



OPEN SOCIETY
JUSTICE INITIATIVE

Briefing # 2 regarding the elaboration of a
Council of Europe treaty on access to official documents

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Briefing # 2 - Issues with Mechanisms and Monitoring Body

Through this Briefing, ARTICLE 19 and the Open Society Justice Initiative, as organisations with observer status at the Council of Europe's Group of Specialists on access to official documents (DH-S-AC), together with Access Info Europe, seek to make a constructive contribution to the process of drafting a binding treaty in the area of access to information.

The second Briefing that we are submitting to the group of specialists, this analysis covers issues that have arisen in discussion in previous drafting sessions and refers to the language of the draft treaty as it stood after the last meeting of the group of specialists in November 2006.

1. Consultation of Original Copies - Article 7

An important part of the language in Recommendation 2002(2) is that consultation of the original document is free of charge. This is also reflected in Principle VII of the Recommendation which provides for inspection of original documents or copies, according to the preferences expressed by the applicant. The right of access to the original gives requestor the right to inspect actual documents and other support media in the format in which they are held by public authorities (barring technical reasons or the delicate physical state of the paper or other support material).

Inspection of originals is important for a number of reasons including that a researcher may wish to inspect a number of documents before selecting those for which he or she pays for copies. In addition, such inspection of originals may be important where there is some concern that the information being provided to requestors does not represent the entirety or an exact copy of the originals held. There should of course be the possibility to exclude inspection of originals where there is likely damage to physically delicate documents such as very old papers or for other technical reasons.

Recommendations:

- For these reasons, we recommend that the word "original" be retained in the text, in both Article 7 and Article 8 of the future treaty.

- We recommend adding some language such as that in the French law which provides the condition "unless the preservation of the document makes it impossible to do so".

Article 7.1 would then read:

When access to an official document is granted, the public authority should provide access to the original or provide a copy of it, ~~taking into account, as far as possible,~~ **respecting** the preference expressed by the applicant **unless the preferred format if it is unreasonable on account of technical difficulties [or obstacles]**.

If so requested, an authority should allow inspection of the original, unless preservation of the document or other technical reasons make this impossible, in which case the requestor shall be permitted to inspect a copy of the original free of charge.

2. Principle of Gratuity - Comparative Analysis - Article 8

Access to information as a right entails a number of fundamental elements including that exercise of the right should, in principle, be free of charge to the individual who exercises it.

The language being considered for the future Council of Europe treaty currently reads:

Article 8 - Charges for access to official documents

1. Consultation of ~~original~~ official documents on the premises should, in principle, be free of charge.
2. A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs [incurred by the public authority] **[of copying]**.

The principle of gratuity in exercise of the right to information was already clearly established in the Council of Europe Recommendation 2002(2), which states at Principle VII that:

1. *Consultation of original official documents on the premises should, in principle, be free of charge.*
2. *A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs incurred by the public authority.*

The bulk of European access to information laws adhere to this principle, with no charges for filing requests and minimal charges for obtaining copies. In compliance with the requirement that consultation of the original should be free of charge, many countries only impose costs for copies (and no costs where the information is provided electronically). France is typical of this with the following structure:

Access to administrative documents may be given:

- a) on-the-spot, free-of-charge consultation, unless the preservation of the document makes it impossible to do so;
- b) provided that reproduction does not adversely affect the preservation of the document, by the supplying of an easily intelligible copy on a medium identical to the one used by the public service or on paper, according to the requesting person's

preference within the limits of what is technically possible to the public service and at the requesting person's own expense, without such expense exceeding the reproduction cost, under such conditions as provided for by decree;

c) electronically and free-of-charge, if the document is digitised.

(Article 4 of the law of July 17, 1978).

Other countries, including Albania, Armenia, Bulgaria, Bosnia, Estonia, Georgia, Finland, Latvia, Macedonia, Montenegro, Norway, the Netherlands, Portugal, Romania, Serbia, Slovakia, Slovenia, and Sweden, follow this pattern and comply with Recommendation 2002(2); namely their laws provide that no fee may be charged for requesting information, and only actual costs of copying may be charged. Many laws also establish that postage charges may be covered if material is provided by post rather than being collected.

There are two exceptions to this predominant picture:

- In Hungary the law allows for a charge for preparation of the response, but this is rarely applied.
- In the Czech Republic it is possible by law to levy a charge for “extraordinarily extensive information retrieval” but this is rarely imposed.

