

28 September 2007

To:
Group of Specialists on Access to Official Documents
Ms. Helena Jäderblom, Chair
c/o Council of Europe
67075 Strasbourg
France

cc:
Steering Committee on Human Rights (CDDH)
Mr. Roeland BÖCKER, Chair

Madame Chair, Sirs:

We write to express our serious concern that the current draft of the future European Convention on Access to Official Documents is defining the right of access to information in a way that, in certain important respects, falls below prevailing European and international standards.

We are gravely concerned that if adopted as it stands, the European Convention on Access to Official Documents will legitimise legislation which lacks important safeguards that are currently found in many domestic access to information laws, thereby flying in the face of the enormous progress made in the past several years, notably the adoption since 1992 of access to information laws in all 20 formerly communist Council of Europe member states, as well as new laws in countries such as the UK and Germany, and modifications to constitutions and statutes in a number of other states. The Council of Europe contributed to these significant advances, including through its Recommendation 2002(2) on Access to Official Documents, and we believe that the only appropriate role for the Council of Europe is to continue setting standards by adopting a treaty that enshrines a core right to information as currently established at the national level in Europe and globally.

We note that the right to information has been confirmed as a basic human right in national constitutions and jurisprudence as well as by the specialised mandates on freedom of expression of the United Nations, the Organization for Security and Co-operation in Europe, and the Organization of American States¹. In September 2006 the right to information was affirmed as a fundamental human right by the Inter-American Court of Human Rights.

We recognise and welcome the fact that the draft Convention has a number of positive features, including recognition of a right to request “official documents”, which are broadly defined as all information held by public authorities, in any form. It is also

¹ See Declaration of 6 December 2004 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression at <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>

welcome that the draft Convention clearly establishes that the right can be exercised by all persons with no need to demonstrate a particular interest in the information requested, and at no charge for filing requests and viewing documents. These positive elements of the treaty do not, however, allay concerns that significant flaws in the current draft, if left unremedied, will undermine the value of the Convention.

For the undersigned civil society groups and individuals, the three most serious problems in the current draft of the Convention are:

1. Failure to include all official documents held by legislative bodies and judicial authorities within the mandatory scope of the treaty;
2. Failure to include official documents held by natural and legal persons insofar as they perform public functions within the mandatory scope of the treaty;
3. Failure to specify certain basic categories of official documents, such as those containing financial or procurement information, that must be published proactively.

It is our contention that the future Convention should reflect best practices which have gained broad acceptance across the Council of Europe's 47 member states, rather than merely the existing law and practice of the 15 member states represented in the Group of Specialists drafting the Convention. For example, in previous submissions to the Group of Specialists², civil society groups have drawn attention to the fact that in the vast majority of Council of Europe member states, all branches of government, including the judicial and legislative branches, are required to provide access to information, either under a single law or separate legislation for each branch. There is no principled reason for treating legislative bodies or judicial authorities any differently than 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. It would be ironic, for example, to exclude from the scope of the treaty documents related to the law-making activities of national parliaments – the most quintessential exercise of representative democracy. Transparency of these institutions enables citizens to form opinions about their functioning, foster efficiency, reduce corruption and ultimately increase public confidence in them. Furthermore, the treaty's exemptions regime is perfectly capable of protecting any legitimate legislative or judicial privileges.

Similar rationales call for the inclusion of private entities that perform public functions within the mandatory scope of the treaty. In an era in which traditional public services – whether it be utilities, healthcare or military operations – are increasingly being

² See *Briefing regarding the elaboration of a Council of Europe treaty on access to official documents*, submitted by Article 19, the Open Society Justice Initiative and Access Info Europe to the Group of Specialists in November 2006; see also *Briefing # 2 regarding the elaboration of a Council of Europe treaty on access to official documents*, submitted by Article 19, the Open Society Justice Initiative and Access Info Europe to the Group of Specialists in July 2007. Available at www.access-info.org, www.article19.org and www.justiceinitiative.org.

outsourced to the private sector, this would be a glaring omission. It would also represent an unjustifiable lowering of the standards established by the Council of Europe's 2002 Recommendation, which covers "natural or legal persons insofar as they perform public functions." For these reasons, we find it unjustifiable that the future Convention proposes to limit the right to legislative and judicial bodies performing "administrative functions" or exercising "administrative authority" rather than including all information held by all branches of government. If the future Convention fails to reach this minimum standard, it will do a great disservice to the right of access to information to the extent that it will run counter to the Council of Europe's mandated role to promote democracy and protect human rights.

With respect to proactive publication of information, we note that proactive publication rules are an essential component of any effective freedom of information regime and that many access to information laws contain detailed provisions on the information that must be disclosed without the need for a request, such as by placing it on a public body's website. Most non-experts will never make a request for an official document; in order to ensure the people are nevertheless able to form a view of the authorities and to engage in decision-making, information of general interest should be made available without the need for a request. To guarantee that this happens in practice, the Convention should identify those categories of information which must, at a minimum, be published proactively.

