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Draft Council of Europe Convention on Access to Official Documents

Report[1]
Committee on Equal Opportunities for Women and Men
Rapporteur: Mr Klaas de VRIES, Netherlands, Socialist Group

Summary

For a democracy to work well, the people must know what their government is doing – and access to official documents is one important way to make the work of public authorities more transparent, throwing a shaft of light onto how decisions are made, encouraging critical debate and even potentially exposing corruption. This draft Council of Europe convention should be welcomed as the first binding international treaty to lay down such a general right of access, according to the Committee on Legal Affairs and Human Rights.

Yet it also has shortcomings: the definition of "public authorities" in the draft is too narrow, allowing some public bodies to continue operating in the shadows, no time limits are laid down, which would allow authorities to delay publication of awkward information until it had lost its value, and review bodies are not given the power to order disclosure of a requested official document where access has initially been refused. Finally, member states can opt out of parts of the treaty by entering wide-ranging reservations when they ratify it.

The committee believes these issues are important enough to justify more work – and therefore makes the rare request that the draft be sent back to its drafting experts for further consideration.

1. See Doc. 11631 for the text of the draft convention.

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A. Draft opinion

1. The Parliamentary Assembly welcomes the draft Council of Europe convention on access to official documents as the first binding international legal instrument which recognises the general right of access to official documents held by public authorities.

2. The Assembly fully shares the conviction expressed in the explanatory report to the draft convention which emphasises that "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."

3. Effective access depends on the nature and extent of the exemptions permitted, which must be carefully circumscribed and narrowly construed and applied. Practical impediments to access, including the factors of time, costs, or any other burdens must also be addressed. The Assembly is satisfied that the draft convention recognises all of these requirements.

4. Whilst recognising that there is little value in an overly ambitious text that states are either unable or unwilling to sign up to, the Assembly stresses that the draft convention should not fall short of reasonable requirements in a democratic society, bearing in mind that many member states of the Council of Europe have already provided a legal basis for access to official documents.

5. The Assembly considers that the definition of "public authorities" in the draft convention is too restrictive in that, apart from the government, it includes only the administrative functions of legislative and judicial bodies and of natural and legal persons. Since one of the key purposes of the right of access to information is to ensure accountability, it is important that as many bodies as possible, insofar as they operate in the public sphere, be encompassed by the convention.

6. The Assembly subscribes to the European Court of Human Rights' observation that information is "a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest". It therefore recommends that a time limit for the handling of requests be included in the convention.

7. The Assembly welcomes the provision foreseen in Article 8 of the draft convention setting out the right to a review of decisions by a court or other independent and impartial body established by law against the refusal of access to a document, expressly or impliedly, in whole or in part. But the scope of this provision needs further clarification and the review body should be granted the power to order disclosure of the requested official document.

8. Since an effective right of access requires a delicate balance of many individual components, and the removal of even one of them could upset the balance and undermine the right, the Assembly considers that no reservations should be allowed to the convention.

9. The Assembly considers that the current draft has some shortcomings which need to be resolved in order not to miss the opportunity to enshrine modern standards for access to information in what will be the first binding international legal instrument in this field. The Assembly finds the issues raised sufficiently important to justify recommending to the Committee of Ministers that it send the draft back to the Steering Committee for Human Rights (CDDH) for further consideration with respect to:

9.1. broadening the definition of "public authorities" to include a wider range of activities of public authorities and hence widening the scope of the information made available;

9.2. including a time limit on the handling of requests;

9.3. clarifying and strengthening the review process provided in Article 8.1.

10. The Assembly further recommends to the Committee of Ministers that the draft convention be amended as follows:

10.1. in Article 1, before paragraph 1, add a new paragraph as follows: "This convention safeguards the right of access to official documents held by public bodies. All official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests";

10.2. in Article 9, to delete (a) and to add a new paragraph after "exercised." As follows:

10.3. *"They shall also take appropriate measures to ensure that public authorities:*

b. [to become new (a)]

c. [to become new (b)]

d. [to become new (c)]"

10.4. to add a new paragraph after paragraph 20, reading as follows: "No reservations may be made with regard to this convention."

11. For the future, the Assembly invites the Committee of Ministers to solicit its opinion at an earlier stage of the procedure leading to the adoption of draft conventions in order to allow for a true dialogue without unduly slowing down the elaboration of new conventions.