In all the above countries, where requests are complex or voluminous or require consultation with third parties, the law provides for extensions of the time period for answering, but this can never be a ground for refusal of the request.

In practice, in all the aforementioned countries, the increasing reliance on electronic delivery of information means that exercise of the right of access to information is completely free of charge.

In only one country, the United Kingdom, is the time/cost burden for the public authority in answering a request a permissible ground for refusing that request. Recent proposals in the UK to extend this regime and introduce new elements into the calculation of time spent (such as the amount of time spent on considering whether to refuse requests) were roundly criticized by a large number of MPs and civil society groups. As a result, the British government seems to have stepped back from this proposal, but currently retains the cost limit (£450 for local government and £600 for central government, being equivalent to between 2-3 days of the total time of the public officials that handle the request) as a ground for refusals.

Other Regimes

The position on costs taken by the Council of Europe Recommendation 2002(2) and confirmed by the law and practice of the majority of Council of Europe member states that have access to information laws is also consistent with law and practice in other countries around the globe. Mexico (an observer at the Council of Europe) adopted an access to

information law in 2002. Highly praised as a model for the Americas, this law does not require payments to be made for anything more than the copies, and since much information is distributed electronically it is given out free of charge – as many as 80% of responses to requests at the federal level in Mexico are delivered electronically. Elsewhere in Latin America, a similar regime obtains in Colombia, the Dominican Republic, Ecuador, and Peru (even though not all these countries have developed electronic systems and it is normal that requestors have to pay for copies).

In Canada (another Council of Europe observer), charges are levied but they are minimal. There is a CAN \$5 filing fee (about €3.50) and after the first five hours there is a charge of CAN \$2.50 (about €1.75) per person per quarter hour of search and preparation. In addition, in Canada, fees can be waived, and there is a mechanism to appeal the fees. We note that the costs imposed here are more symbolic costs, the hourly rate is nominal and designed not to have a chilling effect on the exercise of the right to information.

In the United States (also a Council of Europe observer), the picture is more complex. There is no fee for filing a request, but sometimes charges are imposed for searching. In the US, FOIA requestors are divided into three categories: commercial requestors; representatives of the news media and educational and scientific institutions; and “all other” requestors.

- Commercial requestors can be charged fees both for searching and reviewing of documents (this is an hourly rate, based on the seniority of the government official who does the searching and/or reviewing of the documents for release, as expressed in each agency’s published fee schedule), as well as ordinary duplication fees.
- News media and educational requestors are charged only for duplication, and cannot be charged at all for search and review costs incurred by the agency.
- All other requestors are charged search fees and duplication only, but they generally receive the first 2 hours of search time for free (this means in most cases for simple requests that there will be no charge).

Usually in the US, any fees are paid after the records have been processed. However, if the estimated fees are more than \$250 (c. €185), the requestor may have to pay in advance. Agencies should ordinarily charge search fees only to the first requestor who seeks particular materials; these fees should be waived for any subsequent requestors, because the search has already been conducted.

Cost is not a lawful ground for refusing requests in the US. Given that the charges are generally levied on the commercial users, this is not perceived as a significant problem in the US in terms of the overall burden on information requestors. Furthermore, the US model has a public interest consideration so that requestors acting in the public interest cannot be charged. Indeed, several significant information requests of recent time have been voluminous,

requiring hundreds of hours to process and manifestly resulting in information of critical public interest:

- an FOIA request filed by the American Civil Liberties Union that resulted in disclosure of information showing abusive Pentagon and FBI surveillance targeting peaceful protest groups in the United States;
- a request for information about detainees held by the United States overseas which exposed evidence of widespread and systemic mistreatment of prisoners in US detention facilities in Guantanamo Bay, Afghanistan and Iraq;
- a request for information regarding the use of torture filed in October of 2003, which has already resulted in the release of over 100,000 pages of documents.

Recommendations

Access Info Europe, Article 19 and the Justice Initiative recommend that:

- The Council of Europe retain in the treaty the principle established by the Recommendation 2002(2) that filing requests and on-site consultation of documents should be free of charge;
- The treaty should mention specifically that consultation of the “original” document should be free of charge;
- Provision of material electronically, such as by e-mail, should be free of charge;
- The Council of Europe retain in the treaty that the only permissible costs to be levied are actual costs of copying of the document (which is understood to include copying on other media at actual cost price) and postage charges where material is delivered by post or other delivery method.

