

Briefing Paper

**ACCESS TO INFORMATION:
A FUNDAMENTAL RIGHT, A UNIVERSAL STANDARD**

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Summary

As Council of Europe experts commence debate on the possibility of converting Recommendation 2002(2) on Access to Official Documents into a binding treaty, two important issues need to be addressed. The first, is whether the right is of access to documents or access to information, the second, is whether there exists sufficient consistency in international standards to require that the future treaty to set binding standards rather than laying out a shopping list of options available to member states.

This paper, prepared by the non-governmental organization Access Info Europe, shows that the right to information that has emerged in the world in the past four decades is clearly a right of access to information rather than a narrower right of access to documents. Of the 46 members states of the Council of Europe, 39 have laws regulating the right of access to information held by the authorities, and of these 32 provide for the broader and stronger right to information rather than the narrower right to official documents.

The paper also shows that there exist certain core standards on access to information, which indicate that any future treaty developed by the Council of Europe should set absolute standards. Such a situation might argue against adoption of a framework convention, as these tend to set more flexible regimes for respect of rights. It is recommended that, whatever form the final treaty takes, the Council of Europe ensure that it enshrines the highest standards set by access to information laws in Europe and globally.

Overview: The Right to Information in the World in 2006

There are at present at least 65 access to information statutes in the world, the majority being in Europe (18 in Western Europe, 24 in Central and Eastern Europe and Eurasia) followed by the Americas (13 laws). Of these, at least 50 establish a right of access to information rather than a more limited right of access to documents. The vast majority of developed democracies recognize this right.

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It is also increasingly common to find constitutional provisions guaranteeing not only freedom of information, by the specific right to seek and receive information held by government. Within Europe, of the 46 member states of the Council of Europe, 37 have constitutional provisions on freedom of information, with 24 of these constitutions providing a right of access to either documents or information. Some, such as Norway recently amended their constitutions to recognize this right. As of 2004, the Norwegian constitution establishes that:

*Everyone has a right of access to the documents of the State and of the municipal administration and a right to be present at sittings of the courts and elected assemblies. The law may prescribe limitations to this right in regard of the right to privacy or other weighty considerations.*¹

That there is a right of access to information has been recognized by numerous national constitutional courts, and recently by the Inter-American Commission on Human Rights which in July 2005, in a case against Chile, found that Article 13 of the Inter-American Convention on Human Rights includes a right of access to government-held information.

The Inter-American Commission comments that:

*The importance of an effective right of access to information has a solid basis in international and comparative human rights law ... there is a growing consensus that governments do have positive obligations to provide state-held information to their citizens ..."*²

The Commission also notes that "the Special Rapporteur on Freedom of Opinion and Expression of the United Nations has stated clearly that the right to access information held by public authorities is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR)." The Commission recalls that in 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 for Freedom of Expression. The three mandates on freedom of expression stated that:

The right to access to information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation ... based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exemptions.

The Inter-American Commission underlines the opinion of the three special mandates that not only is there a right to information, but that "the burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions" and that there must be an opportunity to appeal denials of requests for information to an independent tribunal "with full powers to investigate and resolve such complaints."

This finding paves the way for a possible ruling by the Inter-American Court that Article 13 — whose text is similar to Article 19 of the Universal Declaration of Human Rights, Article 19, the International Covenant on Civil and Political Rights and Article 10 of the

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European Convention on Human Rights — establishes a fundamental right of access to information. Such a ruling would reinforce the recognition of the right in national constitutions, legislation and jurisprudence around the world. The Inter-American Court will hear the case in March 2006.

A Human Right Emerges

The right to information has both a long and a very recent history. Although the first law goes back to the Swedish Freedom of the Press Act of 1766³, the majority of the world's FOI laws were adopted within the past 15 years: in 1990 there were just 12 laws, there are now over 65.

The more recent laws are setting the standards in terms of what a freedom of information act should contain. Progressive laws and practices can be found in new Council of Europe member states from the former communist bloc, from Estonia in northern Europe to Slovenia in the south, and in countries like Mexico, an observer at the Council of Europe, which has become a global leader in access to information since its law came into force in June 2003. Countries with active oversight mechanisms, such as those established by the relatively recent acts in Ireland and the UK as well as those set up by the laws of Hungary and Slovenia are leading the way. Court decisions in other countries, such as Romania and Bulgaria are likewise setting new standards of government openness.

The earlier European laws (Sweden, Finland, Norway, France and the Netherlands – all adopted before 1980) and the United States' Freedom of Information Act (FOIA, introduced in 1966, amended in 1974 after the Watergate scandal) codified administrative procedures for providing information to the public and focused on administrative, rather than executive, legislative or judicial bodies. Hence these early laws provide a right of access to official "documents" or "records"—i.e., those formally created by the administration as part of its functions—although some make broader references to information as well.

