



Briefing Note:

3 March 2008

Recommended Drafting Solutions to Seven Key Problems in the Draft European Convention on Access to Official Documents

Access Info Europe, Article 19 and the Open Society Justice Initiative, as the civil society expert observers in the process of drafting the future European Convention on Access to Official Documents, present here the seven main outstanding concerns with the draft treaty, along with proposed language as to how these concerns may be remedied to bring the Convention up to the standard of the prevailing law and practice in Council of Europe member states.

We 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 to ensure that it provides genuine guarantees for the right of access to information.

1. Failure to include a clear opening guarantee of the right of access to official documents and the principle of publicity.

International treaties establishing individual rights typically include in their first article a provision directly related to the objective of the Treaty. For example, Article 1 of the Aarhus Convention provides:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

The draft European Convention on Access to Official Documents, however, does not introduce in its first article a clear formulation of such a guarantee, but rather begins with a statement that the principles in the treaty are minimum standards.

In order to bring the Convention text into line with accepted treaty-making practice, we recommend that the first paragraph of Article 2 be moved to Article 1. Articles 1 and 2 would then read as set out below:

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Section I</p> <p>Article 1 – General provisions</p> <p>1. The principles set out hereafter constitute a minimum standard and should be understood without prejudice to those domestic laws and regulations and to international treaties which already recognise a wider right of access to official documents.</p> <p>(...)</p> <p>Article 2 - Right of access to official documents</p> <p>1. Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.</p> <p>2. Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.</p> <p>3. These measures shall be taken at the latest at the time of entry into force of this Convention in respect of that Party.</p>	<p>Section I</p> <p>Article 1 – General provisions</p> <p>Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, upon request, to official documents held by public authorities.</p> <p>The principles set out hereafter constitute a minimum standard and should be understood without prejudice to those domestic laws and regulations and to international treaties which already provide more extensive protection to the right of access to official documents.</p> <p>Article 2 – Giving Effect to the Right of access to official documents</p> <p>Each Party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities.</p> <p>Each Party shall take the necessary measures in its domestic law to give effect to the provisions for access to official documents set out in this Convention.</p> <p>These measures shall be taken at the latest at the time of entry into force of this Convention in respect of that Party.</p>

2. Failure to include information held by legislative bodies under the scope of the right of access to official documents.

Human rights treaties typically apply to all State institutions. There is no principled reason for treating legislative bodies or judicial authorities any differently from executive bodies under an access to information regime. Legislative bodies and judicial authorities perform public functions and are financed with public money; the rationales that call for transparency of the executive apply with equal, if not greater, force to the legislature and judiciary.

The legislature in particular, as the body directly representing the public, is expected to be the most accountable to the public. The prevailing trend in Europe is that legislatures are bound by the right of access to official documents: our comparative study of 26 access to information regimes in the Council of Europe region found that 21 included the legislative branch in the access to information legislation, and others have some specific provisions related to publicity of documents from legislative bodies. Regulations on access to European Union documents also apply to the European Parliament.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 1 – General provisions</p> <p>1. (...)</p> <p>2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means:</p> <p>1) government and administration at national, regional and local level;</p> <p>2) legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;</p>	<p>Article 1 – General provisions</p> <p>1. (...)</p> <p>2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means:</p> <p>1) government and administration at national, regional and local level;</p> <p>2) legislative bodies</p> <p>3) judicial bodies insofar as they perform administrative functions according to national law;</p>

3. Failure to include information held by judicial bodies under the scope of the right of access to official documents.

The exclusion of the judiciary in all its functions also runs counter to Europe’s long tradition of judicial transparency. As Jeremy Bentham said in 1843, “*Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.*”¹ The principle of “publicity of judiciary” not only implies a right of physical access to judicial facilities and court hearings or a right to have final resolutions published. It also implies the right of access, in principle, to all information held by judicial bodies, whether this information is linked to court records or to administrative functions performed by judicial bodies — subject to exceptions justified on the basis of the protecting the interests enumerated in the Convention such as prosecution of crimes, the equality of parties in court proceedings, the effective administration of Justice, and personal privacy. We note that the European Convention on Human Rights recognises the basic principle of the publicity of judgments.

For these reasons, it is proposed that information held by judicial bodies be also included under the mandatory scope of this Convention.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 1 – General provisions</p> <p>2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means:</p> <p>1) government and administration at national, regional and local level;</p> <p>2) legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;</p>	<p>Article 1 – General provisions</p> <p>2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means:</p> <p>1) government and administration at national, regional and local level;</p> <p>2) legislative bodies</p> <p>3) judicial bodies</p>

¹ 'Draught of a New Plan for the Organization of the Judicial Establishment in France.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols., (Edinburgh: Tait, 1843) vol. iv, p. 316.

