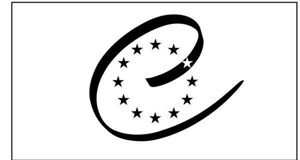

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Strasbourg, 8 March 2000
DH-S-AC(2000)003

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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GROUP OF SPECIALISTS
ON ACCESS TO OFFICIAL INFORMATION
(DH-S-AC)

______

5th meeting
Strasbourg, 22-25 February 2000,

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REPORT

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Introduction

1. The Group of Specialists on access to official information (DH-S-AC) held its fifth meeting from 22 to 25 February at the Human Rights Building, Strasbourg, with Ms Helena JÄDERBLOM (Sweden) in the Chair.

2. The list of participants is set out in Appendix I. The agenda as adopted appears in Appendix II, with references to the working documents.

3. During this meeting the DH-S-AC in particular:

(i) further examined the basic elements (DH-S-AC (99) 8, Appendix III) identified at the previous meetings (see item 4 of the agenda), including the questions posed by the Group of Specialists GT-DH-MAT concerning access to the law and justice of the very poor. The texts chosen as a basis for discussion at the next meeting appear in Appendix III to this report;

(ii) held a consultation with representatives of various sectors concerned by access to official information (see item 2 of the agenda and Appendix IV).

(iii) took note of the information provided by the Secretariat concerning the preparations for the next European Ministerial Conference on Human Rights (Rome, 3 and 4 November 2000) and held an exchange of views on the possible contribution of the Group to the preparation of this event.

Item 1 of the agenda: Opening of the meeting and adoption of the agenda

4. After adopting the agenda, the Chairperson welcomed *Article XIX* (International Centre against Censorship), an NGO based in London and active in the field of access to official information, which was represented for the first time as an observer within the DH-S-AC.

Item 2 of the agenda: Consultation with representatives from sectors concerned by the work of the DH-S-AC

5. The invited guests provided information on their respective spheres of activities concerning access to official information and took part in an exchange of views on the draft instrument currently being drafted by the DH-S-AC. A summary of the discussions appears in Appendix III to this report.

Item 3 of the agenda: *Tour de table* on recent developments in member Sates

6. The "*tour de table*" on recent developments in the field of access to official information, which was held at the last meeting was felt to be useful and was therefore repeated at this meeting.

7. Interesting developments have taken place in member States, such as a recent adoption of a law in Finland, widening the provisions of previous legislation, and preparatory legislative work in other countries (Bulgaria, Germany, the Netherlands, Norway, Russian Federation, Sweden, Turkey, United Kingdom as well as in Scotland). In addition, other, more political developments were mentioned (the planning of a campaign on access to official information including awareness-raising of the public and training of public officials in Sweden or the governmental programme "Modern state, modern administration" in Germany). Several experts of member countries of the European Union also mentioned

difficulties of implementing Directive 90/313/CEE of 7 June 1990 as well as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters adopted in Aarhus, Denmark on 25 June 1998.

8. The representative of the European Commission then presented the Commission's proposal for a regulation regarding public access to documents of the European Parliament, the Council and the Commission. This proposal was adopted by the Commission on 26 January, and still needs to be approved by the Council and the European Parliament. It should be finalised by May 2001. She pointed out that it is the first text which will impose a legal obligation, based on the Treaty of Amsterdam, on the institutions concerned as their current rules concerning access to information are contained in Codes of Conduct and are thus self-imposed obligations. The DH-S-AC held a brief exchange of views with the European Commission representative on the draft regulation during which it was noted that the DH-S-AC instrument had a similar structure.

Item 4 of the agenda: Further examination of the elements to provide a basis for discussion on the future work of the DH-S-AC

9. The DH-S-AC resumed examination of the elements which could provide a basis for discussion for its future work. It took as a departure point for discussion, the text appearing in Appendix III of the report of its last meeting (DH-S-AC (99) 8). It also held a brief exchange of views on the legal nature of the future instrument. At this stage, the DH-S-AC has not yet decided on the legal nature that should be given to the draft instrument, it being understood that such a decision falls within the competence of the CDDH. It hopes to hold a discussion thereon during its meeting in September 2000, in order to identify, for the attention of the CDDH, the arguments in favour and against each possible solution.

