

Council of Europe Convention on Access to Official Documents

(CETS No. 205)

Français

Explanatory Report

I. Introduction

(i) The present Council of Europe Convention is the first binding international legal instrument to recognise a general right of access to official documents held by public authorities. For many years, international cooperation had been pursued within the Organisation in order that a right of access to official documents, which finds its origins in the 1950 European Convention on Human Rights, become a reality throughout Europe.

(ii) The first political and legal expression of this was in Recommendation No. R (81) 19 of the Committee of Ministers to member States on access to information held by public authorities, followed one year later by the Declaration of the Committee of Ministers on freedom of expression and information. Other legal instruments had been elaborated ⁽¹⁾ until, in 2002, the Committee of Ministers adopted its Recommendation Rec(2002)2 on access to public documents, which was the principal source of inspiration for the present Convention.

(iii) The Steering Committee for Human Rights (CDDH), instructed by the Committee of Ministers of the Council of Europe to draft the present Convention, was guided by the concern to identify, amongst the various national legal systems, a core of basic obligatory provisions reflecting what was already accepted in the legislation of a number of countries and that, at the same time, could be accepted by States that did not have such legislation. The Parties to the present Convention undertake to implement rigorously this minimum core of basic provisions, and in order to assist them in achieving this goal an international monitoring mechanism is envisaged in the Convention. The spirit behind this is, of course, to encourage the Parties to equip themselves with, maintain and reinforce domestic provisions that allow a more extensive right of access, provided that the minimum core is nonetheless implemented.

(iv) These considerations were brought to the fore throughout the discussions. Of course, the approach consisting of elaboration of an instrument bringing together the best practices existing in the field of access to public documents was also debated at length. The drafters of the Convention, however, considered that such an approach would lead to an instrument that would be difficult to implement by many countries. The compromise solution therefore consisted of elaborating an instrument capable of being accepted by the greatest number of Council of Europe member States and constituting a genuine starting point for an effective right of access to official documents in the European region.

(v) It remains finally to point out that the present Convention contains no specific provision relating to reservations, which signifies that these are only possible if they comply with the provisions of the Vienna Convention on the Law of Treaties, according to which reservations may not be incompatible with the object and purpose of the treaty.

II. Commentary on the provisions of the Convention

Preamble

1. Transparency of public authorities is a key feature of good governance and an indicator of whether or not a society is genuinely democratic and pluralist, opposed to all forms of corruption, capable of criticising those who govern it, and open to enlightened participation of citizens in matters of public interest. The right of access to official documents is also essential to the self-development of people and to the exercise of fundamental human rights. It also strengthens public authorities' legitimacy in the eyes of the public, and its confidence in them. Considering this, national legal systems should recognise and properly enforce a right of access for everyone to official documents produced or held by the public authorities.

2. The right of access to official documents was first developed in the Nordic European States and spread, little by little to many other West European countries. Development really took off in the 1990's with legislation in the new democracies of Eastern and Central Europe. Longer established democracies also adopted new legislations ⁽²⁾. Constitutions, national laws and jurisprudence across Europe now recognise a right of access to official documents. The right of access to official documents has also been increasingly recognised at the international level. Although the European Court of Human Rights has not recognised a general right of access to official documents or information, the recent case law of the Court ⁽³⁾ suggests that under certain circumstances Article 10 of the Convention may imply a right of access to documents held by public bodies. In addition, the Court has recognised a positive obligation to provide, both proactively and upon request, information related to the enjoyment and protection of other Convention rights such as the right to respect for private and family life ⁽⁴⁾. The right to a fair trial as granted by Article 6 of the European Convention on Human Rights gives the parties to court proceedings a right to have access to documents held by the court and of relevance to their case. The acceptance of the right in other international fora is also increasing. For instance, in September 2006, the Inter-American Court of Human Rights ruled that Article 13 of the American Convention on Human Rights which protects the rights of freedom of expression and information, guarantees a general right of access to state-held information ⁽⁵⁾. The Convention of the Council of Europe on Access to Official Documents comes as the first international binding instrument that recognises a general right of access to official documents held by public authorities.