4. Failure to extend the right of access to official documents held by private bodies that exercise public functions or operate with public funds.

The binding scope of the draft Convention in relation to private parties extends only to “natural or legal persons insofar as they exercise administrative authority”. This is a significant retreat from an earlier draft of the Convention, as well as from the Council of Europe’s 2002 Recommendation on Access to Official Documents, which extends the right to “natural or legal persons insofar as they *perform public functions*” (emphasis added). Similarly, the Aarhus Convention refers to “natural or legal persons *performing public administrative functions* under national law” (emphasis added).

We live in an era in which traditional public services – such as utilities, healthcare, the provision of security and even prison services – are being increasingly outsourced to the private sector. In order to prevent the operation of these services from being removed from public scrutiny and to ensure that there is public accountability for their operation, the Convention should ensure that private persons who assume public functions are under an obligation to provide access to information concerning their performance of these functions.

Our comparative study of 26 countries found that in all of them private bodies performing public functions are referred to in the scope of the access to information laws and although the precise definitions vary, the principle is clearly established in national legislation. In order to accommodate the prevailing comparative norm that the right of access to information applies to private bodies, and in order for the Convention to be consistent with the principle that the right of access to information should enable to public to know how public power is exercised and how taxpayers funds are spent, it is recommended that States Parties are required to extend the scope of the right to private bodies performing public functions and operating with public funds.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 1 – General provisions 1. (...) 2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means: ... 3) natural or legal persons insofar as they exercise administrative authority.</p> <p>ii. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that the definition of “public authorities” also includes one or more of the following:</p> <p>1) legislative bodies as regards their other activities; 2) judicial authorities as regards their</p>	<p>OPTION 1 Article 1 – General provisions 1. (...) 2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means: ... 3) natural or legal persons insofar as they exercise administrative authority and/or perform public functions and/or operated with public funds, according to national law.</p> <p>OPTION 2 Article 1 – General provisions 1. (...) 2. For the purposes of this Convention:</p> <p>a. i. “public authorities” means: ...</p>

<p>other activities;</p> <p>3) natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.</p>	<p>3) natural or legal persons insofar as they exercise administrative authority and/or perform public functions according to national law.</p> <p>ii. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that the definition of “public authorities” also includes one or more of the following:</p> <p>1) legislative bodies as regards their other activities;</p> <p>2) judicial authorities as regards their other activities;</p> <p>3) natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.</p>
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5. Absence of a requirement that states set statutory maximum time-limits within which requests must be processed.

The current drafting solution of Article 5.4 of the Convention does not require states to set a time limit for responding to requests. This contrasts with other international and European instruments on access to information such as the Aarhus Convention and EU Regulation 1049, which establish a maximum one-month time-frame. Most domestic laws provide for time-limits within which requests for access to official documents must be processed, and/or time limits after which appeals against “administrative silence” may be launched. In addition, access to information laws usually stipulate that all requests should be answered as soon as possible, rather than permitting a delayed response as the deadline draws near.

Time limits are necessary in most countries, particularly those with new access to information regimes, to ensure that public bodies have clear guidance about when they must answer requests and to permit requestors to appeal any “administrative silence”. Failure to respond at all is a particularly widespread problem, often identified in monitoring exercises and highlighted in reports by Information Commissioners and civil society.

In addition, in some cases the time-limits set by law are unreasonably long and need be reduced to effectively implement the right of access to information. The treaty should require time-limits, and should either specify that they must be reasonable or should impose a maximum upper limit, such as the one month established by the Aarhus Convention. Clear requirements on time-limits would ensure that the monitoring body of the European Convention on Access to Official Documents could monitor State practice in this regard.

Extensions: In order to address the concerns of some States that, on rare occasions, additional time is needed to process complex or voluminous requests, we propose additional language on time-

frames taken from the Aarhus convention which states in Article 4 as follows: “*The environmental information referred to in paragraph 1 above shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension of this period up to two months after the request. The applicant shall be informed of any extension and of the reasons justifying it.*”

DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 5 - Processing of requests for access to official documents</p> <ol style="list-style-type: none"> 1. (...) 2. (...) 3. (...) 4. A request for access to an official document shall be dealt with promptly. The decision shall be reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand. 	<p>Article 5 - Processing of requests for access to official documents</p> <ol style="list-style-type: none"> 1. (...) 2. (...) 3. (...) 4. A request for access to an official document shall be dealt with promptly. The decision shall be reached, communicated and executed as soon as possible or within a reasonable maximum time limit which has been specified beforehand established by law which in no case may be more than one month. <p>In exceptional cases where the volume and complexity of the information justify it, an extension of up to one additional month may be applied by the public authority. The applicant shall be informed of any such extension and of the reasons justifying it, within a period of no more than two weeks of receipt of the request.</p>

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.

