Committee of Ministers: European Convention on Access to Official Documents

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At the 1024bis Meeting of 27 November 2008, the Committee of Ministers adopted the Council of Europe Convention on Access to Official Documents. Existing instruments are Council Recommendation (2002) 2 on access to official documents and Recommendation No. R (81) 19 on access to information held by public authorities. The idea behind these instruments is that public access to government information is essential for the exercise of fundamental rights, that it enhances the transparency and accountability of the public sector and the informed participation by citizens in the democratic process.

The Parliamentary Assembly has voiced a number of substantial criticisms of the Draft convention, inter alia, that it provided for too many exceptions, applied to too few public bodies and did not establish a robust enough procedure. It advised that the draft be sent back to the Steering Committee for Human Rights (CDDH) for further consideration (Opinion No. 270 (2008)). The Council however pushed forward. The Convention will take effect three months after ten States have consented to be bound by it.

The Convention starts from the premise that all official documents are in principle public and should only be withheld in order to protect other rights and legitimate interests. The right of access pertains primarily to documents of public authorities with administrative functions: these include local, regional and national administration, but also the legislature, judicature and legal persons, at least as far as their administrative tasks are concerned. Contracting States are free to regard documents relating to all public activities of legislative bodies and judicial authorities as subject to the right of access and also to include natural or legal persons, insofar as they have public functions or are funded with public money.

Public bodies should make official documents available at their own initiative, as long at least as this is in the interests of transparency and the stimulation of efficiency in the public sector, or to encourage citizens' participation (Art. 10). Many national Freedom of Information Acts also require public bodies to be pro-active. Access on request is regulated in more detail (Arts. 4-8). The request procedure has the following characteristics: anybody can make a request, and the applicant shall not be obliged to give reasons for the request. The public authority should make reasonable effort to help the applicant identify which document(s) to

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which he or she seeks access. If necessary, the applicant is to be referred to the public authority which holds the official document. Requests must be dealt with "promptly", but the Convention does not prescribe a time limit. A refusal must be reasoned. If the rights and interests that justify refusal apply, but are relevant to part of the document only, then the remainder must be released. If access is granted, the applicant is in principle entitled to decide the form of access (inspection, receiving a copy in a certain format, etc.). Any charges for copies may not exceed the costs of reproduction and delivery.

The Convention recognizes four types of refusals. First, access may be refused because the request remains too vague to determine to which document it relates (Art. 5(5)i). Second, a request may be refused because it is manifestly unreasonable (i.e., huge or repetitive bulk requests; Art. 5(5)ii). Third, partial access to a document may be refused, if it requires an unreasonable effort to produce a "clean" document or if the document becomes misleading or meaningless due to the omissions. Fourth and final, a request may be refused because one or more of the countervailing rights and interests of Art. 3(3) is at stake.

The Convention lists twelve broad classes of such rights and interests, ranging from national security to privacy, from commercial or other economic interests (whether public or private) to public safety. These categories are not the same as those found in, for example, Art. 10 ECHR, and some are optional. But the types of limitation to access must meet similar criteria as the infringement of fundamental rights under the ECHR: they must be set down precisely in law, be necessary in a democratic society and be proportionate to the aim pursued. The test for disclosure is a two-pronged one (Art. 3(3)): if a listed right or interest is at stake, access may be refused if 1) the making public of the information would harm or is likely to harm said interest, and 2) there is no overriding public interest in disclosure.

Citizens must always be able to appeal (implicit) decisions on requests before a court or other independent and impartial body established by law. A fast and inexpensive review procedure must also be available, although it need not necessarily be before an independent or impartial body: reconsideration by the refusing public authority suffices.

Council of Europe Convention on Access to Official Documents (Adopted by the Committee of Ministers on 27 November 2008 at the 1042bis meeting of the Ministers' Deputies)

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