o ochraně osobních údajů. Komentář. [The Act on Personal Data Protection. Commentary.] 1st edition. Prague: C. H. Beck, 2012, p. 154). Although the regime for protection of sensitive personal data [§ 4 let. b)] is stricter compared to the regime for protection of "ordinary" personal data [the data subject's consent must be "express," § 9 let. a)], the exception for the contested provision in relation to sensitive data is justified the same way [let. ch)].

98. Based on the test of legitimacy, the Constitutional Court found that the contested provision, affecting the right to privacy, pursues an aim that is permissible in a democratic society under Art. 8 par. 2 of the Convention, as the petitioner indicates. Incomplete access to archival information, which would result (if the exception were annulled) from the affected person not giving prior consent, would allow only a distorted, incomplete view of the totalitarian past. This depersonalized social self-reflection would have to take place without an authentic experience of stories testifying not only about the fates of persecuted persons and others connected to them – often only accidentally – but also – and primarily – their persecutors. The weakened sharpness of this testimony would not permit a sufficiently intensive social catharsis regarding the past, which is constantly needed.

99. The Constitutional Court refers to its judgment file no. Pl. ÚS 25/07 [sic – 06] of 13 March 2008 (N 56/48 SbNU 791; 160/2008 Coll.) in the matter of a petition seeking the annulment of Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes

and on the Security Services Archive, in which it cited the Act's preamble: "The knowledge of historical sources and further evidence concerning the given regimes, as well as the events leading to them, making possible a better grasp of the consequences of the systematic destruction of the traditional values of European civilization, the deliberate violation of human rights and freedoms, the moral and economic bankruptcy carried out by means of judicial crimes and terror against those holding differing opinions, the replacement of a functioning market economy with a command system, the destruction of the traditional principles of ownership rights, the abuse of upbringing, education, science and culture for political and ideological purposes, and by the heedless destruction of the environment."

100. The contested provision pursues a legitimate aim under Art. 8 par. 2 of the Convention and does not actually pursue a different aim that would be only formally declared as legitimate. Specific information about actors in life and decision making during the totalitarian regime have irreplaceable importance for achieving this aim. Many personal data were collected and processed by the repressive bodies of the time for political reasons, using methods incompatible with the principles of a law-based state, and therefore their informative value can be difficult to verify, and thus questionable. However, learning about the methods by which the security services obtained these data is, in and of itself, important knowledge for this aim. The Constitutional Court considers preservation of the current open regime for viewing archival records and other testimony about the activity of the repressive bodies of the time to be necessary not only for objective historical understanding of the practices of the former regime and naming their organizers and persons performing them, but also for the education of the citizens, leading them to make an independent judgment of the need to recognize the signs of authoritarian tendencies in society in time, in order to strengthen the foundations of a democratic, law-based state, development of a civil society, and fulfilling the idea of justice.

101. The Constitutional Court then turned to conducting the test of proportionality in the narrow sense, which is intended to verify that, in applying the statutory limitations on fundamental rights and freedoms, their essence and significance are preserved in accordance with Art. 4 par. 4 of the Charter. Preserving the material content of the right to privacy requires that in each individual case there be only such limitation of the fundamental right as is necessary and as can be fairly required in a democratic law-based state in order to still fulfill the purpose of the limitation. In other words, after identifying the purpose for which the fundamental right is to be limited, it is necessary to review whether the limitation is suitable and necessary (needed) in order to achieve an approved aim. A limitation is suitable if it exhibits such substantive connection with the aim that it at least supports achievement of the aim. The necessity of a limitation presumes that there is no other means available that is less damaging to the rights of the affected person, i.e. causes less harm, and yet is equally suitable. The limitation of the fundamental right to protection of personal data may not deviate from a proportional relationship to the importance of the aim it pursues, and must be balanced with the constitutional right to access to information, i.e. may not go beyond what is necessary to achieve this aim. If these prerequisites are met, the limitation of a natural person's fundamental right as an individual tied to the society and relating to it is justifiable.

102. The petitioner believes that anonymization (redacting) of personal data or applying the requirement of necessary prior consent of the living affected person will not cause the archival information to lose its informational value about the practices of the communist regime, and therefore maintaining the existing access to it is not necessary. However, in the Constitutional Court's opinion the petitioner does not take into account that mere viewing of

archival record on the basis of an individual application, only for the researcher's needs – as was the case with the employee of the Ostrava branch of Czech Television, who dropped the publication of the obtained archive information – does not in and of itself mean there is a risk of damaging the dignity, honor, and good name of the affected person (the plaintiff in the original proceeding seeking compensation of damages). The plaintiff could have prevented this potential risk (and did) by not giving consent to publication of the information obtained, which the Ostrava branch of Czech Television was supposed to ask him for (and did) in accordance with Act no. 101/2000 Coll., when it was preparing to broadcast its intended program. The contested provision of the Archiving Act did not in any way eliminate or limit the plaintiff's ability to ask for verification of the information, to have the record put straight on the basis of his own statement (he could have attached the decision about his rehabilitation), reduction of the information, etc., or to completely prevent publication. Thus, unauthorized interference in the plaintiff's personality rights could not have occurred merely by viewing the archival record under the contested provision, but only through the possible actions of the Ostrava branch of Czech Television beyond the framework of Act no. 101/2000 Coll. – further processing for purposes of television broadcasting without the plaintiff's consent.