12. The Assembly invites the Committee of Ministers to inform it of action it has taken in response to this opinion.

B. Explanatory memorandum,[2] by Mr Klaas de Vries

1. Procedure

1. At its 1025th meeting on 30 April 2008, 2 and 5 May 2008, the Committee of Ministers decided to ask for the Parliamentary Assembly's opinion on the draft Council of Europe convention on access to official documents (hereinafter "the draft convention").[3]

2. On 23 June 2008, the Assembly referred the request of the Committee of Ministers for an opinion to the Committee on Legal Affairs and Human Rights for a report.

3. At its meeting on 25 June 2008, the Committee on Legal Affairs and Human Rights appointed Klaas de Vries (Netherlands, Socialist Group) as rapporteur.

2. Substantive comments

2.1. Overview

4. The Committee of Ministers of the Council of Europe must be congratulated on taking the initiative to introduce a binding instrument on access to official documents, building in particular on Recommendation Rec(2002)2 on access to official documents. The draft convention has much to commend it. It bears the fruits of expert knowledge and drafting, as well as significant input from civil society. The purpose of freedom of information and the value it brings to society in general are well set out in the Preamble to the convention and in the explanatory report. The convention and explanatory report together contain all of the critical components of a workable freedom of information regime. Ensuring effective access is the aim of a good system. A crucial consideration in that endeavour is the nature and extent of the exemptions permitted. To give maximum effect to the right of access, the exemptions must be carefully circumscribed and narrowly construed and applied. Measures need to be in place also to guard against ways of circumventing the right, such as taking too long to respond to requests, invoking exemptions too readily or making access too expensive or burdensome. The draft convention recognises in principle all of these requirements. The accompanying explanatory report provides valuable guidance to parties and public authorities on ways to fulfil their various responsibilities under the convention.

5. While the draft convention contains all the crucial elements, there are some issues of detail, in particular regarding the scope of its application where the draft does not go far enough. These are addressed in the following commentary. In assessing any lacunae it must be borne in mind that there is little value in having a perfect system which is so demanding that states are either unable or unwilling to sign up to the convention, either at all or only after a long time period needed to put all the necessary measures into place. But at the same time, there is no point in introducing a system that falls short in significant ways so that the right of access available to the public is unsatisfactory. The fact that many member states of the Council of Europe already have relatively high levels of access should be taken as an example.

2.2. General assessment of the draft convention

6. The draft convention of the Council of Europe on access to official documents is most welcome. It marks an important stage in the development of a true right to information, the precise status of which has remained unclear for some time.

7. As rightly expressed in the explanatory report of the draft convention "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." Access to official documents not only provides the public with a valuable source of information, but also, as the Preamble to the draft convention points out, "fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy". Access to official documents thus benefits both information

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2. The rapporteur wishes to express his appreciation for help he obtained from Mrs Marie McGonagle, Head of Department and Director of the LL.M. in Public Law, Law School, National University of Ireland, Galway. A background paper prepared by Mrs McGonagle served as the principal source of this explanatory memorandum.
3. See Document CM(2008)56 Addendum 1.

providers and users and therefore society as a whole. It plays a vital role in bringing information about the business of government into the public domain, giving effect to the reality that the information belongs to the people and is merely held by governments and public bodies on their behalf. An effective access system promotes a stronger relationship between citizen and government.[4]

8. The draft builds on the recognition found in the Declaration of the Committee of Ministers of the Council of Europe on the Freedom of Expression and Information adopted on 29 April 1982, as well as Recommendations No. R (81) 19 on the access to information held by public authorities; 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; No. R (2000) 13 on a European policy on access to archives and particularly Rec(2002)2 on access to official documents. Having prepared the way, the Council of Europe has now reached the point of introducing "the first binding international legal instrument to recognise a general right of access to official documents held by public authorities" (explanatory report, paragraph 1).

9. The draft convention also complements the work of the European Union, particularly Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. It also adds a general right of access to the UN Convention (Aarhus Convention) on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998).[5]

2.3. Language issues

10. The rapporteur has first been confronted with the title of the draft convention which seems to slightly differ in English (draft Council of Europe convention on access to official documents) and in French *projet de convention du Conseil de l'Europe sur l'accès aux documents publics*. Why have the drafters not decided to use "official documents" and "*documents officiels*" or "public documents" and "*documents publics*"? It appears that this question has been discussed in depth by the drafters.