3. Work has been undertaken in other international bodies. This has culminated, inter alia, in the 1998 United Nations Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ⁽⁶⁾, and Regulation (EC) No 1049/2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents.

4. These achievements have been accompanied by a growing awareness at national level, both in civil society and among public authorities, of the value of access to information and the need to safeguard access to official documents. The general trend in the Council of Europe member States is still firmly geared towards reaffirming a body of rules to protect freedom of information and grant a right of access to official documents, which is also inscribed in some national Constitutions.

Section I

Article 1 – General provisions

Paragraph 1

5. Nothing in this instrument prohibits a Party to the Convention from adopting, maintaining or reinforcing domestic standards providing for greater access to official documents than that set out in this Convention. On the contrary, as this Convention is intended to set minimum standards, wider access to official documents is encouraged. Furthermore, nothing in the Convention is intended to justify the lowering of existing standards in national laws and practices if they are higher than those in the Convention.

6. No provision of the Convention may be interpreted as restricting access to documents which must be made available under other international obligations. For instance, the European Convention on Human Rights recognises the basic principle of the publicity of judgments and the Aarhus Convention grants a wider right of access to environmental information.

Paragraph 2

7. Article 1 paragraph 2 defines the scope of application of the Convention.

Sub-paragraph a

8. For the purposes of this Convention, the term “public authorities” covers administrative authorities at national, regional and local level (for example, central government, town councils and other municipal bodies, the police, public health and education authorities, public records offices, etc.). The term “public authorities” covers legislative bodies and judicial authorities as well, insofar as they perform administrative functions, as defined by national law. Natural or legal persons are also covered insofar as they exercise administrative authority.

9. In order to enhance openness, Parties to this Convention may broaden the ambit of the Convention. Several Parties to the Convention have already extended the access to the legislative bodies and judicial authorities in one or more legislative acts. Thus, by means of a declaration when signing or ratifying the Convention, they can include legislative bodies and judicial authorities as regards all their activities.

10. The drafters of the Convention foresaw that the Convention could also include, if the Parties so wished, natural or legal persons insofar as they perform public functions or operate with public funds, according to national law. This obviously implies that national law be in conformity with the international obligations stemming notably from the European Convention on Human Rights. The drafters recognised that there was no common definition of these notions and that examples were very different from one country to the other, often due to historical reasons. Nevertheless, whilst recognising that all depends on each Party’s interpretation of what is considered a public function, Parties are invited to extend the scope of the Convention to bodies exercising public functions.

Sub-paragraph b

11. Paragraph 2, sub-paragraph b also specifies the scope of the Convention by defining the notion of “official documents” for the purposes of this Convention. It is a very wide definition: “official documents” are considered to be any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, e-mails, information stored in electronic format such as electronic databases, etc.).

12. While it is usually easy to define the notion concerning paper documents, it is more difficult to define what is a document when the information is stored electronically in data bases. Parties to the Convention must have a margin of appreciation in deciding how this notion can be defined. In some Parties to the Convention access will be given to specific information as specified by the applicant if this information is easily retrievable by existing means. In some Parties, compilations in data bases of information that logically belong together are seen as a document.

13. A clear distinction should be made between documents received by public officials in the course of their duties and those received by them as private persons and which are not connected to their duties. This last category of documents falls outside the definition of official documents in the Convention.

14. The right of access is limited to existing documents. The Convention does not oblige Parties to create new documents upon requests for information, although some Parties recognise this wider duty to some extent. The concept also includes information physically held by a legal or natural person on behalf of a public authority by reason of agreements concluded between the public authority and that person.

15. Official documents transferred to archives remain under the scope of this Convention.

16. Documents containing personal data are covered by the scope of this Convention. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS No. 108) does not in principle prohibit access of third parties to official documents containing personal data. However, when access to such documents is granted, the use of personal data contained therein is governed by Convention No. 108.

Article 2 – Right of access to official documents

Paragraph 1

17. The Convention gives “everyone” the right to have access to official documents, irrespective of their motives and intentions. While the provisions of the Convention are of particular importance to journalists, as they provide them with the necessary tools to carry out their role as watchdog over the proper functioning of public institutions - a crucial role in a democratic society which has been fully recognised by the case-law of the European Court of Human Rights - the Convention does not make any distinction between them and other individuals.