Article 8 guarantees to an applicant whose request for an official document has been denied access to a review procedure before a court of law or another (non-judicial) independent and impartial body. However, the treaty does not specify what powers this body should have.

As the text stands, States Parties may opt for granting only an appeal to a non-judicial body that is “independent and impartial”, but that – unlike a court of law – may lack the legal power to issue a decision that is binding on all public authorities, including by ordering, where appropriate, the disclosure of the official documents at issue. As a result, the current Article 8 fails to guarantee an effective domestic remedy for the right of access, in violation of one of the basic principles of international human rights law (see, for example, Article 13 of the European Convention on Human Rights). Article 8.1 should be amended to make clear that the review procedure should be binding in all cases (see proposed amendment below).

Current state practice supports this serious concern. Thus, in a number of Council of Europe member states, the effectiveness of appeals against denials of access is greatly reduced because the appeals body lacks the power to order prompt disclosure of the requested information. Sometimes, administrative tribunals and other appeal/review bodies are only able to declare the decision to refuse access void and remand the matter to the public authority for reconsideration. Given the urgency of many requests for access to information, requesters will often not bother to use such an appeals system and, if they do, may only obtain the information once it has lost part or all of its usefulness. We therefore believe that the Convention should specifically stipulate that appeals bodies must have the power to order disclosure of the requested information.

In addition, we note that the Explanatory Memorandum now makes clear in its Paragraph 67 that the word “denied” applies to a range of forms of explicit or implicit refusal to answer a request. This interpretation should be better reflected in the Convention text to ensure its correct application at the national level.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 8 - Review procedure</p> <ol style="list-style-type: none"> 1. An applicant whose request for an official document has been denied, whether in part or in full, shall have access to a review procedure before a court of law or another independent and impartial body established by law. 2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1. 	<p>Article 8 - Review procedure</p> <ol style="list-style-type: none"> 1. An applicant whose request for an official document has been denied, whether in part or in full, whose request has not received an answer, or whose right of access under this Convention has been infringed in any other way, shall have access to a binding review procedure before a court of law or another independent and impartial body established by law. 2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1. 3. A court or other independent body provided for in paragraph 1 shall have the power to order disclosure of the requested official document.

7. Failure to define which provisions of the Convention may or may not be subject to reservations.

This current draft of the Convention fails to include any restrictions on the entry of reservations by the parties, leaving the matter to the general, minimal principles of the Vienna Convention. (According to Article 19 of the Vienna Convention on the Law of Treaties, when a treaty contains no specific provisions about reservations, a State may, when signing, ratifying, accepting, approving or acceding to the treaty, formulate a reservation as far as the reservation is not incompatible with the object and purpose of the treaty.) However, future States Parties to this Convention are not too likely to object to reservations entered by other Parties that may be inconsistent with its object and purpose.

Considering that, “the principles set out [in this Convention] constitute a minimum standard”, the additional failure to impose any restrictions on reservations will allow States to narrow even further the scope of this Convention to unacceptable and unpredictable levels. This is inconsistent with the principles and practice of modern human rights treaty-making, including by the Council of Europe. In fact, this would be one amongst very few, if not the only, human rights treaty adopted by the Council of Europe in the last 25 years that includes no restrictions on reservations.

For this reason, we very strongly recommend to include a provision prohibiting reservations.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
	<p data-bbox="775 595 1399 663"><u>To include a new article between article 20 and 21:</u></p> <p data-bbox="775 703 1257 736">Art. 21 – [Prohibition of] reservations</p> <p data-bbox="775 777 887 810"><i>Option 1</i></p> <p data-bbox="775 846 1407 913">No reservation may be made in respect of any provision of this Convention.</p> <p data-bbox="775 954 887 987"><i>Option 2</i></p> <p data-bbox="775 1023 1407 1124">No reservation may be made in respect of any provision of this Convention, with the exception of Article 5, paragraph 4.</p>

The Civil Society observers have reviewed the draft Convention and do not believe that any reservations should be allowed if the draft remains in its current form. If, however, a change is made to Article 5, paragraph 4, to introduce a maximum time limit for responding to requests, it might be appropriate to allow reservations to this provision — to accommodate, for example, those countries with a long tradition of transparency that do not have strict time limits established by law because the law requires requests to be responded to on an immediate or priority basis.

8. Three additional concerns identified during drafting of the Explanatory Memorandum

The following issues arise out of two different types of concerns identified during the drafting of the Explanatory Memorandum: either because the Memorandum interprets the draft Convention in ways we find to be unduly restrictive or because we believe the Convention and the Memorandum need to be better reconciled.