11. In French, every administrative document is "*public*" (as opposed to "private" (*privé*) ones emanating from private individuals), but it only becomes "*officiel*" once it is adopted by a competent authority (a document under preparation within an administrative authority is a "*document public*" but not yet "official" because not yet finalised and approved). The term "*documents publics*" in French is therefore a wider notion than "*documents officiels*".

12. In English, the equivalent of this wider notion is "official documents" – documents emanating from persons who hold an office ("officials") and not from private persons.

13. The rapporteur thought it was useful to make clear that what appears to be a different word in the French and in the English versions actually has the same meaning.

2.4. Comments article by article

Introductory remarks

14. Before commenting on the draft convention article by article, the rapporteur would like to point out the numerous reactions by civil society, other international organisations, information commissioners of different countries as well as by other bodies of the Council of Europe on the draft convention at various stages of its preparation.[6]

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4. See in this respect Recommendation Rec(2002)2 of the Committee of Ministers on access to official documents.
5. See full text of the Aarhus Convention under www.unece.org/env/pp/documents/cep43e.pdf.
6. See in particular under www.access-info.org, "Access to information: a fundamental right, a universal standard", briefing paper by Access Info Europe, 17 January 2006; "Briefing regarding the elaboration of a CoE treaty on access to official documents", by Access Info Europe, Article 19 and Open Society Justice Initiative, November 2006 and June 2007; letters of the information commissioners of, respectively, Estonia, Slovenia, United Kingdom, Hungary, Serbia, Germany and Ireland, September 2007 and October 2007; "Comments on the draft European convention on access to official documents of the Council of Europe" by the Office of the Representative on Freedom of the Media, OSCE, 11 September 2007 and letters dated 2 November 2007 and 8 January 2008; comments by the Steering Committee on the Media and New Communication Services (CDMC), CMDC(2007)023, paragraph 40, 7 December 2007; and letter of the Information Commissioner of Slovenia and 11 other information commissioners (and letter of support by the Scottish Information Commissioner), 17 March 2008

15. They have pointed out what they consider to be serious shortcomings, fearing that this might result in a missed opportunity, and stressing the historical importance of the creation of the first international legally binding document in the field of freedom of information.

16. The rapporteur has studied their comments carefully and has taken them into account in his article-by-article comments. Without claiming to be exhaustive, references will be made where appropriate to these contributions.

Preamble

17. The Preamble to the draft convention indicates the importance of and reasons for recognising a right of access (paragraphs 5 and 6). It is a welcome starting point that the presumption is clearly in favour of a broad right of access, considering that "*all* official documents are in principle public and can be withheld subject *only* to the protection of other rights and legitimate interests" (paragraph 7, emphasis added).

Section I Article 1

18. As might be expected, Article 1 of the draft convention begins with general provisions, which include definitions of the principal terms, namely "public authorities" and "official documents".

19. However, the article begins with a rather negative statement that "[t]he principles set out hereafter should be understood without prejudice to those domestic laws and regulations and to international treaties which recognise a wider right of access to official documents". Although the purposes of a right of access are well set out in the Preamble, there is no actual statement of the right, which is at the heart of the draft convention, in either the Preamble or the text of the articles. It would strike a much more positive and convincing note to begin the text of the articles of the draft convention itself with a statement of the right, for example "this convention establishes the right of access to official documents held by public bodies".[7] This could then be followed by the text of paragraph 7 of the Preamble, which could be moved down from the Preamble: "All official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests." The statement about international treaties would then follow.

20. Regrettably the definition of "public authorities" (paragraph 2.*a*.i) is somewhat restricted in that, apart from government, it includes only the administrative functions of legislative and judicial authorities and of natural and legal persons.[8] It leaves it to individual states to make a declaration "opting in" to a broader concept of the term "public authorities", which extends to the "other" functions of these authorities and the public functions and public funding aspects of the operation of natural and legal persons (paragraph 2.*a*.ii). The declaratory "opt in" facility is better than none, and the monitoring function (Article 11 *et seq.*) could be used in practice to promote and encourage this step or to amend the text in the future to include these functions as standard rather than additions. Sometimes states do need time to be convinced and/or to prepare to bring the judicial and private bodies within the scope of freedom of information.