18. The right of access applies to both natural and legal persons without any discrimination, including on the basis of nationality, and even to foreigners living outside the territory of a Party to the Convention.

19. This Convention lays down a right of access to official documents. As regards the use of information received, which is not regulated in the Convention, generally requestors are free to use the information for any lawful purpose. This includes disseminating the information and, for example, publishing it. Such use may for example be determined by laws such as those regulating intellectual property or data protection or transposed by the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.

Paragraph 2

20. Each Party shall take the necessary measures in its domestic law to give effect to the provisions set out in this Convention. These measures will include adopting access to official documents legislation and may necessitate amending and adding to existing laws. But often specific rules in other laws may be needed too. Also internal rules regarding the handling of requests or making documents public at the own initiative of the public body or the training of public officers on access to official documents are covered by this provision.

Article 3 – Possible limitations to access to official documents

Paragraph 1

21. Under this Convention, limitations on the right of access to official documents are only permitted in order to protect certain interests laid down in a list in Article 3, paragraph 1. As the basic principle is the right of access to documents, any limitation of this right must be specifically prescribed by law, necessary in a democratic society and proportionate to the aim of protecting other legitimate rights and interests.

22. The list of limitations in Article 3, paragraph 1 is exhaustive. The limitations apply to the content of the document and the nature of the information. It does not, of course, prevent national legislation from reducing the number of reasons for limitation or from formulating the limitations more narrowly, with a view to granting wider access to official documents. Respecting the spirit of this Convention means provision of the widest possible access to official documents and not hindering such access by a misapplication of the limitations laid down in Article 3.

Sub-paragraph a

23. Parties to the Convention may limit access to official documents with the aim of protecting national security, defence and international relations. The notion of national security should be used with restraint. It should not be misused in order to protect information that might reveal the breach of human rights, corruption within public authorities, administrative errors, or information which is simply embarrassing for public officials or public authorities.

Sub-paragraph b

24. Sub-paragraph b provides that Parties to the Convention may limit access to official documents with the aim of protecting public safety, for example by prohibiting the disclosure of documents concerning the security systems of buildings and communications etc.

Sub-paragraph c

25. Parties to the Convention may limit access to official documents with the aim of assuring the prevention, investigation and prosecution of criminal activities. Access to such documents could, for example, be prejudicial to investigations, lead to evasion of justice or evidence being destroyed.

Sub-paragraph d

26. Sub-paragraph d aims at allowing Parties to the Convention to restrict access to official documents in order to preserve public authorities' capacity to carry out disciplinary investigations within their administrations.

Sub-paragraph e

27. Sub-paragraph e provides for the possibility of limiting access to some documents with a view to protecting the proper conduct and conclusion of public authorities' activities as regards supervision, investigation and control (inspections or audits of other organisations, on individuals or internally). On-going tax inspections may be given as examples, as well as school and university examinations, labour inspections, inspections by social services and health and environmental authorities.

Sub-paragraph f

28. Parties to the Convention may set limitations to protect private life and other legitimate private interests. Official documents can contain information of a personal or private nature which is protected, for example criminal records or medical files. It should be remembered that Article 8 of the European Convention on Human Rights guarantees the right of respect to private and family life. These interests may take precedence over the interest in making the information in the document in question available.

Sub-paragraph g

29. Sub-paragraph g provides that Parties to the Convention may establish limitations to protect commercial and other economic interests, private or public. The main purpose of this exception is to prevent undue harm to competitive or bargaining positions. An example of information that may be covered is information that amounts to "trade secrets", which pertain to competition or production procedures, trade strategies, lists of clients, etc. It may also be information that public authorities use to prepare collective bargaining in which they take part or data for tax purposes collected from individuals and legal persons.

Sub-paragraph h

30. The possible limitations under sub-paragraph h concern the protection of financial and other economic policies, as well as monetary and exchange-rate policies of the State. For example, such protection may be needed where a change of interest rates is being considered or for market-sensitive financial information.