103. The position statement from the Office for Personal Data Protection no. 5/2009 "Publication of Personal Data in the Media," states that "... for application of the Act on Personal Data Protection to the field of journalism it is appropriate to distinguish two situations, specifically, preparation of reportages or articles and their subsequent publication." Whereas in the first case one can conclude that the activity of individual journalists when collecting materials for purposes of preparing a reportage or article will not be in conflict with Act no. 101/2000 Coll., because personal data are sought out and used in accordance with Art. 17 par. 4 of the Charter and the risk of unauthorized interference in the privacy of the affected persons in this phase is minimal, in the case of publication of a reportage or article there is – often irreversible – interference in privacy, and conflict with the right to disseminate information (per: Novák, D. Zákon o ochraně osobních údajů a předpisy související. Komentář. [The Act on Personal Data Protection and Related Regulations. Commentary.] Wolters Kluwer, 2014, pp. 111-112). It will be up to the petitioner to evaluate whether the Ostrava branch of Czech television disseminated the plaintiff's sensitive personal data and that should have been covered by prior consent of the defendant [sic?].

104. The "de-humanization of history" as the result of actually limiting access to identification of historical actors would lead to distortion and misunderstanding of the historical context and would thwart understanding the past in the context of understanding the fates and connections from stories of the resistance and opposition of particular people, which can have a liberating effect in relation to one's own story. The dividing line does not go across society between the just and the unjust; it goes inside each one of us, and each one of us must come to terms with his own past and the past of this country. Tolerating interference in one's privacy that consists merely of learning data about the affected person from the totalitarian period, accompanied by the ability to limit their dissemination, is not a disproportionate, constitutionally unacceptable requirement. The contested provision withstood this test as well.

105. Although it was the totalitarian state whose security services, by persecuting opponents of the regime, caused far-reaching devastation of relationships in the society, today's state, established on the democratic principles of the rule of law and respect to the fundamental rights of the individual, cannot free itself of responsibility for unauthorized interference in the

right to protection of data of the victims of that persecution or other persons, which could occur through violation of the responsibilities of archives connected with setting and applying conditions for viewing archival records that are set forth by the Archiving Act and the rules for research, or through abuse of open access to sensitive data by researches through their publication or other processing without the consent of affected persons.

106. The contested provision of the Archiving Act does not release the state from the obligation to protect information from the individual's most intimate personal sphere (sexuality, stigmatizing information about health or harm suffered) and especially vulnerable people (children, people with health disabilities). Effective supervision of observance of related obligations by an independent body, accompanied by palpable penalties if they are violated, is tied to the permissibility of limiting the right to protection of personal data under Art. 10 of the Charter, Art. 8 of the Charter EU and Art. 8 of the Convention.

107. This supervisory function is fulfilled primarily by the Office for Personal Data Protection, through carrying out supervisory activity and imposing fines for violations (up to CZK 5 million for natural persons) or for administrative misdemeanors (up to CZK 10 million for legal entities and natural persons who are entrepreneurs) under Chapter VII of Act no. 101/2000 Coll. (cf., e.g., the decision of the Office for Personal Data Protection, no. SPR-6601/10-21 of 31 January 2011 in the matter the Czech Republic - the Security Services Archive and the decision of chairman of the Office, no. SPR-6601/10-27 of 12 April 2011 in the same matter). For "ordinary" archives, supervision of observance of obligations in the archiving sector is also performed by the Ministry of the Interior, the National Archive, and regional state archives, under Chapter IV of the Archiving Act. Violation of obligations by a researcher under § 84-90 of Act no. 89/2012 Coll., the Civil Code, can be prosecuted by a complaint for protection of personality under Part Four of Chapter III of the Civil Code. In cases of serious harm to rights or justified interests of the affected person, criminal liability is possible for individuals, and as of 1 December 2016 (Act no. 183/2016 Coll., which amends Act no. 418/2011 Coll., on the Criminal Liability of Legal Entities and Proceedings against Them) also for legal entities, for the crime of unauthorized handling of personal data under § 180 of the Criminal Code.

108. If the Constitutional Court declared the contested provision to be unconstitutional, archival records containing information from the files of the security services of the totalitarian regime could be viewed – in the absence of consent from affected persons to earlier access – only after the passage of the protective thirty-year period from the moment when they were selected as archival records (provided they were not made public earlier). As certain files were taken into the archive funds only in connection with the establishment of the Archive of the Security Services in 2007, the relevant archival records would remain inaccessible until the second half of the 2030s, when virtually 50 years will have passed from the fall of the former regime, and when we can really expect a decline in social demand for learning about the totalitarian past. The level of reconciliation with this task is different in every society that has gone through such an experience; therefore the practical usefulness of information about the legal framework for access to these archival records in other countries is limited. Although with the passage of time the sensitivity and thus also the potential for abuse of archival records obviously declines, experience from post-war Germany shows that there was a phased shift in the interest in "contemporary history" to the generation that did not itself experience that past. It was only the following generation that, from the mid-1960s, showed a critical interest in coming to terms with the Nazi past of its country from this perspective. This could mean a revival of interest in the recent past among today's young

population in the Czech Republic, precisely in the period when the relevant archival records would be inaccessible if the contested provision were annulled. It is up to the legislature's discretion, how much it will take these facts into accounts.

109. The de facto closure of no small number of the collections of the Czech national archival heritage, which, after twelve years of unrestricted access, would take place due to annulment of the contested provision, when the scope of the previous access, not conditioned on consent of the affected persons, is practically impossible to determine retroactively, would stand against the concept of an open society that has the will to learn about its recent past and, with the help of that reflection, critically assess its own present. During the time that open access applied, thousands of users were able to view hundreds of thousands of archival records, make extracts, duplicates and digitalized copies of them. The de facto closure of archive collections containing information from the files of the former State Security has therefore already lost its justification. The Constitutional Court does not agree with the petitioner's opinion that archival records, by having personal and sensitive personal data redacted, will not lose their informative value about the practice of suppression of rights under the previous regime. Moreover, we cannot overlook the normative strength consisting of the fact that for 12 years now, archival records containing the personal data of individuals were studied, copied, and otherwise used, and therefore the "closure" of archives that would result from a derogatory verdict or an interpretation imposing an obligation to anonymize all personal date would at present mean only arbitrary interference with varying effects for various persons and researchers.