Following the seismic political shift that took place with the fall of the Berlin wall in 1989, Hungary became the first post-Communist country to adopt a freedom of information law in 1992.⁴ The law set standards for Eastern Europe, including a reasonable timeframe for receiving information (15 days), explicitly defined exemptions, and an oversight mechanism (the Parliamentary Data Protection and Information Commissioner, who must be notified of refusals to provide information).

Throughout the 1990s and into the early years of the new century, the new democracies of Eastern Europe adopted access to information laws, as they have which increasingly become a *sine qua non* of a democratic country. Civil society movements seeking a true break with the past demanded more information from—and greater participation in—government, spurring the trend which by 2005 resulted in 24 post-Communist countries having passed access to information laws.

Lessons learned from the implementation of earlier FOI laws were reflected in later laws: the scope of the laws became broader—covering all branches of government and all bodies performing public functions (in Bosnia's law, for example)⁵ or covered by public funds (Slovakia).⁶ Stipulated timeframes for information delivery gradually became shorter from

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one month in France and two weeks in the Netherlands to as little as five days in Estonia.⁷ More recent laws often provide for greater specificity on the mechanisms for accessing information⁸ the application of exemptions, and the use of harm and public interest tests for assessing the democratic necessity of withholding information from the public.

The wave of adoptions of access to information laws in Europe has been followed in Latin American and the Caribbean. Colombia was the first country to adopt a dedicated access to government-held information law in 1985.⁹ The adoption of access to information laws in Mexico and Peru in 2002 marked a new phase of democratic reforms prompted by civil society activity focused on promoting greater government transparency across the region. The movement for transparency in Latin America developed as much in response to corruption in the 1990s as to human rights violations in earlier years.

In Africa, the first access to information law was passed in South Africa in 2000. South Africa's law was rooted in the move away from Apartheid, with the Constitution of 1996 establishing at Article 32(1) the right of access to (a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise and protection of any rights. This Constitutional provision reflects the highest standards of the right to information, recognizing that it is not only a right of the citizen vis-à-vis government, but a broader human right to information necessary for the full enjoyment of other human rights.

Universal Standards

From this growing body of legislation, constitutions, court rulings and now findings by international tribunals, it is clear that universal standards for the right of access to information are emerging.¹⁰ More recent laws in Western Europe reflect both the concept of a right and that of access to information rather than documents. Typical is the Scottish law which reads at Section 1(1):

A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

Many of these standards are already enshrined in Council of Europe Recommendation 2002(2), which was developed following careful consideration of the emerging comparative law both within Europe and globally. The first official text from an international human rights body setting out minimum standards on access to information, Recommendation 2002(2) defines "official documents" as "all information recorded in any form, drawn up or received and held by public authorities and linked to any public or administrative function, with the exception of documents under preparation"—a broad definition in line with the scope of the newer generation of "access to information" laws.

Some of the standards on which it is clear that comparative law and jurisprudence allows no flexibility include that anyone may request information, regardless of nationality or citizenship, that requestors do not need to justify their interest in the information sought, and that the right applies to all public bodies.

Standards are also emerging on costs (only reproduction costs may be covered) and timeframes (with the global average being no more than 15 working days for responding to information requests)¹¹.

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It is clear that to comply with international human rights standards, all exemptions applied to the right to information must meet a legitimate interest and must be necessary in a democratic society. In terms of access to information legislation, this is expressed as the harm and public interest test: if information is to be exempted from release, it must be shown to harm a particular interest (such as national security or personal privacy) and the countervailing public interest in receiving the information must be considered before disclosure is denied.

Many laws require proactive publication of information, particularly the disclosure of core information relating to the activities of the public body, financial information, and an index of documents held to ensure that information seekers can identify where to file requests.

Finally, an increasing proportion of national and local access to information laws establish an independent agency, such as an ombudsperson or commissioner, to review refusals, promote awareness, and to advance the right to access information.

It is important that any future treaty elaborated by the Council of Europe promotes the highest standards on the right of access to information. It would be unfortunate if too many options were given to states through the principle of the lowest common denominator being applied.

ACCESS TO INFORMATION LAWS IN EUROPE

Council of Europe Member states, candidates and observer nations

Country	Const. Date	Constitution	FOI law Date	Access to Docs	Access to Info
Albania	1998	FOI and ATI	1999		yes
Andorra	1993	FOI	none		
Armenia	1995	FOI	2003		yes
Austria	1920	ACCESS TO INFORMATION	1987		yes
Azerbaijan	1995	FOI	2005		yes
Belarus (candidate)	1994	FOI	none		
Belgium	1831	ACCESS TO INFORMATION	1994	yes	
Bosnia and Herzegovina	1995	No specific provisions	2000		yes
Bulgaria	1991	FOI and ATI	2000		yes
Canada (observer)	1867	No specific provisions	1983	yes	yes
Croatia	1990	ACCESS TO INFORMATION	2003		yes
Cyprus	1960	FOI	none		