Sub-paragraph i

31. Sub-paragraph i is intended to protect the equality of parties in court proceedings and the proper functioning of justice. This limitation aims at ensuring the equality of parties in court proceedings before domestic as well as international courts of law and may, for example, authorise a public authority to refuse access to documents drawn up or received (for example from its solicitor) with respect to court proceedings in which it is a party. It derives from Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial. Documents that are not created in contemplation of court proceedings as such cannot be refused under this limitation.

Sub-paragraph j

32. The possible limitations provided for in sub-paragraph j concern the possibility of limiting the

dissemination of information on the environment and are meant to allow public authorities to carry out effective policies in the area of environmental protection.

33. Such a limitation might, for example, be the prohibition of disclosure of information about the location of threatened animals or plant species, in order to protect them. This limitation is based on Article 4, paragraph 4(h) of the above mentioned Aarhus Convention.

Sub-paragraph k

34. Sub-paragraph k provides for the possibility of limiting access to official documents with the aim of protecting confidentiality of proceedings within or between public authorities concerning the examination of a matter. The word “matter” is wide enough to cover all kinds of issues dealt with by the public authorities, that is, individual cases as well as procedures for political decision-making. It should be noted that, even if the aim of the Convention is to encourage public participation in decision-making, the purpose of this limitation is to preserve the quality of the decision-making process by allowing a certain free “space to think”.

35. Article 3 gives Parties to the Convention that are monarchies the possibility to declare that communication with the Royal Family and the Royal Household shall also be included among the possible limitations. The reason being that the (members of the) reigning Family and its Household or the Head of State may have a special constitutional position which is not covered by any of the other limitations.

Paragraph 2

36. Paragraph 2 of Article 3 expresses two important principles, the “harm-test” principle and the principle of balancing the interest of public access to official documents against the interest protected by the limitation.

37. If public access to an official document does not cause any harm to one of the interests listed in paragraph 1, there should be no limitations on access to that document. If public access to a document might cause harm to one of these interests, the document should still be released if the public interest in having access to the document overrides the protected interest.

38. 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.

39. The outcome of the “harm-test” is closely connected with the lapse of time. For some limitations, certain events inevitably lead to the cessation of that limitation. In other instances, the passage of time may reduce the damage of release of the information.

Paragraph 3

40. This paragraph refers to Parties’ duty to consider setting maximum time limits for limitations on the right of access to official documents. Access can never be refused after the expiration of any time-limit laid down in law.

Article 4 – Requests for access to official documents

Paragraph 1

41. The person requesting an official document is not obliged to state the reasons why he or she wishes to have access to it.

Paragraph 2

42. The present Convention does not require Parties to the Convention to grant applicants a right to submit requests anonymously, but encourages this by including an optional obligation in this respect. In the countries where such a right exists, it has been deemed unnecessary to require the applicant's identity when there at the same time is no obligation for the applicant to declare any reasons for the request.

Paragraph 3

43. Paragraph 3 encourages Parties to the Convention to keep formalities to a minimum. Each Party is free to lay down its own procedures, but the aim is to have as few and simple as possible. Moreover, for every formality, there must be a valid need. In some countries, requests must be in written form (fax, letter, e-mail). In others, they may be made orally (at the office of the public authority concerned or by telephone) and written procedures only apply when a partial or total denial of access is considered.

Article 5 – Processing of requests for access to official documents

Paragraph 1

44. Under paragraph 1, the public authority must make reasonable efforts to help the applicant identify the relevant official document. This means that the applicant is not obliged to have identified the requested document beforehand. The applicant should formulate the request with sufficient clarity to enable a trained public officer to identify the requested document. It is the public authority which has the responsibility for keeping its documents in good order and indexed, so as to be able to identify them. Public registers of documents are of great help for these purposes, both for the public and the authorities themselves.

45. The authority does have a certain margin of appreciation to determine to what extent it is reasonable to provide help. Such assistance is particularly important if the applicant is disabled, illiterate or a foreigner with little or no knowledge of the language.

46. It should be mentioned that the right of individuals to access a specific document begins with the right to be told by the public authority whether or not it possesses the document. In some cases, however, where the protection of other rights and interests prohibits the disclosure, the authority will not reveal the existence of the document if this would lead to the disclosure of information which should remain confidential.