XI. Conclusion

110. The Constitutional Court concluded that in terms of the fundamental right to protection of personal data, under the contested provision mere viewing of archival records containing information about the activities of the security services of the totalitarian regime is legal, legitimate and proportional interference in that right, balanced vis-à-vis the fundamental right to access to information and justified in view of the significant social interest in authentic knowledge of the past. This interference does not attain the intensity of damaging human dignity, honor and good name, because it is not connected with the researcher's authority to publish the obtained information or otherwise process it without the prior consent of the affected person.

111. The contested provision of § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management, in the wording in effect until 30 June 2009, the adoption of which was justified by a strong public interest in understanding the practices of the security services of the former totalitarian regime through open viewing of archival records based on an individual application did not prioritize – and, placed as par. 11 in the present structure also does not prioritize – any one of the affected fundamental rights to the detriment of another in a manner that is constitutionally unacceptable. State bodies, primarily the Office for Personal Data Protection and the general courts, cannot give up their responsibility for effective review of the actions of archives and researchers in adopting measures under § 13 par. 1 of Act no. 101/2000 Coll., which are meant to prevent unauthorized or accidental access to personal data and unauthorized processing of the data, as well as other misuse. This applies, in particular, to protection of the most intimate personal sphere of the individual, which includes stigmatizing information about sexuality, state of health, or spiritual and mental disability of persons, information about minor children or similarly vulnerable persons, the need to protect whose privacy and dignity requires extraordinary attention. The contested provision of the Act thus

does not release the state of the responsibility to protect information from the most intimate sphere of the individual and especially vulnerable persons. State bodies must – again, primarily with regard to protection of sensitive data – also effectively prosecute violations and administrative offences of researchers in the event of not observing the conditions for viewing archival records that are provided by the Archiving Act and the rules of research, including thorough application of fines under Chapter VII of Act no. 101/2000 Coll. and penalizing instruments of civil and criminal law.

112. In view of the fact that the petitioner had active standing for the petition seeking a declaration of unconstitutionality only for part of the contested provision, concerning the words "archival records created before 1 January 1990 by the activities of the security services under the Act on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive," which the Constitutional Court did not find to be inconsistent with the constitutional order, the Constitutional Court, under § 70 par. 2 of the Act on the Constitutional Court denied that part of the petition. The Court then rejected the remaining part of the petition as being submitted by a clearly unauthorized person under § 43 par. 1 let. c).

Instruction: Decisions of the Constitutional Court cannot be appealed.

Brno, 20 December 2016

Pavel Rychetský, /signed/
Presiding Justice of the Constitutional Court

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Dissenting Opinion of Presiding Justice Pavel Rychetský, which was joined by Justices Ludvík David, Josef Fiala, Jan Filip, Jan Musil, Radovan Suchánek and Milada Tomková

I.

1. Under § 14 of Act no. 182/1993 Coll., on the Constitutional Court, I (together with the other judges named above) file a dissenting opinion to the reasoning of judgment file no. Pl. ÚS 3/14. Although I am of the opinion that the words "archival records created before 1 January 1990 by the activities of the security services under the Act on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive" in § 37 par. 6 of Act no. 499/2004 Coll., on Archiving and Records Management and amending Certain Acts (the "Archiving Act"), in the wording in effect until 30 June 2009, (the "contested provision"), was consistent with the constitutional order, I cannot agree with the essential grounds on which the majority decision of the plenum is based.

2. The contested provision cannot be interpreted to rule out further use of the heretofore valid and effective Act no. 140/1996 Coll., on Making Accessible Files Created by the Activities of the Former State Security, as amended by later regulations. This Act continues to apply fully in relation to these files, including the regime for protection of personal data set forth in § 10a. If it were otherwise, the result would be a situation where the content of these files could be made accessible to anybody, without any substantial limitations, without regard to informational self-determination of persons whose privacy, under the communist regime, was under the microscope of the regime's security services. In other words, in that case the

contested provision would result in denying constitutionally guaranteed protection from unauthorized interference in their private life.

II.

3. To start, I would like to emphasize that this petition from the Supreme Court (the "petitioner") is the first time – after almost 25 years since the fall of the communist regime – that the Constitutional Court has before it the question of public access to files of the former State Security and the sensitive data contained in them about persons who, for various reasons, were objects of its attention. Obtaining this data was part of the repressive practices of the state bodies at the time. The affected persons were followed or bugged. Those who were in contact with these persons were forced to testify about them. At that time, when the state interfered in all aspects of the lives of its citizens, the data thus obtained were one of the instruments of repressing their political or other fundamental rights and freedoms. Any information could lead to violence, loss of freedom, or at least palpable interference in personal life (consisting of, e.g. loss of employment or inability to obtain an education), whether of the person "of interest" or persons close to him or her. This repression could take various forms, and anyone could become the victim of it. The atmosphere of distrust arising from it was reflected in everyday human relationships. Any statement, even though made privately, could ultimately be turned against the speaker.

4. The result of several decades of this activity is extensive archival documentation, which includes data from various private spheres of a great number of people, including the most intimate. These sensitive personal data concern, e.g., personal and family life, state of health, political beliefs, religion and ethnic origin. The manner in which they were obtained was due to the totalitarian regime and incompatible with the values of a democratic, law-based state. At the same time, there is no guarantee that they are true. Citing untrue data in particular cases could have been in the interest of both the members of these services, and of the people who provided the information. Verifying them retroactively today is generally impossible or extremely difficult.

