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Council of Europe Treaty on Access to Official Documents

Civil Society Calls for Urgent Action

-- Draft Convention Fails to Ensure Adequate Protection of Right to Information

The world's first treaty on access to information, currently being drafted by the Council of Europe, risks falling below prevailing European standards according to civil society groups from across Europe. The treaty, which will become the "European Convention on Access to Official Documents", is being drafted by a Group of Specialists, chosen by 15 of the 47 governments that are members of the Council of Europe. The Group of Specialists is mandated to finish its work by the end of 2007, but has just one more drafting session scheduled for 9-12 October in Strasbourg.

The future European Treaty on Access to Official Documents establishes a right to request "official documents", which are broadly defined as all information held by public authorities, in any form. On the positive side, the future Convention will establish that the right to "official documents" 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.

However, the draft treaty has three major flaws:

- 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.

Civil society groups from across Europe and internationally, including Access Info Europe, ARTICLE 19 and the Open Society Justice Initiative, are calling on these omissions to be rectified before the Convention is adopted by the Committee of Ministers, the Council of Europe's top political body. They note that, inevitably, the treaty will be viewed by many as codifying prevailing norms in Europe, and thus as reflecting the minimum standards to which governments in other parts of the world should be held. But this treaty does not reflect prevailing norms in Europe or other parts of the world, and in any event fails to ensure adequate protection of the right of access.

The right to access information held by the State has developed rapidly. In 1990, only 12 countries had access to information laws. Now, more than 75 countries do. In the Council of Europe region, 24 of the 47 member states have enshrined the right in their constitutions (for example Norway amended its Constitution in 2004 to specifically recognise the right); Spain is the only country with a population over 1 million that does not have a dedicated access to information law. At the international level, the right to information has been confirmed as a basic human right in national constitutions and

jurisprudence, as well as by the specialised freedom of expression mandates of the United Nations, the Organization for Security and Co-operation in Europe, and the Organization of American States. In September 2006 the right to information was affirmed as a fundamental human right by the Inter-American Court of Human Rights.

A substantial majority of the 47 member states of the Council of Europe grant access to a wide range of information held by their legislatures and judicial bodies, either under access to information laws or other legislation (norms that often predate the access to information regimes).

The draft treaty, in its current form, only requires the legislative and judicial branches to disclose documents related to their "administrative functions". There is, however, 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 is 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, health care or military operations – are increasingly being 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."

With respect to proactive publication of information, the civil society groups 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, there are several other deficiencies with the current draft of the Convention:

- 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 interest exemptions:
 - a. There are no time limits on the application of the internal deliberations exemption; such documents may be withheld indefinitely, even after a final 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. 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.

The draft Convention, once finalised by the Group of Specialists in mid-October, passes to the Council of Europe's Steering Committee on Human Rights (likely to consider the draft in November) and then to the Committee of Ministers for approval and eventual adoption, which could happen as early as the first quarter of 2008.

WHAT YOU CAN DO

Urgent action is needed before 9 October (when the final drafting session of the Group of Specialists begins) to call for the Convention to contain acceptable minimum standards on the right of access to information.

Here are some ideas for actions you can take to call on your government to press the representatives in Strasbourg to remedy the flaws in the treaty:

- **Sign the civil society letter:** Sign the letter calling on the Council of Europe to improve the treaty: we are aiming for 500 signatures from NGOs (civil society groups) across Europe by 28 September. Please encourage other NGOs to sign as well. A copy of the letter and how to sign up can be found by going to the home page of Access Info: www.access-info.org.
- **Contact your representatives in the Parliamentary Assembly of the Council of Europe:** Every Council of Europe member state sends parliamentarians to the Parliamentary Assembly of the Council of Europe (PACE). If possible, meet with your country's representatives and call on them to raise the issue in the next session of the Parliamentary Assembly in Strasbourg.

The national delegations to the Parliamentary Assembly are listed here

http://assembly.coe.int/ASP/AssemblyList/AL_DelegationsList_E.asp

- **Get the support of other NGOs:** Translate information about the treaty and the problems into your language and distribute it to other civil society groups: encourage them to sign the letter. This issue is relevant to human rights groups, environmentalists, consumer groups, women's and youth groups ... anyone who needs information should care about this issue!
- **Spread the word:** Let other interested communities know about the issue and call on them to take action and disseminate the news: archivists, librarians, bloggers, and academics (such as in faculties of communication, law, political science, etc) are among the groups of people who are likely to care about this issue and help raise concerns.
- **Discuss with Information Commissioners:** If your country has an Information Commissioner, let them know about this issue and discuss what joint actions you might be able to organise, such as a public debate of the right to information. In other countries it is possible that Protection Commissioners and Human Rights Ombudspersons would be interested in the issue and ready to participate in public discussions or talk to members of government.
- **Write to your government:** Write to your Head of Government (President or Prime Minister as appropriate) and the Ministers of Justice and Foreign Affairs and call on them to urge their representatives at the Council of Europe to take action to press for the treaty to meet the minimum standards. Get as many national NGOs as possible to sign the letter to your government.
- **Brief the politicians:** Try to meet with government representatives to explain the issues to them – find out what their opinion is and if they will support the call for a strong treaty.
- **Try for a parliamentary resolution:** Brief parliamentarians and, where possible, urge them to adopt a resolution calling for the treaty to meet minimum standards (declarations of support from political parties could also be helpful).
- **Brief the media:** Tell journalists (especially those who write about access to information) about the problems and get them to write stories: ask them to ask the government what it is doing to ensure the treaty meets the highest standards. Let the media know that on September 28, International Right to Know Day, there will be news about how many groups have signed the NGO letter as well as about actions taking place all across Europe.
- **Right to Know Day Special Actions:** On 28 September, in addition to your regular Right to Know Day activities, take some special action to promote awareness of the Council of Europe treaty problem. Keep an eye on the Access Info Europe website for the latest news on what groups are doing around Europe and how many NGOs have signed the joint letter.

Countries with representatives on the Groups of Specialists are Belgium, Bulgaria, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, Turkey and United Kingdom.

Other countries may participate in the discussions – Slovenia was one such participant in the July 2007 drafting session. Since all 47 Council of Europe member countries have a representative in Strasbourg, it may be that your government can send this person (or

another appropriate representative such as the Information Commissioner from your country) to make a contribution to the final treaty drafting session.

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