As a result, a revised Article 8 would read:

Article 8 - Charges for access to official documents

1. Consultation of original ~~official~~ documents on the premises should, ~~in principle,~~ be free of charge.
2. Provision of information electronically via the Internet (by e-mail or other means of electronic delivery) should be free of charge.
3. A fee may be charged to the applicant for a copy of the ~~official~~ document, which should be reasonable and not exceed the actual costs ~~{incurred by the public authority}~~ {of copying}
4. A fee may be charged to the applicant for postal or other delivery of information if the applicant chooses not to collect copies in person; postal charges should be levied at actual cost.

3. Review procedures - Article 9

Article 9 of the working document defines the rights of the requesters when access to official documents is officially refused, or no decision is taken within the prescribed timeframe:

Article 9 - Review procedure

1. An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Article 7 6, paragraph 3 4 ~~should have access to a review procedure before a court of law or another independent and impartial body established by law~~ **should always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review.**
2. An applicant should **also** always have access ~~to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1 above~~ **to a review procedure before a court of law or another independent and impartial body established by law.**

Article 9, then, guarantees the requester two forms of redress against denials of access: a reconsideration by a public authority, and/or an appeal to a court or other independent body.

Domestic access to information laws in the Council of Europe area typically provide for judicial or quasi-judicial appeals to one of three types of mechanisms: the ordinary administrative courts, a dedicated freedom of information commission or the ombudsman. In some countries, the requester is required to, or has the option to, seek reconsideration from the public body in question before lodging an appeal.

Although a dedicated information commission offers significant advantages, we support the agnostic drafting of Article 9, provided it specifies, in more exact terms than is currently the case, the minimum standards of accessibility, promptness and effectiveness which a review procedure must meet, leaving the choice of means to the domestic authorities.

Some of the problems we most commonly observe with review procedures, and which we believe the Convention should guard against, are:

- **Undue delay in the handling of appeals.** While delays are a common inconvenience in most judicial systems, they are especially insidious in access to information cases. As the European Court put it, information is “a perishable commodity and to delay its

publication, even for a short period, may well deprive it of all its value and interest”.¹ For instance, an MP may often need information before a vote takes place or a journalist before the deadline for a particular story passes.

At the very minimum, Article 9(2) should require appeals to be processed expeditiously, as is already the case for reviews under Article 9(1). Given the prevalence of unacceptable delays, however, we believe a more specific safeguard is necessary, such as a straightforward time-limit within which appeals must be handled. Exceptions could be recognised in cases where the requester’s behaviour indicates the matter is not urgent – such as where the appeal was not filed within a certain number of days of refusal.

- **Excessive cost of procedure.** Compared to other administrative procedures, appellants in access to information cases will often have little financial or personal interest in pursuing their claim. A media outlet or NGO performing its public watchdog role is unlikely to be willing and able to invest the same resources in an appeal against a denial of information as, say, a business in challenging the denial of a licence. Court fees and legal costs may therefore exert a strong chilling effect on the exercise of the right to access information.

Safeguards should be added to Article 9(2) to ensure that appeals procedures are inexpensive. We believe no fee should be payable to appeal a refusal to provide access to information. Moreover, appellants who are unsuccessful should in principle not be ordered to pay the legal costs of the opposing side. An exception to this principle could be recognised in cases where the appeal is vexatious or manifestly unfounded.

- **Inadequate adjudication powers.** Appeals will inevitably involve claims and counterclaims about the sensitivity of the requested information and the harm that would result from its disclosure. In order to reach a decision, an appeals body must have adequate powers to ensure evidence is made available to it. These include in particular the power to inspect the withheld documents *in camera*, to compel the production of evidence and to compel witnesses to testify.

We accordingly recommend specifying in Article 9(2) that appeals bodies will possess these powers.

- **Ineffective remedies.** In some countries, a successful appeal does not result in prompt release of the withheld information. Sometimes administrative courts lack the power to order disclosure, and must instead annul the decision to refuse access and remand

¹ *The Observer and Guardian v. United Kingdom*, 26 November 1991, Application No. 13585/88, para. 60.

the matter to the public body for a new decision. In other cases, the penalty for non-compliance with a disclosure order is simply too low to impress the public body.