5. The activities of the security services of the time, whether we want to admit it or not, are part of our history, and therefore it is desirable for them to be subject to critical scrutiny. Nonetheless, the Constitutional Court's task in this proceeding was not to make value judgments about the past. Its obligation was to assess whether the contested provision, which partly governs the regime for giving access to documentation about these services, is or is not consistent with the constitutional order. Individual files still contain data from people's private sphere that were obtained without their knowledge or against their will. Access to them without the consent of these persons is undoubtedly interference in their personality rights. Therefore, our decision was meant to bring an answer to the question of whether the contested provision establishes such interference, and if so, whether that interference will stand as constitutional as regards the constitutionally guaranteed right to protection from unauthorized interference in private life.

III.

6. I also consider it desirable to state that the fundamental value, which the whole case concerns and which is not sufficiently emphasized in the judgment, is the informational self-determination of the affected persons. The constitutionally guaranteed fundamental right to protection of private life (to respect of privacy), as stated in Art. 7 par. 1, Art. 10 par. 2 and 3,

12 and 13 of the Charter of Fundamental Rights and Freedoms (the "Charter") and Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), includes protection of privacy in all its aspects. This concerns not only the traditional concept of privacy in its spatial dimension (protection of one's home in the wider sense of the word) and in connection with the autonomous existence and undisturbed formation of social relationships (in marriage, in the family, in society), but also the individual's ability to make his own decisions about whether, or to what extent, in what manner and under what circumstances facts and information from his private sphere are to be made accessible to other subjects [judgment of 22 March 2011 file no. Pl. ÚS 24/10 (N 52/60 SbNU 625; 94/2011 Coll.), point 29; judgment of 1 March 2000 file no. II. ÚS 517/99 (N 32/17 SbNU 229)]. The right to informational self-determination, thus defined [for more on this concept see judgment of 17 July 2007 file no. IV. ÚS 23/05 (N 111/46 SbNU 41), points 34 and 35; judgment of 1 December 2008 file no. I. ÚS 705/06 (N 207/51 SbNU 577), point 27; judgment file no. Pl. ÚS 24/10, points 29 to 35], together with personal freedom, freedom in the spatial dimension (domicile), freedom of communication and other constitutionally guaranteed fundamental rights, completes the personality sphere of the individual, which, as a completely essential condition for his dignified existence, and development of human life in general, must be respected and consistently protected (point of the last cited judgment).

7. Interference by the public authorities in the individual's right to informational self-determination, consisting of obtaining, storing, or processing information concerning the individual's privacy without his consent, or not providing effective protection against such conduct by a third party, can be permissible only on the condition that it occurs on the basis of the law, if it pursues a legitimate aim and if it can be considered proportional in terms of the ability to achieve that aim (the principle of proportionality applies here). The degree of permissibility will differ, depending on its nature, especially its sensitivity. It will be assessed most strictly in cases of information concerning "the most intimate personal sphere of the individual," including his sexuality, state of health, or physical or spiritual harm suffered, or with especially vulnerable persons (as stated in point 77 of the judgment).

8. The need to respect the cited conditions is reinforced by the fact that giving access to data from the private sphere of a particular person can palpably interfere in his life up to the present and irreversibly affect his name and reputation, status in society and social relationships, whether in the personal, professional, or other sphere. However much a particular piece of information may seem insignificant from a distance, in a particular environment its publication can have serious consequences, which it may not be possible to remove. In the case of the cited sensitive personal data there can be, for example, stigmatization of the affected person as ill or disabled.

IV.

9. As I indicated above, the key reason for my disagreement with the majority legal opinion is that it incorrectly assessed the relevant statutory framework, which affects giving access to the documentation of the former security services, including files created by the activity of the former State Security. Although only the contested provision was the subject of the Constitutional Court's review, answering the question of whether it establishes impermissible interference in constitutionally guaranteed fundamental rights and freedoms cannot be assessed in isolation. Any obligation – in this case the obligation of the affected person to tolerate against his will the giving of access to information from his private sphere to third persons – must always be assessed in the context of the entire legislative framework that

applies to the legal relationship in question. Only in that case can we say with certainty that it is the legal basis for a particular impermissible interference lies precisely in the contested provision, and that removing it would achieve a constitutionally compatible situation. I consider these starting points for review to be self-evident.

10. For assessing the content of the contested provision it was important whether the statutory framework at the time maintained viewing archival records created before 1 January 1990 by the activities of the security services under Act no. 181/2007 Coll., on the Institute for the Study of Totalitarian Regimes and on the Security Services Archive and Amending Certain Acts without any limitations, or whether it set forth some limitations. I point out that under the as yet unamended § 2 let. c) of Act no. 181/2007 Coll. a "security service" means the Federal Ministry of the Interior, the Ministry of the Interior of the Czech Socialist Republic, with the exception of sections engaged exclusively in activities pertaining to civil law and administration, , the National Police Corps, with the exception of sections functioning as state archives, the Corrections Force, Frontier Guards Forces, Ministry of the Interior Forces, the Intelligence Service of the Czechoslovak People's Army General Staff, the Internal protection Section of the Corrections Force of the Ministry of Justice of the Czech Socialist Republic and their predecessors during the time of the communist totalitarian power. The former State Security is included in this list as a component of the National Police Corps.

11. Except for § 37 par. 1 and 2 of the Archiving Act, in the wording in effect until 30 June 2009, which, in view of the exception contained in the contested provision does not apply, the Archiving Act does not set any other condition that would limit the ability to view the cited archival records for the purpose of protection the personal data of natural persons to whom these archival records relate. Such protection was also not provided by any of the remaining grounds for denying viewing under § 38 par. 1 of the cited Act, nor by any of the formal conditions defined in the rules for research. Despite that, one cannot conclude that no such limitation exists. It arose unambiguously from Act no. 140/1996 Coll., on Giving Access to Files Created by the Activity of the Former State Security.