Forms of access (Principle 6)

10. The Group resumed work on this principle which had already been started at the last meeting, during which several questions in relation to forms of access were raised (DH-S-AC (99) 8, paragraphs 17 and 18).

11. The first issue tackled was the basic principle that an applicant should have a right to consult the original or receive a copy of the document. To emphasise the fact that when the document is actually to be handed out to the applicant a decision to grant access to that particular document has already been taken, the term "When access is to be granted" was included in the first paragraph.

12. The provision that the public authority must take into account the preferences expressed by the applicant within reasonable limits, was agreed to. The term "within reasonable limits" was included to allow some flexibility for authorities. For example, the topic was addressed of the various forms that copies can take – technical recordings, electronic versions, audiovisual, etc. and whether copies could always easily be produced. Apart from the cost of certain forms of copies, in some member States' authorities it would not always be feasible to produce a copy for example of a video cassette. In such a case, access to the original may be the only option. It was agreed to explore this issue in the Explanatory Memorandum. The issue was also raised whether an electronic version of a document could be classed as "a copy" and how the authority should guarantee the authenticity of such a copy.

13. After this, the DH-S-AC dealt with cases of partially sensitive documents, ie the problem of blanking out the sensitive parts. The Group agreed that in cases where only partial

access can be granted because a restriction applies, the remainder of the document should be supplied to the applicant. Furthermore, it was decided that any deletion in the document should be clearly indicated, so that the applicant gets a realistic idea of the original document. The issue of partial release of documents was included in the second paragraph of Principle 6.

14. In addition, the question of largely sensitive documents was raised and whether a document consisting mostly of blanked out spaces should be exempt or nevertheless sent to an applicant. Such a document could eventually be misleading or meaningless. For this reason, the DH-S-AC decided to include a reference to this issue in paragraph 2 of Principle 6.

15. The Group decided that the question of on-the-spot consultation of a document could be elaborated in the Explanatory Memorandum, stating that originals were likely to be consulted on the spot and that authorities should have an open attitude in allowing the general public into their offices. Nevertheless, it was agreed, that there may be practical problems, such as opening hours or requests by a significant number of people to consult the same document at the same time.

16. The last point agreed under Principle 6 was that authorities are not obliged to produce an official document if the document is easily accessible to the applicant by other means. Reference to a similar provision in the draft of the European Commission was made and it was pointed out that the question in that instrument is dealt with under the scope and not under forms of access as in the draft of the DH-S-AC. For this reason, both the wording of the issue and the best place for it to be included were discussed. With regard to the wording, it was stressed that the term “easily accessible by other means” depends, *inter alia*, on the individual situation of the applicant. It was decided to develop this notion in the Explanatory Memorandum giving various examples of circumstances which could influence an evaluation of whether a document is “easily accessible” or not by other means (access to Internet, geographical situation of the applicant, etc.). On the question as to where to include the issue of availability by other means, it was decided to keep it under Principle 6 for the moment.

17. The Group recalled the request put forward by the CDDH at its 46th meeting (22 – 25 June 1999, CDDH (99) 10, paragraph 50) to examine, in particular, possible problems of access to official information for handicapped people or those persons in situation of extreme hardship (illiterate, homeless, etc.) and decided to address the issue globally rather than under one single principle.

Costs (Principle 7)

18. On costs, the DH-S-AC agreed that the draft instrument should contain a principle with two sub-paragraphs, one dealing with consultation of the original document on the premises of the local authority, and the other addressing the question of copies. For the former, the Group agreed that access to documents on the spot should be free of charge. The more difficult issue of the fees for copies was resolved by agreeing that a fee may be charged by the public authority solely to cover the costs of producing a copy. But in any case, such a fee must be reasonable and not exceed the self-costs incurred by the authority.

Reviews/appeals (Principle 8)

The Group called to mind all the different situations in which the applicant who has not obtained satisfaction could be confronted (eg. explicit refusal, total or partial, of access to documents, silence from the public authorities over the request). The applicant should have a procedure available to him which is expeditious and inexpensive where his request can be re-examined by an independent and impartial body. Various existing possibilities on a national

level were brought up, such as resorting to an ombudsman or mediator, to an internal review procedure (before legal proceedings) or a Court appeal.

