

News update:

Seven Key Problems Remain in the Draft European Convention on Access to Official Documents

3 March 2008: After the final drafting session of the Group of Specialists in Strasbourg (12-15 February 2008), the current version of the draft European Convention on Access to Official Documents, when read together with the text of its Explanatory Memorandum, continues to have serious problems and fails to guarantee a full right of access to information in seven principal ways:

1. Failure to include a **clear opening guarantee of the right** of access to official documents and the principle of publicity.
2. Failure to include information held by **legislative bodies** under the scope of the right of access to official documents;
3. Failure to include information held by **judicial bodies** under the scope of the right of access to official documents;
4. Failure to extend the right of access to official documents to private bodies that exercise **public functions** or operate with public funds;
5. Absence of a requirement that states set statutory **maximum time-limits** within which requests must be processed;
6. Absence of a guarantee that when requests for information are denied, the requestor will have **access to an appeals body** which has the power to order public authorities to disclose official documents;
7. Failure to define which provisions of the Convention may or may not be subject to **reservations**.

From a human rights perspective the future Convention – which the Explanatory Memorandum recognises will be the “first international binding instrument that recognises a general right of access to official documents held by public authorities” – should ensure the basic principles of any fundamental right, namely that the right applies to all branches of government, is subject to a binding appeals mechanism, and can never be restricted where there is a prevailing public interest against the restriction (the tests of proportionality and necessity in a democratic society established in the European Convention on Human Rights and consistently upheld by the European Court of Human Rights).

Access Info Europe, Article 19 and the Open Society Justice Initiative are seriously concerned that the proposed draft of the future Convention still sets standards that fall below prevailing law and practice in Council of Europe member states, and is below the standards of other international instruments in this area, including the Aarhus Convention on Access to Environmental Information, and the European

Union's Regulation (EC) No 1049/2001 on regarding Public Access to European Parliament, Council and Commission Documents. For example, the Aarhus Convention guarantees a right to "information" (rather than the more limited concept of "documents"), establishes maximum time-frames for responding to information requests, and requires a binding appeals mechanism. The European Union rules also apply to the legislative branch (European Parliament) – an essential requirement if the public is to participate in decision-making and know what laws and rules are being developed.

Comparative study of laws in the Council of Europe region confirms that most of the legal regimes of member states establish a broad definition of access to information and almost always apply to the legislative branch of government. One recent survey found that out of 26 European countries, relevant legislation in 22 of those countries refers to access to information rather than documents. Of these 26 countries, 21 grant a right of access to information held by the legislative branch, and others have specific legislation on publicity of legislative acts. For example, the legislation of Macedonia, the last country in the region to adopt an ATI law (2006), encompasses the government and administration at national and local level as well as legislative bodies and judicial authorities, private bodies (natural and legal persons) that perform public functions and all other bodies and institutions that are established by law (independent commissions, regulatory bodies, etc.).

Solutions and Problems in the Explanatory Memorandum

The civil society observers note with disappointment that only two of the concerns raised earlier by civil society groups, several Information Commissioners and the OSCE were addressed in the Explanatory Memorandum (EM), and even in these cases, guarantee of these principles can only be assured if included in the text of the treaty itself:

1. The EM confirms that a "denial" of a request includes a range of explicit and implicit refusals, including unjustified failures to provide access in a timely fashion or in the form preferred by the requestor.
2. The EM provides guidance to states on the classes of information that should be made available on a proactive (ex officio) basis, but does not make this a firm requirement.

While we welcome inclusion of these points in the EM, they should also be included in the text of the treaty itself. In addition, we note that the EM fails to clarify the meaning of some key phrases in the text of the Convention such as the possibility that only "authorised bodies" shall be required to answer requests for information, leaving them open to (mis)interpretation and possible restrictions on access.

Of particular concern, the EM appears to undermine the requirement to apply the harm and public interest tests each time an exception to the right of access is applied. The EM concedes that states are entitled to a margin of discretion that would permit national law to establish absolute exemptions – a possibility that, in our view, cannot be read in the text of the Convention itself – and could allow for entire classes of information to be exempted from the public domain without consideration of the public interest in their publicity. In other words, absolute statutory exceptions would permit States Parties to avoid application of the tests of proportionality and necessity in a democratic society which are fundamental to the European Human Rights system. The EM should be modified to assert this principle.

Access Info Europe, Article 19 and the Open Society Justice Initiative call on the CDDH, which will consider the draft text of the Convention and the Explanatory Memorandum on 26th March, to take these concerns into consideration and to reform the treaty accordingly to ensure that it provides genuine guarantees for the right of access to information.

Notes

1. Other bodies that have called for improvement to the draft Convention include the Organisation for Security and Cooperation in Europe (OSCE), and the Information Commissioners of Estonia, Germany, Hungary, Ireland, Macedonia, Serbia, Slovenia, and the UK. In October 2007 a letter calling the draft Convention to be improved was submitted to the Council of Europe – it contained the signatures of over 250 civil society groups and 270 individuals.
2. Serious concerns have also been expressed by the Steering Committee on the Media and New Communication Services (CDMC) at its meeting on 27 to 30 November 2007. The CDMC report states:

40. It noted, in particular, development in respect of a binding instrument on access to official documents (draft prepared by DH-S-AC, reporting to the Steering Committee for Human Rights).

The CDMC noted that, contrary to what it had previously suggested (see paragraph 34 of the report on its 4th meeting, 28 November to 1 December 2006), the DH-S-AC favoured the approach of defining in a somewhat restrictive manner official documents, instead of adopting the broader approach followed in Recommendation No. R (81) 19 on the access to information held by public authorities. Moreover, the approach followed by DH-S-AC appears not to take account of recent developments in international jurisdictions. More particularly, concern was expressed at the rather low common standards foreseen in the draft text.

The CDMC recalled that access to information is essential in ensuring accountability in a democratic society and to allow media to fulfil its watchdog function. This position was maintained by member state representatives as well as by other participants in the meeting (e.g. the Conference of International Non-Governmental Organisation and the OSCE) and observers representing media professional organisations.

The CDMC decided to bring its views to the attention of the Steering Committee for Human Rights.

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