V.

12. For explaining the cited conclusion, I consider it desirable to be more precise about those parts of the judgment that are the genesis of the relationship of Act no. 140/1996 Coll. and the Archiving Act (in particular, points 38 to 44 of the judgment). The first cited Act was adopted as a special regulation to the then-effective Act no. 97/1974 Coll., on Archives. Its original subject was the declassification of and making accessible files created by the activities of the former State Security. A "file" was understood as a discrete set of documents established and maintained by the State Security in the period from 25 February 1948 to 15 February 1990 and registered in the finding aids of the statistical and records department of the Federal Ministry of the Interior or the statistical and records division of the regional administrations of the National Police Corps or their predecessors [§ 2 let. a)]. Only the person on whom a file was kept could view the content of a personal file or a file with personal data [§ 2 let. b) and c), now § 3 let. b) and c)] (could be given access to a copy), and if that person died, his spouse and children, or his parents. If the file contained the name or false (cover) name of a person registered as a collaborator or member of the security service, the person could also be given access to his personal file or personnel (political clearance) file (originally § 1, now § 4). However, access was always given only to a copy in which specified personal data about other persons, especially about their private and family life, criminal activity, health and property, (originally § 6, now § 10a par. 1) were redacted.

13. The amendment introduced by Act no. 107/2002 Coll., with effect as of 20 March 2002, also applied the regime of giving access under that Act to certain other documents of the former security services. As newly provided by § 2 par. 1, the subjects of access and publication under this Act are preserved or reconstructed documents created by the activities of the security services in the period from 25 February 1948 to 15 February 1990, registered in period file or archive aids (registers) of these services or the central administrative bodies above them. A file was understood to be a discrete set of documents established and maintained by the security services and registered in the finding aids of the statistical and records department of the Federal Ministry of the Interior, individual administrations of the security services, finding or archiving aids of the archive of the Ministry of the Interior or the statistical and records divisions of regional administrations of the National Police Corps or their predecessors [§ 3 let. a)].

14. The circle of authorized persons was significantly expanded, because the right to receive access to copies of files with personal data [§ 3 let. c)] and also personal files or personnel (political clearance) files of persons registered as collaborators or members of a security service was also extended to all natural persons over the age of 18 (§ 5). The purpose of the Act was thus to make these files accessible not only to those on whom the files were kept, but to anyone who expressed an interest. Nonetheless, here too the condition applied of redacting specified data under § 10a par. 1 of Act no. 140/1996 Coll., under which "before making a document accessible to an authorized applicant, the archive shall redact in the copy of the document the date of birth and residence of other persons, as well as all data about their private and family life, about their criminal activity, health and property. If the document being made accessible is a political clearance (personnel) file of a member of a security service, all data in it about persons outside the professional and public activity of that member shall also be redacted." This provision, which regulates the protection of personal data of "affected and third persons," was in effect in the same version during the decisive period, and is still so today. At the same time – and legitimately – it denies similar protection to members of the State security.

15. Adoption of the Archiving Act in 2004 did not lead to annulment of Act no. 140/1996 Coll. This Act continued to govern (and still governs) giving access to archival records created by the activities of the former security services, itself later being amended several times. We can cite especially the amendment implemented by Act no. 181/2007 Coll., as a result of which the giving of access to the subject archival records was transferred from the competence of the Ministry of the Interior to the competence of the Archive of the Security services.

16. The contested provision set forth, for certain kinds of archival records, an exception from the general regime for viewing them, with a different purpose, based on their particular nature. In the case of "archival records that were already publicly accessible before the application to view them was filed" or "that were publicly accessible as a document before being selected as archival records," any subsequent limitation of access to them would obviously not make sense. As regards "archival records created before 1 January 1990 by the activities of the former State Security, as well as social organizations and political parties associated in the National Front," the determining factor was the requirement of understanding or "reconciliation" with the past. However, while in the case of archival records created from the activity of "social organizations and political parties associated in the National Front" the exception in question really did result in opening the materials to anyone;

in the case of files created by the activity of the former State Security, or files of the former security services, the provision only stated that the question of giving access to them is regulation by a different statute, specifically Act no. 140/1996 Coll.

17. In my opinion, the legal opinion which the majority of the plenum reached and according to which the contested provision set forth a new regime for access to the archival records of the former security services that ruled out further application of Act no. 140/1996 Coll. (the only way to understand the conclusions stated in points 44 to 52 of the judgment), cannot stand. First, it is not significant that the contested provision was adopted later. Applying the rule of priority for the later law (lex posterior derogat legi priori) – if we accept it even without express annulment of the earlier law – would come into consideration only on the assumption that there was no other solution for the conflict of two legal frameworks. However, in this matter not only do the two not rule each other out, but they supplement each other. More precisely, the fact that under the contested provision the viewing or archival records by natural persons was not conditioned on fulfilling the conditions under § 37 par. 1 and 2 does not yet mean that it could not be subject to conditions under Act no. 140/1996 Coll. That Act even today has the nature of a special regulation as regards the Archiving Act. The possibility of the opposite situation, that is that the contested provision would be applied as a lex specialis, is ruled out by the fact that a special regulation cannot empty (make obsolete) the general regulation.