Paragraph 2

47. Paragraph 2 states that a request for access to an official document must be dealt with by any public authority holding the document. This means i.a. that a document that has been reproduced in several copies that are held by various authorities can be requested from any such authority. If the public authority does not hold the document or if it is not authorised to process the request, paragraph 2 requires it, wherever possible, to refer the application or the applicant to the competent public authority.

Paragraph 3

48. Paragraph 3 provides that requests for access to official documents must be dealt with on an equal basis. As a rule, requests should be dealt with in order of receipt. No distinction in this respect should be made on the basis of the nature of the request or the status of the requestor.

Paragraph 4

49. A prompt response to request is at the core of the right of access to official documents. In many countries, the law stipulates a maximum time limit for reaching a decision, notifying the applicant and, if the decision on access is favourable, making the document available. In a small number of countries that have a long and strong tradition of openness, however, the only rule is that requests should be dealt with immediately. Those countries fear that having a set maximum time limit might have the unintended effect of delaying the processing of the request towards a maximum time limit or reducing authorities' willingness to deal with complicated requests.

50. In many countries, good practice includes informing the applicant of any delay in the process of the request.

51. It goes without saying that the fact of imposing a maximum time limit should not encourage the public authorities to wait until that time limit has been reached before releasing the requested document. The faster the document is made available, the more the spirit of the Convention is respected.

Paragraph 5

52. From paragraph 5 follows that a public authority may refuse to deal with a request for access to an official document on two grounds: either because, despite assistance from the public authority, the request remains too vague to allow the document to be identified or because the request is manifestly unreasonable (for example, if the request requires a disproportionate amount of searching or examination). Where the request is clearly vexatious (for example, one of many requests intended to hinder a department's work, repeated requests for the same document within a very short space of time by the same applicant), it might be refused.

Paragraph 6

53. Paragraph 6 requires the public authority to give reasons for refusing access to official documents. A minimum requirement in this respect is to state the legal basis for refusal by reference to the relevant provisions in law as well as an explanation of how these provisions apply.

Article 6 – Forms of access to official documents

Paragraph 1

54. There are various forms of access to official documents: inspection of the original, provision of a copy of the document, or both. Under paragraph 1, it is for the applicant to indicate which type of access he or she prefers. The public authority should accommodate such preferences whenever possible. However, this may be impractical or impossible in some cases. For instance:

- An authority may be justified in refusing to provide a copy of the document if, for example, the technical facilities are not available (for audio, video or electronic copies), or if this would entail unreasonable additional costs, or if, according to national legislation, intellectual property rights might be infringed.
- It may also be justified in refusing direct access to the original version document if it is physically fragile or in poor condition. In such cases, the authorities shall provide a copy of the document.

55. The public authorities should enable as far as possible consultation of a document by providing reasonable opening hours and physical facilities.

56. As a good practice in many countries, where the applicant who received the document is unable of obtaining a basic understanding of its content, the public authorities are invited to help him or her as far as it is possible and reasonable. This is in keeping with the wishes expressed by the Committee of Ministers in its Recommendation No. R (93) 1 on effective access to the law and to justice for the very poor. Help with comprehension, however, does not imply an obligation to translate the documents or to provide highly specialised technical or legal explanations.

Paragraph 2

57. If a limitation only applies to some of the information in a document, the rest of the document should normally be released. It should be clearly indicated where and how much information has been deleted. Whenever possible, the limitation justifying each deletion should also be indicated in the decision.

58. As regards paper documents, deletions could be made on a copy, deleting or blacking out the parts to which the limitation applies. If the original document is electronic, a new document or a

paper copy should be provided, giving a clear indication of which parts have been deleted (for example, by leaving the relevant sections blank).

59. If the redacted version of the requested document is misleading or meaningless, Parties to the Convention may allow for refusal of the whole document. This possibility is intended to be interpreted in a restrictive way. Whether the remainder of information is meaningless or misleading or not must be assessed with restraint and respect for the applicant. If some of the information contained in the document in question is not disclosed some countries oblige their authorities to provide a summary of the document, although this is not an obligation under the Convention.