21. If, however, states choose not to opt in, large areas of public information will fall outside the scope of the convention. The safeguards contained in other articles should be sufficient to allow either for states to opt in or preferably for an expanded definition to be included in the text. For example, the grounds for possible limitations on access to information contained in Article 3 include the "prevention, investigation and prosecution of criminal activities" and the "equality of parties in court proceedings and the effective administration of justice". They also include the "deliberations within or between public authorities concerning the examination of a matter", as well as "privacy and other legitimate private interests" and "commercial and other economic interests". Such possible exemptions are phrased in sufficiently broad terms to give comfort to judicial and legislative authorities, and to natural or legal persons performing public functions or in receipt of public funds. Since one of the key purposes of a right of access to information is to ensure accountability, it is important that as many bodies operating in the public sphere and as many areas of information as possible be brought within the terms of the convention, and hence national legislation.[9]

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7. See the submissions of Article 19, Open Society Justice Initiative and Access Info Europe, although those organisations would prefer that the term "information" be used rather than "official documents". The argument is a valid one, particularly since national laws in 22 of 26 countries included in their survey refer to "information" rather than "documents", as does the Aarhus Convention. The most important underlying consideration, however, is that the definition, whether the term "information" or "official documents" is used, should be a broad one and as inclusive as possible.

8. See in particular the Comments by the Steering Committee on the Media and New Communication Services (CDMC), CMDC(2007)023, paragraph 40, 7 December 2007, as well as the other references in footnote 6.

22. The option for parties to make a declaration, accepting a broader definition in relation to "one or more" areas (judicial, legislative, natural or private persons), is better than not including those bodies or persons at all but it falls short of ensuring their inclusion. Another option, therefore, might be to strengthen the "opt in" mechanism. The provision could perhaps read, "Each Party shall … declare that the definition of 'public authorities' shall include, [from date/or within one year/two years of the coming into force of this convention], if not already included, the following: …." Something of that nature would put an onus on parties to include all the additional areas of information held by public authorities but allow them a definite extra period of time to do so or allow them to do so incrementally.

23. The definition of "official documents" (paragraph 2.*b*) is broad and focuses on the content ("information") as opposed to the form ("recorded in any form, drawn up or received and held by public authorities"). It makes clear that it includes all information received, created or amassed by public authorities or held by them. This is a strength. It is attenuated, however, by the restrictive definition of "public authorities" (above), unless the declaratory "opt in" facility in paragraph 2.*a*.ii is availed of.

24. Furthermore, as the explanatory report makes clear, the definition means that the right of access is limited to existing documents and the convention does not oblige parties to create new documents in response to requests for information (paragraph 14). That is a reasonable stance, provided the absence of documents is not a deliberate attempt to prevent information coming into the public domain or that the documents are not of a kind that really should be recorded, drawn up, received or held and made available. It is also reasonable that private papers be excluded (explanatory report, paragraph 13).

Proposals:

– further consideration should be given to broadening the definition of "public authorities" to include a wider range of activities of public authorities and hence a wider range of information;

– before paragraph 1, add a new paragraph as follows: "This convention safeguards the right of access to official documents held by public bodies. All official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests."

Article 2

25. Although very much a standard feature in modern freedom of information rules, it is a strength of the draft convention that the right of access is available to everyone. The explanatory report expands on the practical implications and effects of including everyone (explanatory report, paragraphs 17 and 18). It makes clear that motive and intention are irrelevant and that requesters will be entitled to use any information accessed for any lawful purpose (explanatory report, paragraph 19).

Article 3

26. Limitations on the right of access are permitted but only when prescribed by law, necessary in a democratic society and proportionate to the aim of protecting certain specified interests. This formulation has the advantage of following quite closely that of the European Convention on Human Rights. By requiring that such refusal be permitted only when the tests (prescribed by law, necessity and proportionality) are met, it obliges public authorities to justify any such refusal and guards against blanket or wholesale refusal of access to documents on the grounds listed. Also parties "may" impose limitations; the text does not say "shall", thus the provision is enabling, not mandatory. This is a positive aspect. The list of areas that could justify the imposition of limitations (defence matters, privacy, etc.) is also reasonable, and as pointed out in the explanatory report, is exhaustive. That is an important consideration, as states cannot therefore add areas of limitation of their own. The only addition to the main list contemplated in the convention is contained in a clause following the list, which allows for the possibility of some states including communication with the reigning family or head of state among the possible limitations. The explanatory report makes clear that this is necessary because of the constitutional position of the reigning family or head of state in certain countries (explanatory report, paragraph 35).