18. Act no. 140/1996 Coll. has not ceased to apply to giving access to the archival records set forth in it, even in view of the transitional provision of § 82 par. 4 of the Archiving Act. Under that provision, archival records less than thirty years old that were made accessible under special regulations before the day this Act went into effect are subject to the regime for access under legal regulations that were valid before the day this Act went into effect. Although the Act, in a footnote, refers to Act no. 140/1996 Coll. as a special regulation, this reference cannot be understood as anything other than a mere example of a special law governing access to archival records. Any application of it to archival records to which the cited Act applies would not only be problematic, but would not make reasonable sense.

19. The cited transitional provision was supposed to stop any already accessible archival record from newly being considered inaccessible only because it was not over thirty years old. Of course, in the case of archival records created by the activities of former security services, that problem could not arise even theoretically. Even if it were possible to admit that, as of the effectiveness of the Archiving Act, the regime of the contested provision applied to them exclusive (that is, that no other special regulation would be applied), in view of the exception set forth by it, access to them would be possible regardless of their "age." In other words, the protective period of thirty years would play no role with these materials, so it would not even be necessary to decide whether it should or should not be applied on a transitional basis.

20. I do not agree with the conclusion that this transitional provision establishes, for the period until the archival records are more than 30 years old, a dual regime for viewing the archival records of the former security services. It certainly does not do so on the basis of whether a particular archival record was in fact made accessible to some person or not. In terms of § 82 par. 4 of the Archiving Act the significant thing is that a particular archival record was under the "regime for access" under a different law. If that was the case, that regime would continue to apply to without a time limitation. Thus, the consequence of applying this provision could be that archival records made accessible before the Archiving Act went into effect, which were less than thirty years old on the day it went into effect (i.e.

all that were created in the years 1975 to 1989), would remain under the regime of Act no. 140/1996 Coll., for which there are no reasonable grounds. The dual regime thus created clearly could not stand from the viewpoint of a rational legislature.

21. Finally, even the interpretation that the Archiving Act (or the contested provision) and Act no. 140/1996 Coll. are two independent, parallel regimes for viewing does not come into consideration. Of course, generally it cannot be ruled out that a certain consequence could be reached through two different statutory procedures, each of which pursued a different aim. However, in the present matter the purposes of these statutory frameworks are not fundamentally different. The judgment states that there is such a difference, but it does not further develop this conclusion (see point 47 of the judgment). On familiarizing one's self with the content of the two statutory frameworks, one cannot but conclude that the aim of both of them was to open access to the archival records in question for the wider public, for any purpose, including scholarly research. Neither § 5 of Act no. 140/1996 Coll. not § 34 et seq. of the Archiving Act specify the purpose for which natural persons can view archival records. Anyway, under the Archiving Act a researcher is any natural person. Both statutes differ only in the regime of personal data protection that applies to access to the archival records of the former security services. While the Archiving Act – in view of the contested provision, does not set forth any substantial limitations in this regard, Act no. 140/1996 Coll. accepts them only on condition that sensitive personal data are redacted under § 10a par. 1. Because the personal data protection thus set forth would be denied by accepting the first cited general regime, one can only repeat that in this case Act no. 140/1996 Coll. must be applied as a special regulation.

22. For these reasons, I am of the opinion that the contested provision did not exempt archival records created before 1 January 1990 by the activities of the security services under Act no. 181/2007 Coll. from the regime for access under Act no. 140/1996 Coll. Therefore, if while that was in effect a natural person applied for access to one of the archival records set forth in § 3 let. a) of Act no. 140/1996 Coll., the application was supposed to be assessed and the archival record made accessible according to this Act, including possibly redacting the specified personal data.

23. It is worth mentioning that the arguments summarized above basically correspond to how the issue of the relationship between the two Acts was handled by the Municipal Court in Prague in its decision of 27 November 2013, file no. 3 A 86/2011-89 (see point 46 of the judgment), which denied the complaint of the Archive of the Security Services against a ruling on a fine, imposed on it by the Office for Personal Data Protection. The Archive was alleged to have breached its obligation, in connection with making accessible files of the former Secret Security, by neglecting to redact personal data of persons outside the professional and public activity of a member of the State Security, as presumed by § 10a par. 1 of Act no. 140/1996 Coll.

VI.

24. Thus, in summary, the contested provision set forth that viewing archival records created from the activity of the former security services is not subject either to the condition of thirty years passing from the creation of the archival records, or to the condition of preliminary [sic] consent with the viewing from a living person about whom the archival record contains sensitive personal data. Thus, under the Archiving Act, this viewing is not subject to further limitations in terms of protection of these data. Of course, that does not rule out applying a

different regime for access to them under a special statute. Because in this case the regime is governed by Act no. 140/1996 Coll., the exception described above cannot be seen as a statutory basis for constitutionally impermissible interference in the privacy of affected persons. Any objections in this regard can be directed only against Act no. 140/1996 Coll., or its individual provisions. This Act would ultimately also be applied if the contested provision did not apply at the time in question.

25. For completeness I add that the relationship between the cited Acts, thus defined, does not call into question the petitioner's active standing, because the contested provision completes the statutory basis for viewing files of the former State Security. Within its judgment, the petitioner verified in a reasonable manner that the assessment of the extraordinary appeal on points of law it adjudicated – with regard to the petitioner's interpretation of sub-constitutional law – depends on answering the question of the constitutionality of the contested provision. A holding that it is unconstitutional would have a direct influence on the assessment of the legality of the actions of the Archive of the Security Services in the plaintiff's case, and thus also on the result of the proceedings on points of law.

26. The logical consequence of these deliberations is the conclusion that the contested provision was not inconsistent with the right to privacy, and analogously the right to informational self-determination, arising from Art. 10 of the Charter and Art. 8 of the Convention. Thus, I do not consider the petition to declare it unconstitutional to be justified.