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Country	Const. Date	Constitution	FOI law Date	Access to Docs	Access to Info
Czech Republic	1993	FOI and ATI	1999		yes
Denmark	1849	No specific provisions	1985	yes	
Estonia	1992	FOI and ATI	2000		yes
Finland	2000	FOI and ATI	1951	yes	yes
France	1958	No specific provisions	1978	yes	
Georgia	1995	FOI and ATI	1999		yes
Germany	1949	FOI	2005		yes
Greece	1975	ATI	1999	yes	
Holy See (observer)	2000	No specific provisions	none		
Hungary	1949	FOI and ATI	1992		yes
Iceland	1944	No specific provisions	1996	yes	yes
Ireland	1937	No specific provisions	1997	yes	yes
Italy	1948	No specific provisions	1990	yes	
Japan (observer)	1947	No specific provisions	1999	yes	yes
Kosova	2003	ATI	2003	yes	
Latvia	1922	FOI	1998		yes
Liechtenstein	1921	No specific provisions	1999	yes	
Lithuania	1992	FOI and ATI	1996	yes	yes
Luxembourg	1868	No specific provisions	none		
Macedonia	1991	FOI and ATI	draft		
Malta	1964	FOI	none		
Mexico (observer)	1917	FOI	2002		yes
Moldova	1994	ATI	2000		yes
Monaco	1962	No specific provisions	none		
Montenegro	1992	FOI and ATI	2005		yes
Netherlands	1815	No specific provisions	1978	yes	yes
Norway	1814	No specific provisions	1970	yes	yes
Poland	1997	FOI and ATI	2001	yes	yes
Portugal	1976	FOI and ATI	1993	yes	yes
Romania	1991	FOI and ATI	2001		yes
Russian Federation	1993	FOI	provinces		
San Marino	1600	? No specific provisions	none		
Serbia	2003	No specific provisions	2003		yes
Slovakia	1992	FOI and ATI	2000		yes
Slovenia	1991	FOI and ATI	2003		yes
Spain	1978	FOI and ATI	1992	yes	
Sweden	1975	FOI and ATI	1766	yes	
Switzerland	1999	FOI and ATI	2004	yes	
Turkey	1982	FOI	2003	yes	yes
Ukraine	1996	FOI	1992		yes
United Kingdom	unwritten	FOI (bill of rights)	2000		yes
United States (observer)	1789	No specific provisions	1966	yes	

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Conclusions and Recommendations

Access Info Europe welcome the initiative by the Council of Europe to draft a binding treaty on access to public information. We recommend that:

- The treaty being drafted by the Council of Europe reflect international standards by recognizing the right of access to information in preference to the narrower right of access to official documents.
- The future treaty sets forth the highest standards of comparative law and practice. Member states should not be given multiple options to comply with the right to information.
- The treaty establish a strong and effective oversight mechanism to ensure that member states respect the right of access to information all members of the public.

¹END NOTES

Norway's Constitution , Grlbest. 29 okt 2004 nr. 1402, Article 100.

² Petition submitted by the Inter-American Commission on Human Rights to the Inter-American Court of Human Rights in the Case of *Claude Reyes et al v. Chile (No. 12.108)*, 8 July 2005, *paragraph 53*.

³ Some analysts trace the right back further than Enlightenment philosophies, even as far back as rights granted under the Chinese Tang Dynasty of 618 to 907. See Lamble, Stephen. (2002) "Freedom of Information, a Finnish clergyman's gift to democracy," *Freedom of Information Review*, No. 97, February 2002, 2-8.

⁴ Hungary, Act LXIII on the Protection of Personal Data and the Publicity of Data of Public Interest (1992).

⁵ Freedom of Access to Information Act for Bosnia and Herzegovina, Official Gazette, no. 28/2000, November 17, 2000, Article 3, "Definitions."

⁶ Bosnia's Act On Free Access To Information And Amendments Of Certain Acts (The Freedom Of Information Act) 2000, at Article 2 "Obligees".

⁷ Public Information Act of 15 November 2000 (RT¹ I 2000, 92, 597), entered into force January 1, 2001, Article 18(1): "A request for information shall be complied with promptly, but not later than within five working days."

⁸ See, for example, Bulgaria's law Public Access to Information Act (2000), Article 24(1): "The request for granting access to public information shall be made in the form of a written application or verbal request."

⁹ Law on Publicity of Official Acts and Documents (Law 57 of July 5, 1985). Colombia has a long history of legislation recognizing access to information, since the 1888 Political and Municipal Organization Code provided for the right of individuals to request documents held by government bodies or archives. See Toby Mendel, *Libertad de Información: Derecho Protegido Internacionalmente*, in UNAM University, "Derecho Comparado de la Información," No. 1. January-June 2003, Mexico City, Mexico.

¹⁰ See the Ten Principles on Access to Information developed by the Open Society Justice Initiative.

¹¹ The Open Society Justice Initiative calculated the average of 40 laws globally to be 14 working days, and recommends a 15 working day timeframe for responding to requests.

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