20. The experts debated the possibility of mentioning these different possibilities within the text of principle 8, and establishing a certain hierarchy between them. It was decided only to mention them and to emphasise that, whatever the national system, the importance is to make available to the applicant a fast and inexpensive procedure for re-examination. In this respect, the experts were usefully inspired by the pertinent provisions contained in the aforementioned Aarhus Convention on Access to Information in Environmental Matters (see paragraph 7 above). [In addition, it was pointed out that the Explanatory Memorandum could mention that in certain national systems, an internal review procedure is often seen as an intermediary step before a Court appeal].

21**.** It was not judged necessary to make reference in the Principle to appeals by a third party against positive decisions to give access to documents, as remedies for third parties exist by other means, particularly regarding data protection, protection of private life, maladministration, etc. The Explanatory Memorandum could however point out that excessive access to information or to an administrative document may result in an appeal by a third party before a competent judge in accordance with legislation which protects such and such private interests, and in particular private life (in this respect, see Recommendation No R (91) 10 on the communcation to third parties of personal data held by public bodies).

"Support system" (Principle 9)

22. In drafting this principle, the Group aimed to make public authorities aware of their duty to ensure an effective implementation of the right of access. On the one hand, authorities should inform the public of the existence of this right and the manner in which it can be exercised. On the other hand, they must train their officials on how to implement this right (including, if need be, by drawing up internal guidelines or codes of conduct).

23. The Group identified a certain number of ways which could facilitate the exercise of this right, such as:

- the good management of documents to make them easily accessible,

- the application of clear and well-established guidelines on storage and destruction of documents, keeping in mind particularly the need to ensure the preservation in archives of certain originals; this idea could be addressed in the Explanatory Memorandum;

24. Keeping in mind the difficulties encountered by certain sectors of society such as illiterate or deprived persons, certain categories of immigrants, the disabled, etc to access information the Group felt it useful to point out that for public authorities to help these sectors to exercise their right should not be seen as positive discrimination which would be contrary to principle 5.4 *(Access to information shall be provided on the basis of equality.)* In this respect, the Explanatory Memorandum could refer to Recommendation (93) 1 regarding access to law and justice of persons in extreme poverty.

25. Finally, the Group felt that it is the duty of public authorities to help the applicant to understand the contents of the document which he is given, when there are obvious reasons to do so (eg. illiterate persons or persons with a disability which does not allow them to acknowledge the information contained in the document they have received, etc).

Item 5 of the agenda: Information on the preparation of the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000)

26. The Secretariat reported on the meeting of the drafting Group of the CDDH which was held in Rome on 21-23 February 2000 with a view to drafting the texts to be submitted to the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000) on the occasion of the 50th anniversary of the European Convention on Human Rights (4 November 2000).

27. It was recalled that the DH-S-AC had prepared during its 4th meeting possible elements which could be included in these draft texts (DH-S-AC (99) 8, Appendix IV). On the basis of these elements, three paragraphs had been inserted in the document which was examined by the CDDH Drafting Group at their above-mentioned meeting. Although the Group did not have time to examine in Rome the wording of the three paragraphs, it stated its interest, in principle, of including the issues of transparency of the administration and access to official information in the texts which will be submitted to the Conference. It hopes to come back to the pertinent paragraphs in the course of its next meetings (9-10 March and 20-23 June 2000).

28. The DH-S-AC expressed its satisfaction at the favourable reception given to its work by the CDDH. It is aware of the fact that the last of the three paragraphs that it has proposed, will, in the final stage, reflect the current situation of the DH-S-AC's work concerning the draft instrument that it is preparing. Already, it proposes that the CDDH:

- puts into brackets paragraph 41 of the document CDDH-GR (00) 3 prov.;

- takes away the brackets which currently surround the phrase "*which take into account the new environment which has been created by information technology and communications*".

- reflects in the texts the link which exists between freedom of expression and information and the field which is covered by the DH-S-AC's terms of reference.