In addition to the three most serious problems highlighted above, other significant concerns with the current draft are:

4. Absence of a guarantee that individuals will have access to an appeals body which has the power to order public authorities to disclose official documents.
5. Absence of a guarantee that individuals will be able to appeal against violations of the right of access other than "denial" of a request (such as unjustified failures to provide access in a timely fashion or in the form preferred by the requester);
6. Lax drafting of exceptions that permit withholding of official documents under the internal deliberations and commercial interests exemptions:
 - a. There are no time limits on the application of the internal deliberations exemption; such documents may be withheld indefinitely, even after a decision on the matter has been taken;
 - b. The treaty should protect only "legitimate commercial interests," not all and any "commercial interests," as in the present draft.
7. Absence of a requirement that states set statutory maximum time-limits within which requests must be processed.

Of particular concern here is the issue of judicial protection of the right of access (point 4). The current draft of the Convention grants applicants whose request for information has been denied "access to a review procedure before a court of law or another independent and impartial body established by law." It fails to specify, however, that the non-judicial body of appeal should have the legal authority to order disclosure of official

documents. Given that access to information is now recognised as a human right, as will be confirmed by this treaty, it is essential that the future Convention enshrine the principle of a right of appeal to an independent body (a judicial or equivalent body) that is empowered to protect the rights of individual requestors by ordering, when appropriate, the release of requested information. In the absence of such a guarantee, the applicant's theoretical right of access would be denied effective judicial protection – in violation of one of the basic principles of human rights law.

Last but not least, we note that the monitoring mechanism for the treaty will need to be robust and well-resourced if the Convention is to serve its intended purpose of upholding the right of access to information for the 800 million people in the Council of Europe region.

Since the Convention aims to ensure a minimum level of respect for the right of access to information, its drafters should avoid the pitfall that if one or two member states do not meet a particular standard, the Convention will accommodate those states by lowering the bar—this would defeat the very purpose of this standard-setting effort. Rather, the core provisions of the Convention should be mandatory, and states whose legislation does not, at time of ratification, meet those minimum standards may, as a last resort, make declarations or reservations and notify the monitoring body when they have brought their legislation into line with the treaty.

We, the undersigned, call on the Group of Specialists to address the seven concerns identified above by making the following modifications to the draft Convention:

1. Include all official documents held by legislative bodies and judicial authorities, irrespective of their nature, within the mandatory scope of the treaty;
2. Include all documents held by natural and legal persons insofar as they perform public functions within the mandatory scope of the treaty, if necessary further defining the meaning of “public functions”;
3. Introduce a provision that requires regular, proactive publication of certain basic, specifically defined categories of official documents including information about the structure of each government body, personnel, activities, rules, guidance, decisions, and public procurement;³
4. Introduce a guarantee that individuals will have access, in all cases, to an appeals body with the power to order government agencies to disclose official documents and ensure compliance with the right of access;
5. Introduce language to the effect that in addition to a right to appeal against “a denial of a request”, individuals shall have the right to appeal all administrative actions or omissions that violate their right to information;

³ List taken from the submission of the OSCE Representative on Freedom of the Media to the Group of Specialists.

6. Redraft the exemptions relating to internal deliberations and commercial interests to ensure:
 - a. that there is a time limit on the applicability of the internal deliberations exemption (*i.e.* following the conclusion of internal deliberations on a matter or within a reasonable period thereafter);
 - b. that the treaty refers to legitimate commercial interests only;

7. Introduce a requirement that states set statutory maximum time-limits within which requests must be processed.

We believe that only if these concerns are addressed, will the future European Convention on Access to Official Documents enshrine the essential principles of the right of access to information.

Signatories:

Access Info Europe (Madrid)
Article 19 (London)
Open Society Justice Initiative (New York)
Statewatch (London)
Asociación por los Derechos Civiles (Association for Civil Rights, Argentina)
Movement for Freedom of Information in Israel
APADOR-CH (the Romanian Helsinki Committee)
Due Process of Law Foundation (Washington)
Access to Information Programme (Bulgaria)
Silha Center for the Study of Media Ethics and Law (Minnesota, USA)
Center for Independent Journalism, Bucharest, Romania
Foundation Open Society Institute – Macedonia
Macedonian Young Lawyers Association *
Pro Media (Macedonia)
Open Democracy Advice Centre, Cape Town, South Africa
Pro Acceso (Chile)
Greek Helsinki Monitor
Minority Rights Group-Greece
Acces-info Centre (Moldova)
Association of Young Journalists (Montenegro)
Electronic Frontier Foundation (Brussels, Toronto, San Francisco and Washington D.C)
Media Rights Agenda (Lagos)
The National Press Club (Washington DC, USA)
Citizen and Democracy Association (Slovakia)
Poder Ciudadano (Argentina)
Hungarian Civil Liberties Union
Farmsubsidy.org
Freedom of Information Center of Armenia
Consejo de la Prensa Peruana (Peruvian Press Council)
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