We recommend specifying in Article 9(2) that the body to which appeals are made shall be equipped with the power to order prompt disclosure of documents, as well as with such powers as are necessary to ensure compliance with its decisions.

- **A policy of disclosing information only once an appeal has been filed.** Public bodies sometimes use appeals procedures as an informal extension of the time-limit within which they are required to respond to requests for information. They are able to do so with impunity if domestic law considers an appeal to have become moot upon the release of the requested information, and the requester bears the cost of the procedure.

The Convention could foil this kind of behaviour either by specifying that the release of information in the course of an appeal will not prevent a decision on the merits, or that requesters shall be entitled to costs if the information is released after an appeal has been lawfully filed.

- **Applicant loses the right to appeal by waiting for overdue decision.** Some domestic access laws treat failure to respond to a request for information within the prescribed time-limit as a refusal to provide access (this is also known as negative administrative silence). Where the requester nevertheless continues to wait for a response, but domestic law also stipulates a timeframe within which appeals must be filed, s/he may eventually find the time window for appealing has lapsed.

To prevent this from happening, the Convention should stipulate that any time-limit for filing an appeal shall not begin to run until a decision has been communicated to the requester in conformity with the prescribed procedure. In cases of administrative silence, the requestor should have the right to appeal from the moment the time-limit for responding has passed and for an indefinite period without the appeals period expiring.

Recent Council of Europe treaties, such as the Criminal and Civil Law Conventions on Corruption, include substantive and procedural guarantees similar to those we recommend here. Some of these include provisions on granting courts authority to compel provision of evidence or grant adequate remedies in domestic proceedings. For example, Article 23 of the Criminal Law Convention on Corruption requires states parties to “empower its courts” to order that financial records be made available in corruption investigations, notwithstanding any bank secrecy rules. The Civil Law Convention on Corruption includes obligations for the parties to provide for “effective procedures for the acquisition of evidence” (art. 11) as well as

“such court orders as are necessary to preserve the rights and interests of the parties” (art. 12) in the relevant domestic processes.

In addition to safeguards for the efficacy of domestic review procedures, we believe Article 9 should elaborate three further grounds for an appeal in addition to (partial) refusal to provide information, “dismissal” and failure to respond to a request. These are the charging of an excessive fee (in contravention of Article 8(2)), failure to provide access to information promptly after the formal granting of a request, and failure to communicate the information in the form requested (in contravention of Article 7(1)). The term “dismissal” should also be clarified. We take this to refer to a refusal made without an intention to conform to the procedural requirements of Article 6(7)).

Finally, we welcome the guarantee of a “review procedure, involving either reconsideration by a public authority or review” in Article 9(1). Such a review may prove a low-cost and amicable way to settle many disputes before they go to litigation. At the same time, we believe the relationship between reviews and appeals should be clarified. In particular, Article 9 should address the question whether domestic law may require the requester to utilise the review procedure before filing an appeal. In our view, a facultative review procedure is preferable, as the requester may have good reasons to believe that the public authority will not reconsider its decision in good faith. If a choice is made to permit mandatory reviews, then clear time-limits should be specified for the completion of such reviews. We furthermore believe the double use of the word ‘review’ is confusing, and the second instance could probably be deleted.

4. Measures to promote openness - Article 10

Educational measures and information management

Article 10 stipulates a number of ‘complementary measures’ which States parties must take to promote access to official documents. These include education of the public on the right of access, training of public officials, organisation of files in a manner which facilitates access, adoption of rules on the preservation and destruction of documents, and explaining the role of each public authority and the type of information held by it to the public.

Article 10 is a positive provision, which could be further improved on by reflecting best practices in the Council of Europe area. We recommend adding a requirement to publish a guide in each official language, explaining in an accessible way what the right to access entails and how it can be exercised.² We also recommend a further requirement for domestic

² See, for example, Serbia’s *Law on Free Access to Information of Public Importance*, Art. 37 (“The Commissioner shall without delay publish and update a manual with practical instructions on the effective exercise of rights regulated by this Law in the Serbian language, and in languages that are defined as official languages by law”), the *Freedom of Access to Information Act* of Bosnia and Herzegovina, Art. 20(a), the *Freedom of Information Act 2000* of the United Kingdom, s. 47(2) and the *Freedom of Information Act 1997* of

authorities to ensure that the amount of information cumulatively available to the public as a result of proactive publication is increased over time. For example, the Convention could specify that each State party must adopt an information strategy, outlining how documents held by public authorities which are of general interest will be progressively made available without the need for a request.