Paragraph 3

60. Paragraph 3 states that access may also be granted by referring the applicant to easily accessible alternative sources. For example, if a document is published on the internet and is easily accessible to a specific applicant, the public authorities may refer him or her to this alternative source. In any event, whether a document is “easily accessible” must be assessed on a case-by-case basis: for example, not everyone may have access to internet. “Accessible” also encompasses affordability; it may not be in accordance with this paragraph, for example, to refer somebody to purchase an expensive publication.

Article 7 – Charges for access to official documents

Paragraph 1

61. In principle, on-site consultation should be free of charge. However, the public archival authorities and museums may charge the applicant for the cost of the services they supply.

Paragraph 2

62. In the case of copies, the cost of access may be charged to the applicant, but also in accordance with the self-cost principle and be reasonable; the public authorities should not make any profit.

63. This does not preclude public authorities from producing publications for commercial purposes and selling them on the market at competitive prices.

Article 8 – Review procedure

Paragraph 1

64. Paragraph 1 states that an applicant whose request has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law. This review body must be able, either itself to overturn decisions taken by public authorities which it considers do not comply with the legislation in force, or to request the public authority in question to reconsider its position. At the same time, the possibility of other legal and disciplinary actions against public authorities which have committed a serious breach of their obligations under the present Convention must not be excluded.

65. The term “denied” should be broadly understood and embraces, for instance, the refusal, express or implied, in full or in part of a request for a document on the grounds of an exemption listed in Article 3. When national law establishes time-limits for responding to requests, the applicant should have the right to appeal against administrative silence.

Paragraph 2

66. Paragraph 2 states that the applicant shall always have access to an expeditious and inexpensive review procedure. In some national systems, an internal review procedure is a compulsory intermediary step before a court of appeal or other independent complaints procedure. In some Parties to the Convention, it is also possible to complain about refusals or malpractice in this field to an ombudsman or a mediation body.

67. When a public authority refuses access to a document, it should indicate in the decision the possibilities of appealing.

Article 9 – Complementary measures

68. Article 9 states that the Parties must take appropriate measures to inform the public about its rights, for example, by publishing documents electronically or by setting up documentation centres. The public authorities may, inter alia, create contact points within the various administrative departments to inform the public and facilitate access to the documents for which those departments are responsible. That means creating and updating lists or registers of the documents in their possession.

69. Such information and referral tasks may also be entrusted to the independent body responsible for monitoring or supervising access to official documents.

70. It is necessary that Parties to the Convention provide for measures to set up effective systems for the management and storage of the public authorities' documents. This includes rules and practices as regards archiving and destruction of official documents. A basic rule as regards destruction should be that it should not be allowed as long as there may be a public interest in the document and never during the processing of a request for it.

Article 10 – Documents made public at the initiative of the public authorities

71. Any policy which seeks to make official documents of general interest public without the need for individual requests must ensure that citizens are able to form an opinion on the authorities that govern them and to become involved in the decision-making process. National rules on proactive publication are thus encouraged.

72. In some countries, public authorities are required by law to publish, on their own initiative, information about their structures, staff, budget, activities, rules, policies, decisions, delegation of authority, information about the right of access and how to request official documents, as well as any other information of public interest. This is done on a regular basis and in formats including the use of new information technologies (for example web pages accessible to the public) and in reading rooms or public libraries, in order to ensure easy, widespread access.

73. One criterion which public authorities may use to determine which documents should be published proactively is if a document, or a particular kind of document, is frequently requested.

Section II

74. Section II of the Convention contains provisions establishing a monitoring system which aims at ensuring the effective implementation of the Convention by the Parties and developing the right of access to official documents. Two monitoring bodies are created through the Convention: The Group of Specialists on Access to Official Documents is a technical body, composed of independent and highly qualified experts in the area of access to official documents. Then there is a more political body, the Consultation of the Parties, composed of one representative per Party.

Article 11 – Group of Specialists on Access to Official Documents

75. Article 11 contains provisions on the functioning of the monitoring procedures by the Group of Specialists.

Paragraph 1

76. Paragraph 1 a) obliges the Group of Specialists to present reports on the adequacy of the measures in law and practice taken by the Parties to give effect to the provisions set out in the Convention.