9. See also in this respect Resolution CJI/RES.147 (LXXIII-O/08) on principles on the right of access to information, adopted by the Inter-American Juridical Committee on 7 August 2008, which calls, *inter alia*, for public bodies to be defined broadly: www.article19.org/pdfs/igo-documents/principles- on-the-right-of-access-to-information.pdf.

27. A distinction is drawn between access to documents, which may be limited as above, and access to information contained in documents. In other words, access to documents may in some cases be refused on the basis of one or more of the above listed interests. In other cases, access to the documents themselves may be allowed but certain information in them may be refused – and presumably removed or blanked out – on the grounds that "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" (paragraph 2). This provision is explained in the explanatory report by reference to the "harm test" and "balancing of interests" principle (explanatory report, paragraphs 36 to 39). Again, this reflects an emphasis on disclosure, which is very much in the spirit of access and freedom of information.

28. The provision in paragraph 3 that "Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply" is welcome. It requires ("shall" is mandatory) parties to consider setting not necessarily to actually set – time limits. This is an important inclusion because without it limitations could be imposed in one set of circumstances and not removed when those circumstances changed. It also means that if states do not set time limits they can be asked to give reasons or documents can be re-sought after a period of time. It is important to note also that information can be time sensitive and delay can render the information useless, so a time frame where possible is highly desirable.

Article 4

29. The three provisions of this article are to be commended: an applicant does not have to give reasons for requesting the documents; parties may allow applicants anonymity except where disclosure of identity is essential in order to process the request; and formalities are to be confined to the essentials. This favours the applicant and makes the process as straightforward and easy as possible – key components of an effective right of access.

Article 5

30. The process of making a request, as set out in Article 5, is admirable as far as it goes. The requirement that the public authority "shall help the applicant, as far as reasonably possible, to identify the requested official document"[10] places a duty on the public authority to provide reasonable assistance (paragraph 1). The language used ("applicant", "requested") suggests that the assistance is to be given once the request has been made. For example, people sometimes make requests for all references to a particular scheme or event and it may be helpful to them if the public authority can assist them to pinpoint more clearly the nature of the references they actually want. It would be too onerous to require public authorities to help everyone individually before they made a request. That is where training and education of the public comes in, as well as the requirement that public authorities make available to the public generally information on how they operate, what schemes they implement, what type and range of records they hold, and so on.[11] It is of course desirable that public authorities appoint freedom of information officers to assist members of the public with queries, direct them to already available information and provide a resource to the authority itself by, for example, centralising queries and identifying areas of repeated inquiries where it might be appropriate for the authority to make the information available proactively without waiting for formal requests. A general requirement to inform the public about their right is contained in Article 9.

31. Similarly, a duty is placed on a public authority to redirect "wherever possible" the application or applicant to the appropriate authority if it does not hold the document itself (paragraph 2). Again, this is important assistance to an applicant. It also puts some pressure on public authorities to provide manuals or online guides to the systems they employ, the schemes they administer, and the documents they hold, in order to cut down on the amount of assistance they will have to give and the need to redirect applicants or applications.

32. The language of paragraph 3 ("Requests for access… shall be dealt with on an equal basis") is rather vague but clarified in the explanatory report (paragraph 48) as meaning that requests will normally be dealt with in order of receipt and regardless of the status of the applicant or the nature or complexity of the request. This would mean, for example, that journalists as applicants should neither be given priority nor penalised because of the likely publication of information accessed. The latter in any event is prohibited by Article 2, which requires (as indicated in the explanatory report) that access be granted regardless of the motive or intention of the requester.

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10. In some cases more than one document may need to be identified, so it might be more appropriate in the drafting to refer to "document or documents", but this is only a very minor point.
11. See further Article 9 below.

33. The requirement in paragraph 4 that requests be dealt with promptly and decisions "reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand" is essential to the effective operation of the right of access to information.[12] Access delayed without justification undermines the right itself.

34. Access if it is to mean anything must be effective, in that information must be available by means of a reasonably easy and timely process. The formulation used ("as soon as possible or within a reasonable time limit which has been specified beforehand") is appropriate; it requires specific time limits, so that applicants will know when to expect decisions but also allows individual states some leeway. A certain leeway is necessary for parties because, if a precise short time limit were to be laid down for all, it might be too onerous for some states or some public authorities that receive a high number of requests. As a result, access could be rendered ineffective by some public authorities in some states, for example, becoming clogged up with requests and being unable to process them within the set time, thus facing backlogs. Such a development would not be in the interest of either an authority or the public.