8.1 Undue burden on requestors to identify documents and limited scope of the duty to assist requestors.

The current text of the Convention appears to put an undue burden on requestors to identify the official document containing the information that they seek. Whilst the Explanatory Memorandum makes clear that this should not be the case, the Convention text still gives this impression. Given

that the drafters did not include a requirement that public authorities publish an index or register of records held, this is a disproportionate burden.

Related to this, the current draft of the Convention limits the duty to assist requestors to identification of documents and does not provide that requestors should be helped to formulate requests or to identify the authority that holds the documents/information sought (the latter is only referred to in passing in Article 5.5 on refusals). This contrasts with the more general duty to assist included in the Aarhus Convention which in two articles (3 and 5) requires States Parties “to ensure that officials and authorities assist and provide guidance to the public in seeking access to information”.

We therefore propose an amendment designed to mitigate the burden on requestors to identify documents and to establish a positive duty to assist requestors.

DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 5 - Processing of requests for access to official documents</p> <p>1. The public authority shall help the applicant, as far as reasonably possible, to identify the requested official document.</p>	<p>Article 5 - Processing of requests for access to official documents</p> <p>1. States Parties shall ensure that public authorities and officials assist applicants exercise the right of access under this Convention, including by helping the applicant, as far as reasonably possible, to formulate the request in such a way as to enable the public authority to identify the requested official document.</p>

8.2 Introduction of an “authorisation to process” notion that undermines the right of access.

There is an apparent self-contradiction in Article 5.2 of the Convention: if all² bodies are obliged to handle requests for all information they hold, there should be no limitation as to whether or not bodies are “authorised” to process requests. This specific language of the Convention (“or if it is not authorised to process that request”) could be abused to give any number of bodies exclusive authority to decide whether to provide access to official documents they create or manage — thus eroding the general rule that requests for documents can be filed with, and should be handled by, any authority holding them. This loophole would in practice result in great frustration of the exercise of the right. For that reason, we recommend its deletion in order to avoid confusion and misunderstandings.

CURRENT DRAFT	DRAFT WITH PROPOSED AMENDMENTS
<p>Article 5 - Processing of requests for access to official documents</p> <p>1. (...)</p> <p>2. A request for access to an official document shall be dealt with by any public authority holding the document.</p>	<p>Article 5 - Processing of requests for access to official documents</p> <p>1. (...)</p> <p>2. A request for access to an official document shall be dealt with by any public authority holding the document. If</p>

² In the French text the language is clearer: « Une demande d'accès à un document public est instruite par *toute* autorité publique qui détient ce document.» (emphasis added). It is clear that the drafter’s intention is that word “any” means “all” public bodies, or “each and every” public body.

<p>If the public authority does not hold the requested official document or if it is not authorised to process that request,—it shall, wherever possible, refer the application or the applicant to the competent public authority.</p>	<p>the public authority does not hold the requested official document or if it is not authorised to process that request,—it shall, wherever possible, refer the application or the applicant to the competent public authority.</p>
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8.3 Possibility of Blanket Exceptions on Entire Classes of Information

The text of the draft Convention makes clear that the limitations on access established in Article 3 shall be subject to tests of harm to the protected interest (legitimate limitation) and the test of whether there is an overriding public interest in disclosure:

Article 3 - Possible limitations to access to official documents

(...)

2. Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.

The Explanatory Memorandum, however, introduces a lack of clarity as to whether the public interest test must be applied each time an exception to the right of access is applied.

41. The “harm test” and the “balancing of interests” may be carried out for each individual case or by the legislature through the way in which the limitations are formulated. Legislation could for example set down varying requirements for carrying out harm tests. These requirements could take the form of a presumption for or against the release of the requested document or an unconditional exemption for extremely sensitive information. When such requirements are set down in legislation, the public authority should make sure whether the requirements in the statutory exceptions are fulfilled when they receive a request for access to such an official document. Absolute statutory exceptions should be kept to a minimum.

Such a margin of discretion to introduce absolute exemptions – which is not present in the text of the Convention itself – would allow for blanket exceptions to the right of access and 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 Explanatory Memorandum should be clarified to assert this principle.

For more information, please contact

- Helen Darbishire, Executive Director, Access Info Europe
+ 34 667 685 319 helen@access-info.org
- Sejal Parmar, Legal Officer, ARTICLE 19,
+ 44 20 7239 1192 sejal@article19.org
- Darian Pavli, Legal Officer, Open Society Justice Initiative
+ 1 646 247 4504 dpavli@justiceinitiative.org