77. Paragraph 1 b) enumerates a list of means by which the Group of Specialists monitors the effective implementation of the Convention by the Parties. The Group of Specialists can thus express opinions, make proposals, exchange information and report on significant developments, make proposals to the Consultation of Parties for the amendment of the Convention and formulate

its opinion on any proposal for the amendment of the Convention made in accordance with Article 19.

Paragraph 2

78. Paragraph 2 provides the Group of Specialists with a possibility to request information and opinions from civil society. What is foreseen is that the non governmental organizations and other representatives of civil society will continue their engagement in issues related to access to official documents and be willing to provide useful experiences for the Group of Specialists.

Paragraph 3

79. Paragraph 3 establishes that the Group of Specialists consist of a minimum of 10 members and a maximum of 15 members, who are elected by the Consultation of the Parties. This paragraph specifies the regularity of their elections and the competences they have to possess.

Paragraph 4

80. Paragraph 4 underlines that the members of the Group of Specialists shall be independent and impartial, which means among other things that they shall not represent or act on behalf of any government.

Paragraph 5

81. Paragraph 5 indicates that the procedure for the election of the members of the Group of Specialists shall be determined by the Committee of Ministers. The Parties themselves will then be in charge of electing the members of the Group of Specialists. Before deciding on the election procedure, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. This requirement recognises that all Parties to the Convention are able to determine such a procedure and are on an equal footing.

Article 12 – Consultation of the Parties

Paragraph 1

82. Article 12 sets up the second body of the monitoring system: the “Consultation of the Parties”.

Paragraph 2

83. Paragraph 2 enumerates the aims of the Consultation of the Parties, which consist in considering the reports, opinions and proposals of the Group of Specialists, making proposals and recommendations to the Parties, making proposals for the amendment of this Convention in accordance with Article 19 and formulating its opinion on any proposal for the amendment of this Convention made in accordance with Article 19.

Paragraph 3

84. The setting up of the Consultation of the Parties will ensure equal participation of all the Parties in the decision-making process and in the monitoring procedure of the Convention and aims at strengthening cooperation between the Parties and between them and the Group of Specialists in order to ensure the proper and effective implementation of the Convention.

Article 13 – Secretariat

85. The Secretariat of the Council of Europe assists the Group of Specialists and the Consultation of the Parties with practical arrangements as well as expertise in the field of the right of access to official documents in carrying out their functions pursuant to the monitoring system.

Article 14 – Reporting

86. Article 14 deals with different reports on implementation of the Convention and other issues related to access to official documents that must be given regularly and on request by the Parties to the Group of Specialists.

Paragraph 1

87. Paragraph 1 concerns the first report that must be given by the Parties to the Group of Specialists within a year of the entry into force of this Convention. This report shall contain full information on the legislative and other measures taken to give effect to the provisions of this Convention.

Paragraph 2

88. Paragraph 2 deals with the following reports that shall be transmitted to the Group of Specialists before the meeting of the Consultation of the Parties. These reports are an update of the information mentioned in paragraph 1. They should be transmitted to the Group of Specialists within a period fixed in the rules of procedure adopted by the latter.

Paragraph 3

89. Paragraph 3 specifies that the Group of Specialists can request from each Party all information that it deems necessary to fulfil its tasks. This right for the Group of Specialists gives them a possibility to gather information in any area of access to official documents that it decides to investigate closer.

Article 15 – Publication

90. All the documentation mentioned in Article 15 shall be made public. This shall be done through publication of the documentation on the Council of Europe's web site.

Section III

91. With some exceptions, the provisions in Article 16 to 22 are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315th meeting, in February 1980.

92. The Convention is open for signature by Council of Europe member States. Once the Convention enters into force, in accordance with paragraph 3, other States may be invited to accede to the Convention in accordance with Article 17 paragraph 1.

Article 16 – Signature and entry into force of the Convention

93. Article 16 paragraph 3 sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 10. The number is not so high, however, as to unnecessarily delay the Convention's entry into force.

Article 17 – Accession to the Convention

94. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any other State or any international organisation to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to this Convention.

Article 18 – Territorial application

Paragraph 1

95. Article 18 paragraph 1 specifies the territories to which the Convention applies.

Paragraph 2

96. Article 18 paragraph 2 is concerned with extension of application of the Convention to territories stated in the declaration.