35. However, in order to ensure that parties do not accord too much time to public authorities and in order to bring some certainty to the process, it would seem prudent to add something like "and in any event no longer than thirty days,[13] unless in exceptional circumstances, in which case the public authority shall inform the applicant within the thirty days, giving reasons for the delay and indicating when the decision and means of access will become available". Where states opt for the longer time frame, pressure can be put on them via the monitoring process (Article 11 *et seq.* below) and through training and activation of the public, to reduce such time limits.[14] Training of both public authorities and of civil society, journalists and the voluntary sector are crucial to the successful implementation and use of any freedom of information scheme. If necessary, the explanatory report could state that parties that already have a lower time limit should not extend it.

36. If one considers the fact that Committee of Ministers Recommendation Rec(2002)2 on access to official documents already has a stronger wording in VI.3, "A request for access to an official document should be dealt with promptly. The decision should be reached, communicated *and* executed within any time limit which may have been specified beforehand" (emphasis added), one might fear that the actual wording of the draft convention ("as soon as possible *or* within a reasonable time limit which has been specified beforehand", emphasis added) does not only bring no added value as regards the crucial question of time limit but actually represents a step back in comparison with existing standards.

37. Paragraphs 5 and 6 are both quite acceptable. It is perfectly reasonable to refuse requests that are unduly vague or manifestly unreasonable (paragraph 5). It is also imperative that refusals in whole or in part be accompanied by reasons explaining the decision (paragraph 6). If the applicant is satisfied with the reasons, his/her right of access has been met. If he/she is not satisfied, some form of appeal is warranted; otherwise the right cannot be said to have been given effect to in practice. Besides, states could offer and hide behind spurious reasons, safe in the knowledge that there was no right of appeal.[15]

Proposal: further consideration should be given to the inclusion of a reference to an upper time limit on the handling of requests.[16]

Article 6

38. Article 6 deals with forms of access. It gives the applicant a right to choose, within reason, the form in which he/she wishes to receive the information.

39. Paragraph 2 contains the important principle that where some of the information in a document is subject to a limitation, access to the remainder of the information should be granted, with omissions clearly indicated. The exceptions to this principle are where the remainder of the information is misleading or meaningless or if it imposes a manifestly unreasonable burden for the authority to release the remainder of the document. If any of these exceptions are applied, the applicant will have a right to seek a review of the decision and the authority will have to justify the refusal on one of the grounds stated. In this regard, it is important that the review/appeals body can look behind a claim on one of those headings. The notion of "misleading" is perhaps less subjective than that of "meaningless", especially since in the latter case the authority may deem the information meaningless without knowing the purpose for which the information is

12. See reference above to information being time sensitive.
13. Or "within twenty working days".
14. This has been the experience in a number of countries, for example New Zealand.
15. Regarding reviews/appeals, see further Article 8, paragraph 1, below.
16. As already advocated by the OSCE, Article 19 and others in their various contributions.

sought. For instance, it might still be useful to a journalist, either because it is not so meaningless in the context of the story being pursued or because it may enable the journalist to make a point about the freedom of information regime or some other matter. The explanatory report makes clear that the possibility of refusing information on these grounds "is intended to be interpreted in a restrictive way" and whether it is "meaningless or misleading or not must be assessed with restraint and respect for the applicant" (explanatory report, paragraph 59).

40. Paragraph 3 of the text is merely common sense and practical. It also gives public authorities a reason to make information available routinely and proactively, in the knowledge that they will not have to process individual requests if the information is already available elsewhere.

Article 7

41. Article 7 deals with fees to be charged and takes a common sense approach: inspection is to be free (except for archives and museums) but a "reasonable" fee, which does not exceed the actual costs of reproduction and delivery of the document, can be charged for copies. There is also an obligation to publish the tariffs of charges so that applicants know the financial implications of making a request and choosing a particular form of access. Fees for reviews/appeals should also be required to be reasonable (see further Article 8, paragraph 2, below). The amount or imposition of fees should also be within the scope of the review process.

Article 8

42. Article 8 is one of the most important but potentially problematic articles of the convention. It is a positive provision for making the system of access effective and meaningful in that it sets out the right to a review of decisions. It gives an applicant "access to a review procedure" to "a court or other independent and impartial body established by law" when a public authority refuses access, expressly or impliedly (for example, through not responding within the time frame laid down), in whole or in part.