27. I did not further consider the question of whether, in the decisive period, Act no. 140/1996 Coll. provided (and still provides) sufficient protection from unauthorized interference in the privacy of the affected persons. Likewise, I did not assess whether, on the contrary, it established (or establishes) impermissible limitation of the right to information. I could turn to such deliberations only if the present petition was aimed directly at this Act.

VII.

28. While, for the abovementioned reasons, the contested provision does not establish interference in the constitutionally guaranteed right of persons who were of interest to the former security services, to protection from unauthorized interference in private life under Art. 10 of the Charter and Art. 8 of the Convention, the question of the permissibility of such interference is superfluous by the nature of the matter. Nevertheless, in the last part of the dissenting opinion, I would like to consider it as well, but in connection with the interpretation that the majority of the plenum reached. I point out that, according to the judgment, archival records created before 1 January 1990 by the activities of the security services under of Act no. 181/2007 Coll. were made accessible in the period through 30 June 2009 (as is the case now too) exclusively in the regime of the Archiving Act. In accordance with the contested provision, anyone who applied had (and still has) access to these archival records.

29. If one starts with the cited interpretation of the contested provision, it is obvious that its content is the obligation of a person whose sensitive data are the content of archival record that is made accessible to tolerate limitation of his informational self-determination, consisting of the fact that anyone can, without his consent, view that archival record and familiarize himself with its content. Constitutional law review of that provision should thus concentrate on answering the question of whether that obligation is permissible interference in the affected person's fundamental right to informational self-determination, or, in the wider

sense, to protection of his privacy. For that purpose, the test of proportionality was supposed to be duly conducted, in which it would be assessed whether that obligation pursues a legitimate (constitutionally approved) aim of limiting a fundamental right, and, if so, whether it is a provision that is suitable (the suitability requirement) for achieving that aim, and further, whether that aim cannot be achieved by a different method, which would be less harmful to the affected fundamental right (the requirement of necessity), and finally, whether the interest in achieving that aim within a certain legal relationship outweighs the affected fundamental right (proportionality in the narrow sense). The result of that test should have been comprehensive and understandable arguments that would lead to a conclusion about whether the contested provision can stand from a constitutional law viewpoint or not.

30. With all due respect to the different legal opinion of the majority of the plenum, I must point out that the adopted judgment did not meet these requirements. The test of proportionality is performed inconsistently in it, which makes its entire legal argumentation unclear and difficult to grasp. Of course, this reservation that I have requires more detailed analysis.

31. The adopted judgment consistently distinguishes between "viewing" archival records (giving individual access to them) and "publication" of their content (points 89, 90 and 94 of the judgment), and identifies as interference that can take place under the contested provision only the "viewing" of researchers, allowing them to become familiar with the sensitive personal data of affected persons. However, in this regard there is very little emphasis on the fact that a researcher under the Archiving Act is any natural person, and his authorization to view materials can be exercise for any purpose. That is necessarily reflected in the question of what aim the interference actually pursues. Here the judgment offers several alternatives. If I overlook a number of phrases, the use of which somewhat erases the line between an essay and justification of a court decision ("social catharsis of the past," "de-personalized social self-reflection"), I conclude that according to the judgment the aim of the contested provision is "understanding the past" and "reconciliation with it." The point is to permit researchers to work with the subject documentation in its full extent, so that they can correctly understand its full context.

32. I do not doubt that the contested provision pursues this aim as well. However, I emphasize that viewing archival records is not tied only to that aim, but that it can take place for any other aim. Objectively speaking, in the wording of the relevant provisions of the Archiving Act, including the contested provision, one can conclude that the purpose of the reviewed interference, that is, the obligation of the affected person to tolerate the viewing of materials and related knowledge of his sensitive personal data by a third person, is fulfillment of the right to information in the widest sense of the word. Thus, the aim presumed by the judgment, to permit research that is necessary "for objective historical understanding of the practices of the former regime and naming their organizers and persons performing them, but also for the education of the citizens, leading them to make an independent judgment of the need to recognize the signs of authoritarian tendencies in society in time, in order to strengthen the foundations of a democratic, law-based state, development of a civil society, and fulfilling the idea of justice" (point 100 of the judgment), is, in terms of the contested provision, only a partial aim, which – as will be stated below – is also reflected in the further steps in the test of proportionality. Nonetheless, in accordance with the judgment it will be necessary to take this narrower concept as a starting point. At the same time, I consider "understanding the past," on a general level, to be a legitimate aim, pursuing the fulfilment of the constitutionally guaranteed right to information.

33. As regards the suitability of the subject interference for achieving the pursued aim, it is obvious that the unlimited ability to view the subject archival records permits "understanding the past". Thus, we get to the next step of the text, which is assessment of the necessity of the interference, that is, whether the aim pursued can also be achieved in another manner that would be less harmful to the affected fundamental right (point 101 of the judgment).

34. The fact that such a less harmful manner is possible is indicated by the overview contained in the judgment of the legislative frameworks in other countries that have similar experience with non-democratic regimes (see points 29 to 36). That comparison should contain a conclusion that none of these countries made impossible public access to archival records related to the activity of their former repressive bodies, but that approach was never completely unrestricted. In all cases, to one or another degree emphasis was placed on the requirement to protect sensitive personal data of persons who, for some reason, became the objects of the interest of the former repressive bodies. The specific form of the protection depended on whether the data were to be inaccessible (typically, redacted, e.g. Germany, Slovakia) or made accessible on condition of the prior consent of the affected person, or under conditions limiting the ability to misuse them (e.g. Spain, Austria, Slovenia). In that case, access was given only to a certain group of persons who showed a justified interest in it (for example, scholarly research). Unlimited access to these archival records, which was affirmed by the judgment, is an idiosyncrasy of our legal order, which has no equivalent in the surrounding countries.