Liability for (non-)disclosure

A further important omission from the working document is a guarantee that public officials will not be penalised for disclosing information in the good faith belief that domestic law requires them to. A guarantee of this nature is necessary to ensure that public officials, when considering a request for a contentious piece of information, exercise balanced judgment rather than defaulting to non-disclosure. This safeguard should extend to criminal, civil and disciplinary liability.

Conversely, consideration should also be given to requiring the criminalisation in domestic law of wilful obstruction of access to information, through the destruction of documents or otherwise.

5. Proactive publication of information - Article 11

The Group of Specialists drafting the future Council of Europe treaty on access to official documents is currently considering the scope of the provision on “ex officio” or “proactive” disclosure of information.

The draft provision currently reads as follows:

Article 11 - Information made public at the initiative of the public authorities

1. Public authorities shall make public information which it holds in the following fields:
 - i.
 - ii.
2. ~~A public authority should, Public authorities shall endeavour to at its own initiative and where appropriate, take the necessary measures to make public other information which it holds subject to limitations mentioned in Article 4 when the provision of such information is in the interest of promoting the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.~~

The submitting organizations have collected information on the proactive publication provisions of 23 countries in the Council of Europe region (including 13 members of the European Union). This information is presented in Annex A.

Ireland, s. 39.

We found that the following categories of information must be made proactively available in at least the given number of countries:

- Information relating to the **organizational structure** of a public body - at least 17 countries;
- Information on the **budget** of the public body must be made public by that body in at least 11 countries (others note that publication of budget and other financial information is often available from a centralized source);
- Information on the **functions, activities**, decisions taken and formal acts issued - at least 17 countries;
- Information on decision-making procedures and mechanisms for public participation in decision-making – at least 17 countries;
- Contact information for the **information officer** and/or information on the mechanisms for accessing information - at least 18 countries.
- An **index or register of information held**, or of the classes of information held, by each public body - at least 14 countries.
- Information on **public procurement procedures** both before and after the issuing of a contract must be made available in at least 11 countries under the access to information and/or public procurement laws, with additional countries having requirements of transparency in their public procurement legislation.

Five of the countries surveyed require no or little proactive publication: the UK (which does not require, but does recommend, proactive disclosure), Sweden (whose law, last updated in 1976, simply does not address proactive disclosure), and Georgia, Germany and Montenegro.

In addition to the broad categories of information that we surveyed, we found that a number of countries have more detailed provisions in their access to information laws. These provisions are often complemented by additional requirements of ex officio publicity of information to be found in other legislation, such as e-FOIA laws and a wide range of other legislation and norms. The public procurement requirements of publicity are just one example of a growing trend for regulations governing specific aspects of a government's activities to be made public.

A number of countries in both western and eastern Europe are in the process of reforming the current rules to include greater transparency of information by electronic means with requirements that information be posted on the websites of bodies obliged under the access to information law. An example of this trend is Hungary, which in 2005 adopted an extensive e-FOIA regime. Other countries with longer standing access to information provisions do not have specific requirements for electronic publication, but in practice make large amounts of information public.

Recommendations

Given that this is a very dynamic process and the standards for minimum proactive transparency are in the phase of evolution, we recommend that the Council of Europe treaty be flexible enough to encourage states to commit proactive transparency without locking them in to a particular standard. To this end we recommend that the Council of Europe maintain the broad categories of information similar to those under which we have regrouped the information here:

- Organizational Structure, including information on personnel, names and contact information of public officials.
- Budget information (projected budget, budget expenditure) and other financial information.
- Information on functions, activities, decisions and formal acts issued.
- Information on decision-making procedures and mechanisms for public participation in decision-making.
- Information on the right of access to information and how to request information (including contact information for the responsible person in each public body).
- An index or register of information held [it might be left to each member state to define the level of detail that this should contain and good practice through sharing of comparative information will, over time, encourage better standards and more detail].

We recommend that member states be given the option to indicate whether these categories of information will be made public (a) through publication in the official gazette or other media, (b) through public posting in the premises of the relevant institution and/or (c) electronically on the website of the institution. We recommend that posting of the proactive information in a public space in or near the institution and posting on its website should be mandatory.