43. It is clear and appropriate that the review envisaged in paragraph 1 is not just a review by the authority itself but by a court or other independent and impartial body established by law. That is a positive feature. What is not altogether clear, however, is whether it envisages a judicial review by a court of the process of reaching the decision or whether it envisages an appeal against the substance and process of the decision. In other words, can such a review body seek further information from the authority about the substance of the information as well as the process of deciding, and overrule the authority and order disclosure if it thinks fit? The explanatory report (paragraph 64) states that the 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". It should really be able to do both (and perhaps that is what is intended, although the language suggests otherwise). One problem here is the word "or". It might be better to re-order the sentence as follows: "must be able to request the public authority in question to reconsider its position and/or to overturn itself decisions taken by public authorities which it considers do not comply with the legislation in force".

44. Another problem is that there is no clear statement that the review body can seek further information from the authority, although that may be implicit if the review body has the right to overturn decisions of the authority; it can hardly do so without obtaining further information from the authority and the authority having an obligation to furnish such information to the review body. Given the lack of clarity around aspects of this provision, the simplest thing to do, in order not to be overly prescriptive, may well be to adopt the wording proposed by Article 19 et al. in relation to ordering disclosure.[17] The power to order disclosure would cover all of the issues raised here.

45. Two other things are noteworthy. First of all, the provision is for "review", not "appeal". This is significant, particularly in light of the second observation, namely that there is no indication in either the text of the draft convention or in the explanatory report that the decision of the review body would be final, subject only to recourse to a court on a point of law.

17. "A court or other independent body provided for in paragraph 1 shall have the power to order disclosure of the requested official document."

46. Paragraph 2 states that 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". The sentiment here of an expeditious and inexpensive review procedure is admirable and necessary. As is the case regarding the processing of requests (Article 5, paragraph 4), it would be desirable to have a specified time limit placed on the review process.

47. Presumably the word "always" in Article 8, paragraph 2, refers to situations other than those envisaged in Article 8, paragraph 1, that is, denial of a request, expressly or impliedly. For instance, it might include the imposition or amount of fees charged, or the lack of time limits when any of the limitations in Article 3 are invoked. The explanatory report merely points out that some states have both a review by a public authority itself and by a court or independent body, such as an ombudsman or mediation body.

48. The explanatory report also states that "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" (explanatory report, paragraph 64). This might include, for example, the deliberate destruction of documents to frustrate access or review and is a deterrent to any such action.

Proposal: further consideration should be given to clarifying and strengthening the review process provided in Article 8, paragraph 1, to ensure its effectiveness.

Article 9

49. Article 9 is headed "Complementary measures" and includes a duty on the parties to inform the public of their right of access and how that access may be exercised. This is vital to the success of the scheme, as the public need this information if they are to avail of the right. A list of matters for which "appropriate measures" must be taken is set out. All of these matters facilitate the development of a meaningful and achievable right of access.

50. There is a slight difficulty and lack of clarity with the drafting of this article, in that the subject of the first two sentences is the "Parties". "They", that is, the parties, shall inform the public of their right and "They" shall also take appropriate measures to do the things listed in *a* to *d*. That formulation suggests that they, that is, the parties, are to "provide information on the matters or activities for which they are responsible;" etc., whereas it would seem that it should be the public authorities themselves who should be charged with doing so. Furthermore, the ratification of the convention assumes that parties will need to educate public authorities as to their duties and obligations. If that is so, it would be better to delete *a* and to make a new paragraph beginning with "They shall also take appropriate measures to ensure that public authorities:", followed by *b*, *c* and *d*. That would mean that the parties are to take appropriate measures (which implies the education of public authorities in their duties and obligations) to ensure that public authorities do these various things. If this is not the intended meaning, and the onus is on the parties to do these various things in *a* to *d* themselves, then it may be that the word "they" in *b* should read "the public authorities" and "their" in *c* should also be replaced and the meaning made clear. The explanatory report at paragraphs 68 and 70 seems to view the duties as those of the parties.

Proposal: to delete *a* and to make a new paragraph after "exercised." as follows:

"They shall also take appropriate measures to ensure that public authorities:

b. [to become new a]

c. [to become new b]

d. [to become new c]."

Article 10

51. Article 10 makes it mandatory for public authorities to be proactive in the release of information "where appropriate". As the explanatory report indicates or implies in its reference to what some states already do, it is important that information issued proactively be issued in an accessible and user-friendly format and at locations, physical and online, which will ensure easy, widespread access. As suggested above, such measures are of benefit to both the public and the authorities themselves.