35. Assessment of the need for the subject interference is performed only partly in the judgment. Its key components are set forth only after assessment of the test of proportionality as a whole (!), in those parts of the reasoning that summarize the legal guarantees preventing misuse of sensitive personal data that the researcher learns when viewing the archival record in question. Briefly, this concerns the ability to seek protection through a civil law complaint for protection of personality, and also the state's obligation to prosecute and penalize violation of obligations under Act no. 101/2000 Coll., on Personal Data Protection and Amending Certain Acts, as amended by later regulations, or under relevant criminal regulations (point 107 of the judgment). These means are supplemented with the archive's obligation to instruct a researcher in advance about the consequences of unjustified handling of the data (point 96 of the judgment).

36. The weak side of this reasoning is the inadequate analysis of the fact that any natural person, for any purpose, has the right to view an archive and familiarize himself with its content. More precisely, the cited means are to be used to impose penalties if a researcher disclosed to another person, persons, or the public certain sensitive personal data which, however, any of the recipients of that disclosure can find himself without any restrictions in the relevant archive. In this situation, I ask myself what is actually supposed to be the object of the offence that the researcher is to have committed by his actions. I am afraid that the functionality of this solution is more on the level of a wish than a realistic expectation. One can hardly protect the sensitive personal data of affected persons by prosecuting disclosure of those data to third persons to whom the legislative framework itself accords the right to obtain these data by viewing the archival records.

37. These doubts are not dispelled by the fact that the state's obligation to provide protection to information from the individual's most intimate personal sphere and to especially vulnerable persons arises directly from the constitutional order, specifically Art. 10 of the

Charter and Art. 8 of the Convention (point 106). Even emphasis on the direct application of these provisions, which could, in this regard, be merely of the nature of not permitting viewing archival records, cannot lead to a solution of that dilemma. The fundamental problem is in the statutory framework itself, specifically in the lack of statutory conditions for viewing that would limit access to the archival records in question.

38. I am convinced that the indicated possibility of private law or public law penalties could prevent the abuse of sensitive personal data obtained by viewing archival records only if the statutory framework tied access to these data to a certain specific purposes and at the same limited the circle of authorized persons. This is a standard requirement that can be documented not only by reference to the already cited comparison of foreign legislation. We can find this solution in many cases even in our legal order, e.g. in connection with access to classified information or access to sensitive personal data arising from the exercise of powers entrusted by statute. Access to certain information is simply given only to a limited circle of persons, who are bound by an obligation of confidentiality, violation of which can be penalized.

39. However, the judgment does not contain these deliberations at all. It does not in any way consider whether it is "necessary" for any natural person whatsoever to have unlimited access to the archival record in question, or whether an applicant for access to these archival records should have to at least demonstrate in some way that he has a justified interest in viewing them (e.g. scholarly research). The contested provision does not in any way distinguish whether the researcher is concerned with "knowledge of the past" in terms of the full relevant context, or writing an article about the affairs of once-famous people for tabloid newspapers, or acquiring discrediting information about a particular person that "could be useful at the right time." The judgment also does not address the question of the reasons for which, in such cases, the consent of the affected person should not be required. The conclusion that the adjudicated interference will withstand the test of proportionality as necessary is therefore unpersuasive and at the very least premature, if not even – as the foregoing indicates - incorrect.

40. For the same reason I also consider premature the conclusion that the contested provision, or interference in the right to informational self-determination performed on its basis, will withstand assessment of proportionality in the narrower sense. In my opinion it is precisely this step whether there is room to consider the importance of the fact that in our state for twelve years there was de facto unlimited access to these archival records (point 109 of the judgment). Of course, I see an uncrossable boundary in the fact that interest in "understanding the past" cannot predominate if the consequence of the regime for viewing established by the Act would be interference in the dignity of the affected persons. A legislative framework that leaves access to their sensitive personal data open to anyone at all undoubtedly establishes such interference, because – simply put – it permits making their most intimate personal sphere the object of research by the wider public, with all the negative consequences that can arise from that for the affected person and his private life.

VIII.

41. In conclusion, I would like to emphasize again that in my opinion, in relation to viewing archival records created before 1 January 1990 by the activities of the security services under Act no. 181/2007 Coll. the regime of access under Act no. 140/1996 Coll., including the personal data protection it sets forth will continue to apply. This rules out the conclusion that

impermissible interference in the right to informational self-determination could take place on the basis of the contested provision. However, if it were possible to ascribe the contested provision a different meaning, that on its basis no limitations will be applied in relation to viewing the cited archival records, I could not agree with the legal opinion of the majority of the plenum that it is constitutional. Making these archival records accessible for purposes of historical research could also be implemented in a different manner that would be less harmful to the fundamental rights of the affected persons, as a result of which this provision cannot be considered constitutional and would have to be declared unconstitutional.

42. By confirming unlimited access to archival records containing sensitive personal data, moreover obtained through fully impermissible abuse of power by the former repressive bodies, the Constitutional Court judges voting with the majority absolutized an uncertain interest in "reconciliation" with the past without any limitations whatsoever, even where the very essence of the individual's right to private life is involved. The idea that a suitable means for such "reconciliation" is the unlimited access to the results of several decades of interference in the privacy of persons "of interest" is incompatible with the importance I ascribe to human dignity and the affected fundamental rights. This is de facto a denial of the right of these persons to informational self-determination. Therefore, in this section as well I cannot agree with the majority's reasoning.

Brno, 20 December 2016

Pavel Rychetský /signed/
Ludvík David /signed/
Josef Fiala /signed/
Jan Filip /signed/
Jan Musil /signed/
Radovan Suchánek /signed
Milada Tomková /signed/