Article 19 – Amendments to the Convention

Paragraph 1

97. Paragraph 1 provides that amendments may be proposed by any Party, the Committee of Ministers, the Group of Specialists or the Consultation of the Parties provided for in Article 12, in accordance with standard Council of Europe treaty-making procedures.

98. This procedure provides therefore for a form of consultation that the Committee of Ministers should carry out before proceeding to the formal adoption of any amendment. This is the mandatory consultation of the Parties to the Convention including non-member Parties. This consultation is justified in so far as non-member Parties are concerned because they do not sit in the Committee of Ministers and therefore it is necessary to provide them with some form of participation in the adoption procedure. This procedure takes place in the framework of the Consultation of the Parties which gives an opinion in pursuance of Article 12.

99. The Committee of Ministers may then approve the proposed amendment. Although it is not explicitly mentioned, it is understood that the Committee of Ministers would approve the amendment in accordance with the majority provided for in Article 20.d of the Statute of the Council of Europe, that is a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee (paragraph 4). The involvement of the Committee of Ministers, which includes representatives of all member States of the Council of Europe – not all of which may be Contracting parties to the Convention – was questioned by some delegations during the drafting of this Convention. In this respect, it should be recalled that this procedure, which is common to all Council of Europe Conventions containing explicit provisions on their amendment, aims at reaffirming the link between the Convention and the Organisation under whose aegis it was elaborated and adopted. Council of Europe Conventions – and the amendments thereto – are in fact prepared and negotiated within the institutional framework of the Organisation, and are a fundamental instrument to pursue its objectives: the Statute of the Council of Europe after stating the aim of the Organisation, provides in Article 1, paragraph b that "This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms." Thus, the negotiation would culminate in a decision of the Committee of Ministers establishing *ne varietur* the text of the proposed treaty or amendment. In the case of amendments, the entry into force is subject to their acceptance by all the Parties, who therefore maintain their right to decide to be bound or not by the proposed amendment.

100. The amendment would then be submitted to the Parties for acceptance (paragraph 5).

101. Once accepted by all the Parties, the amendment enters into force on the first day of the month following the expiration of a period of one month following notification of acceptance by the last Party (paragraph 6).

102. In accordance with standard Council of Europe practice and in keeping with the role of the Secretary General as depositary of Council of Europe Conventions, the Secretary General receives proposed amendments (paragraph 2), communicates them to the Parties for information (paragraph 3) and for acceptance once adopted by the Committee of Ministers (paragraph 5) and receives notification of acceptance by the Parties and notifies them of the entry into force of the amendments (paragraph 6).

Article 20 – Declarations

103. Article 20 contains provisions allowing Parties to the Convention to make declarations regarding particular Articles or to specify how certain Articles will apply.

Article 21 – Denunciation

104. In accordance with the United Nations Vienna Convention on the Law of Treaties, Article 21 allows any Party to denounce the Convention.

Article 22 – Notification

105. Article 22 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and it also lays down the entities to receive such notifications.

Notes

- (1) Recommendations No. R (91) 10 on the communication to third parties of personal data held by public bodies, No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes, Rec(2000)10 on codes of conduct for public officials, Rec(2000)13 on a European policy on access to archives and Rec(2007)7 on good administration.
- (2) An OSCE study had been made in this sphere: Access to information by the media in the OSCE region: trends and recommendations - Summary of preliminary results of the survey. The preliminary conclusions of the study, which covers 56 countries and was carried out by the Office of the OSCE Representative on Freedom of the Media (ORFM), were published on 30 April 2007 (see www.osce.org/fom).
- (3) Sdružení Jihočeské Matky v. Czech Republic, application n°19101/03, decision on admissibility of 10 July 2006.
- (4) See in particular judgments of the European Court of Human Rights dated 7 July 1989 in the case of Gaskin v. United Kingdom (application No 10454/83) and 19 February 1998 in the case Guerra and others v. Italy (application No 14967/89).
- (5) Case of Claude Reyes and others v. Chile, see <http://www.corteidh.or.cr/casos.cfm?idCaso=245>.
- (6) Hereafter, the Aarhus Convention.