Section II Articles 11 et seq.

52. Section II of the draft convention sets out the procedures for monitoring and reviewing the operation of the convention and its implementation by the parties. The provisions are fairly standard and informed by the guiding principles of the Council of Europe. The system provides for the establishment of a group of specialists, which will meet at least once a year. Its composition, role and functions are set out in Article 11 and some of the subsequent articles. A second monitoring body, called the consultation of the parties, is also provided for and its role is set out in Article 12 and following articles. As usual in the case of conventions, the procedures for signature and entry into force of the convention are set out (Articles 16 *et seq.*), as well as matters such as accession, territorial application, amendments, declarations, etc.

53. The question of reservations remains problematic in that a delicate balance is needed to provide all the necessary components, theoretical and practical, that make for an effective right of access. A reservation made in respect of any one or more components could potentially weaken or undermine the effectiveness of the right of access, and therefore permitting reservations even in accordance with the Vienna Convention might prove problematic in practice.

Proposal: to add a new paragraph reading as follows: “No reservations may be made to this convention.”

Reporting committee: Committee on Legal Affairs and Human Rights.

Reference to committee: Doc 11631, Reference No. 3462 of 23 June 2008.

Draft opinion adopted unanimously by the committee on 9 September 2008.

Members of the committee: Mrs Herta **Däubler-Gmelin** (Chairperson), Mr Christos **Pourgourides**, Mr Pietro **Marcenaro**, Mrs Nino **Nakashidzé** (Vice-Chairpersons), Mr Francis **Agius**, Mr José Luis Arnaut, Mrs Meritxell **Batet Lamaña**, Mrs Marie-Louise **Bemelmans-Videc**, Mrs Anna Benaki, Mr Erol Aslan Cebeci, Mrs Ingrida Circene (alternate: Mr Boriss **Cilevičs**), Mrs Alma Čolo, Mr Joe Costello (alternate: Mr Terry **Leyden**), Mrs Lydie Err, Mr Valeriy **Fedorov**, Mrs Mirjana **Ferić-Vac**, Mr Aniello Formisano (alternate: Mr Andrea **Manzella**), Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr József Gedei, Mrs Svetlana Goryacheva (alternate: Mr Arsen **Fadzaev**), Mrs Carina Hägg, Mr Holger **Haibach**, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Andres **Herkel**, Mr Serhiy **Holovaty**, Mr Michel **Hunault**, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot Islami, Mr Željko Ivanji, Mrs Iglica **Ivanova**, Mrs Kateřina Jacques, Mr Karol Karski, Mr András Kelemen, Mrs Kateřina **Konečná**, Mr Eduard **Kukan**, Mr Oleksandr Lavrynovych (alternate: Mr Ivan **Popescu**), Mrs Darja Lavtižar-Bebler, Mrs Sabine LeutheusserSchnarrenberger, Mr Humfrey **Malins**, Mr Andrija Mandić, Mr Alberto Martins, Mr Dick **Marty**, Mrs Assunta Meloni, Mr Morten Messerschmidt, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr Alejandro Muñoz Alonso (alternate: Mr Miguel **Barceló-Pérez**), Mr Felix **Müri**, Mr Philippe Nachbar, Mr Fritz Neugebauer, Mr Tomislav Nikolić, Mr Anastassios Papaligouras (alternate: Mr Theodoros **Pangalos**), Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr John Prescott (alternate: Mrs Ann **Clwyd**), Mr Valeriy **Pysarenko**, Mrs Marie-Line Reynaud, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Paul Rowen, Mr Armen **Rustamyan**, Mr Kimmo Sasi, Mr Ellert Schram, Mr Christoph Strässer, Lord John Tomlinson, Mr Mihai Tudose, Mr Tuğrul **Türkeş**, Mrs Özlem **Türköne**, Mr Vasile Ioan Dănuţ **Ungureanu**, Mr Øyvind **Vaksdal**, Mr Hugo Vandenberghe, Mr Egidijus Vareikis, Mr Klaas **de Vries**, Mr Dimitry **Vyatkin**, Mrs Renate **Wohlwend**, Mr Jordi **Xuclà i Costa**, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Łukasz **Zbonikowski**.

NB: The names of those members present at the meeting are printed in bold.

See 36th Sitting, 3 October 2008 (adoption of the draft opinion); and Opinion No. 270.