We also recommend that the treaty drafters give special attention to information necessary for restricting corruption, such as full financial transparency, full transparency of the public procurement process, and access to the assets and conflict of interest declarations of public officials.

6. Implementation Mechanism - Articles 15 and 16

New Articles 15 and 16 of the draft Convention set up a minimal monitoring mechanism, whereby Parties are required to submit 5-yearly reports on their compliance with the treaty, which are to be reviewed by a meeting of experts specifically convened for that purpose. We consider this arrangement to be insufficient and highly unlikely to ensure the effective implementation of the norms set by the Convention or contribute to further standard-setting. Indeed, if adopted in the current form, the Article 15-16 mechanism would be the single

biggest flaw of the Convention, which would undermine any progress made in defining the content of the right to information.

Virtually all other Council of Europe treaties on basic rights – and in particular, those adopted in the last two decades – include stronger built-in monitoring mechanisms that operate on an ongoing basis.³ Strong monitoring bodies with wide-ranging authority have even been established to tackle structural social problems, such as intolerance and corruption (see the European Commission against Racism and Intolerance (ECRI), and the Group of States against Corruption (GRECO) mechanism, respectively).

The establishment of an effective implementation mechanism would be a prime indicator of the Member States' genuine will to protect and promote the right of access to information held by public authorities, both within and beyond the Council of Europe area. The existing implementation framework sends the wrong signal in this respect. On the other hand, an adequate access mechanism would complement the work of the Council of Europe and its specialized bodies in other priority areas, such as anti-corruption.

Recommendations

We strongly recommend an overhauling of the draft's implementation framework to establish a monitoring body as outlined below. The suggested mechanism borrows from the design of similar bodies set up by the Council of Europe in the last two decades, employing a comprehensive approach that recognizes both the rights-based and structural reform aspects of a proper access to information regime. It also tries to strike an appropriate balance between effectiveness and economy. The main elements of the suggested mechanism are described below.

1. ***Nature and composition.*** It is essential that the Convention establish a Monitoring Body (MB) that operates on an ongoing/permanent basis, as opposed to meeting every five years to review periodic state reports. The MB could be composed of ten to fifteen independent experts, who should meet no fewer than three to four times a year, for at least one week at a time. The process of the experts' selection should guarantee their independence, integrity and a balanced pool of expertise in areas relevant to access to information.
2. ***Mandate.*** In keeping with the multiple dimensions of the government transparency agenda, the Monitoring Body should be granted adequate authority that allows it to be effective. Its mandate should include: a. monitoring the Parties' compliance with the Convention; b. identifying where the laws and practices of the Parties fall below the standards it establishes for the right of access to information, and recommending the

³ See, among others, the Committee to Prevent Torture (CPT); the European Commission Against Racism and Intolerance (ECRI); the Advisory Committee on National Minorities (ACNM); the European Committee of Social Rights (ECSR); and the Group of Experts Against Trafficking in Human Beings (GRETA).

necessary policy, legislative, institutional and practice reforms; and c. promoting the sharing of best practices in government transparency within the Council of Europe borders.

3. **Reporting obligations.** Regular reporting by States Parties, coupled with independent expert review and feedback on those reports, are critical elements of any effective implementation mechanism. We recommend that the Convention should provide for the following measures:
 - a. Parties should submit their first compliance reports within the first year following the Convention's entry into force in relation to each of the Parties, and should submit periodic reports every three or four years thereafter. Another option, which seems preferred by more recent implementation mechanisms, would be to authorize the MB to determine the precise duration and terms of the reporting cycles.
 - b. It is particularly crucial in this area of human rights law that country reports, as well as all final MB opinions and recommendations, be made public, after the respective Party is given an opportunity to comment. It would be ironic if such reports on government openness were to be treated confidentially.
 - c. Civil society organizations (CSOs), civic actors and other sources should be allowed and encouraged to submit independent information to the MB on all matters falling under its remit.
 - d. The Convention or the MB's mandate should provide that every third round of Party reporting ought to focus on the status of implementation of earlier MB recommendations.
 - e. The MB should have the authority to make ad hoc requests for information to the Convention Parties, including for the purpose of producing thematic reports, or commission independent reports on any matters within its mandate.
4. **Country visits.** The MB should be granted authority and adequate resources to conduct regular country visits in the interest of performing its monitoring and promotional functions; States Parties should welcome and facilitate such visits.
5. **Other powers.** The MB should also have the ability to adopt measures or recommendations of general application; engage in research and dissemination of best practice; offer advisory opinions on the compatibility of (draft) national legislation with treaty provisions; and undertake any other activities that would enable it to fulfil its mandate.

We believe that a monitoring body structured along these lines would lend credibility to the Convention's implementation framework and contribute greatly to the promotion of government openness and integrity. It would also have the potential to become, as similar Council of Europe bodies have in other areas of human rights law, a global leader in access to information standard-setting. We urge the Group of Specialists to seriously consider these recommendations.

7. Protection of whistleblowers

A number of domestic access to information laws of Council of Europe member States contain a provision on the protection of whistleblowers.⁴ Such protection is an important complement to an access to information regime, ensuring that public officials who in good faith release information of significant public interest will not be penalised, even if they did so without appropriate authorisation.

We believe a general requirement to ensure that whistleblowers are effectively protected should be added to the draft Convention. The choice whether to do so in the access to information legislation or elsewhere can be left to States parties.

The wording of this provision might be based on Article 9(5) of the Council of Europe *Civil Law Convention on Corruption*,⁵ which provides:

Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion.

The word "corruption" should then be replaced by a broader phrase, such as "wrongdoing, or the existence of a serious threat to health, safety or the environment".

⁴ For example, *Law on Access to Information of a Public Character* of Moldova, Article 7(5).

⁵ Adopted at Strasbourg, France, 12 April 1999, ETS no. 174, entered into force 1 November 2003.

Briefing regarding the elaboration of a Council of Europe treaty on access to official documents
 - submitted by Access Info Europe, Article 19 and the Open Society Justice Initiative

Annex A - Proactive publication of information in national access to information laws

| Country | Date of FOI Law | Organizational Structure | Budget Information | Information on Functions, Activities, Decision-Making Procedures | Info Officer Contact information; How to Obtain Information | Index of Information Held | Public Procurement, Concession & Tender Notices | Winning Bids & Contract Information | Information Must be Published on Website | Other Information & Notes |
|---|-----------------|--|--------------------|--|---|---|---|-------------------------------------|--|--|
| <i>Approx. number of states (of 24 total) requiring (recommending) proactive publication:</i> | | 17 (18) | 11 (12) | 17 | 18 | 14 (15) | 11 (10) | 11 | 8 (9) | |
| Albania | 1999 | Yes | No | Yes | Yes | Yes | Not in FOIA [check procurement law] | Not in FOIA [check procurement law] | No | No |
| Armenia | 2003 | Yes. List of personnel, positions and salary levels. | Yes | Yes | Yes | Yes, under both FOIA and procurement law. | Yes | yes | Yes. Web is one means of dissemination established by law. | |
| Belgium | 1994 | Yes | Yes | | | | | | | Elaborated in several laws, inc. e-FOIA. |
| Bosnia and Herzegovina | 2000 | Yes | Yes | Yes | Yes | Yes | Not specifically | Not specifically | No | |
| Bulgaria | 2000 | Yes | No | Yes | Yes | No, but list of acts issued and other data resources. | Yes, but under other legislation. | Yes, but under other legislation. | No | |

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|----------------|-----------------|--------------------------|--------------------|---|---|--|---|--|---|--|
| Croatia | 2003 | Yes | Yes | Yes | [to check] | No | [to check] | [to check] | [to check] | Must publish answers to info requests. |
| Czech Republic | 1999 | Yes | Yes | Yes | Yes, the access mechanisms must be published. Officer info does not. | No, but information on databases and registers held. | Yes, under Public Procurement Act N. 137/2006 Coll. | Yes, some information must be published under Public Procurement Act N. 137/2006 Coll. | Yes, some classes of info must be available via website. | Information must also be available during working hours. |
| France | 1978 | Yes | [to check] | Yes, most admin documents including directives, instructions and notes on admin procedures must be published. (Article 7) | Yes, contact and access information must be published, including on a website if the authority has one. | Yes, registers of documents containing public data should be made public. (Article 17) | [to check] | [to check] | Voluntary. Information included under Article 7 (see left) and other information may be published on internet | See Decree of 30 Dec 2005. |
| Georgia | 1999 | No | No | No | Yes | Yes, info. must be published in public register within 2 days of creation or receipt. | No | No | No | Law does not call for proactive publication apart from a public register of documents. |

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|---------|-----------------|----------------------------|----------------------------|--|---|---|--|--|--|--|
| Germany | 2005 | No | No | No | Yes | Yes | [to check] | [to check] | Yes | |
| Hungary | 1992 | Yes | Yes | Yes | Yes | Yes, e-FOIA required central register by 1 Jan 2006 but the service is not yet functioning. | No. Tender information must be purchased. This has been challenged in court, but the court affirmed that FOIA does not apply here. | Yes. Act on Public Finance requires publication if the contract is above 5 million HUF (c.€20,000). Act on Public Procurement also requires publication. | Yes, FOIA requires regular electronic publication and e-FOIA requires it. | e-FOIA includes an extensive list of information that must be published proactively. |
| Ireland | 1997 | Yes | No | Yes | Yes | Yes, classes of info. | Not under the FOIA. [to check other laws] | Not under the FOIA. [to check other laws] | Yes | |
| Latvia | 1998 | Yes, required under eFOIA. | Yes, required under eFOIA. | Yes, required under eFOIA. | FOIA does not establish an Info Officer. | Yes, but there is no unified format for the registers. | Yes, law requires all info be published on the Bureau of government procurement website. | Yes, law requires all info be published on the Bureau of government procurement website. | Yes, the eFOIA law defines a series of broad categories that must be published online. | FOIA demands that "on its own initiative, institution should grant access to all kinds of generally accessible information." |

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|------------|-----------------|--------------------------|--------------------|--|--|---|---|-------------------------------------|--|---|
| Macedonia | 2006 | Yes | Yes | Yes | Yes. Name and contact info of Info Officer, along with annual FOIA report. | Yes | Yes | Yes | No, except for annual FOIA report. | Law details other categories to be published. |
| Moldova | 2000 | Yes | No | Yes, including functions, activities & decisions. | Yes. Name and contact info of Info Officer. | No | Yes, but under other legislation. | Yes, but under other legislation. | No | |
| Montenegro | 2005 | No | No | No | Yes | Yes. FOIA prescribes an obligation to publish a registry of information held by the authority, no matter when or where it was produced. (Articles 5, 6) | No | No | No | |

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|-------------|-----------------|---|--------------------|--|--|---|--|---|--|---------------------------|
| Netherlands | 1978 | Yes | Yes | Yes | Yes, some information at the least. | No | Yes | Yes | No, but web publication of info is increasingly common. | |
| Norway | 1970 | | | | | | | | | |
| Romania | 2001 | Yes | Yes | Yes | Yes | Yes | Yes, annual procurement plan and tender notice must be published every year. If bid is over €100,000, advance intention to tender notice must also be published. | Yes – see government decision on public procurement law plus amended ATI law requires provision contracts to all legal or natural persons who request them. | Ex officio information must be posted at the public authority's office or published in either the Official Gazette, the mass media, or on the institution's website. | |
| Serbia | 2003 | Yes. Directory of structure and function is available, free of charge, to requestors. | Yes | Yes | Yes. Info on requests and refusals is also required to be published. | Yes. A directory of information held is available free of charge. | No | No | Comm'r guidelines require that index be published on website. | |

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|----------------|-----------------|---|--|--|--|--|---|---|---|--|
| Slovakia | 2000 | Yes | No, budget information is disclosed on request only. | Yes. Powers and duties must be published. | Yes. Access mechanisms must be published, but not contact info. | No | Yes, under the Public Procurement Act. | Yes, under the Public Procurement Act. | | |
| Slovenia | 2003 | Yes. Published online and free of charge. | Yes. Published online and free of charge. | Yes. Published online and free of charge. | Yes. Contact information must be published, but not access mechanisms. | Yes. Published online and free of charge. | Yes. Published online and free of charge. | Yes. Published online and free of charge. | Yes. Info is available through a joint agency portal, e-uprava. | Article 10 regulates the information to be published proactively, electronically, and free of charge. |
| Sweden | 1766 | | | | | Each public authority is required to keep a register of all official documents. Most indices are publicly available. | | | | While there are no specific provisions for publication, much info is available on government websites. |
| United Kingdom | 2000 | Recommended | Recomm'd | Recomm'd | Recomm'd, including a log of the information disclosed. | Recomm'd | Recomm'd | Recomm'd | Yes, but each authority defines its publication scheme. | See commentary for further explanation. |