Item 6 of the agenda: Organisation of forthcoming work

29. Although the DH-S-AC is aware of the importance of making constant progress in its work, it realises that the time it needs to complete its work, and in particular for the consultations which will need to be made with other committees, will exceed the time limit for the Ministerial Conference in Rome. The DH-S-AC felt that, in any case, the political texts of the Conference should at least show satisfaction for its on-going work and give it a certain impetus. As far as possible, the work of the Group should be finalised in 2001. The DH-S-AC hopes that the CDDH, in giving new terms of reference to the Group or in renewing its current terms of reference, will maintain its present composition, which has proved to be very efficient and which would therefore ensure an effective continuation of its work.

30. As for the order of business for September 2000, the DH-S-AC agreed to discuss the various texts which appear in brackets in Appendix III to the present report, to obtain the necessary compromise solutions. In particular, the DH-S-AC planned an exchange of views on the scope to be given to the instrument (access to information/access to documents) and on its legal nature (recommendation/convention). In addition, it will examine the text of the draft Explanatory Memorandum which the Secretariat is instructed to prepare and to send to experts in good time for the aforementioned meeting. It took note that, on this occasion, the CJ-PD will have transmitted any observations it may have on the work of the DH-S-AC which could be taken into account for the continuation of its work.

Contacts with other bodies

31. To ensure co-ordination between its work and the on-going work in the Project Group on Data Protection (CJ-PD) and the Culture Committee (CC-Cult), the DH-S-AC asked the Secretariat to send the present report to the Secretariat of these committees, it being understood, that at a more advanced stage, the CDDH will request a formal opinion from the Steering Committees responsible for these committees. In addition, the DH-S-AC asked the Secretariat to take the necessary measures so that a representative of the CDMM could participate as an observer in its meeting in September 2000.

32. The DH-S-AC was informed on the calendar foreseen by the CC-Cult with a view to finalising the draft Recommendation on Access to Archives. The representative of the Archives sector, Mr P. CADELL, pointed out that, in principle, the draft Recommendation should be submitted to the Committee of Ministers in the autumn of this year for possible adoption.

33. The DH-S-AC requested that the Secretariat send the present report to those consultants who took part in the exchange of views held on Tuesday, 22 February 2000.

Consultation with a judge from the European Court of Human Rights

34. The DH-S-AC expressed its agreement to hold an exchange of views, during its next meeting (September 2000) with one of the judges of the European Court of Human Rights. The aim of this meeting would be to obtain information on the Court’s approach to the issue of access to official information and on transparency of administrations and to consequently make reference to the relevant case-law in the Explanatory Memorandum. To this effect, the Secretariat was invited to prepare a brief document on such case-law and to send it to the members of the DH-S-AC before its next meeting.

35. Finally, the DH-S-AC took note that the Chairperson will participate in the meeting of the CDDH in June 2000 to report on the work of the Group.

Item 7 of the agenda: Other business

Data protection

36. The representative of the CJ-PD, observer for the CDCJ, Mr Michel CAPCARRERE was invited to address the group on the concerns he expressed in a letter to the Chairperson (DH-S-AC (99) 9) on the compatibility of the draft instrument currently being prepared within the Group with existing instruments concerning data protection. He proposed various possible options which should be considered during the drafting of the draft legal instrument on access to official information, in order to avoid any infringement or conflict with data protection legislation.

37. Whilst agreeing that compatibility must be ensured, several members of the DH-S-AC felt that the draft instrument, in its present state, had taken into account any potential conflict. They referred in particular to the preamble of the draft instrument where mention is made of key legal instruments of the Council of Europe in the field of data protection. In addition, the list of possible restrictions/limitations of Principle 2 expressly includes the protection of personal privacy as well as, *inter alia,* commercial and other economic interests.

38. Nevertheless, given the validity of this issue, and after some debate, it was suggested that reference to data protection legislation be mentioned where appropriate. At this stage, the Group decided to mention it in the Explanatory Memorandum under Principle 2 (limitations/restrictions) and under Principle 6 (forms of access). The Chairperson also asked Mr Capcarrère if he would provide any relevant input or advice when the Group advances through the instrument a second time in its drafting procedure. The Group also thought it would be useful to have a more detailed view on the position of the CJ-PD and decided to send the report to the latter for an informal opinion in time for the next meeting of the DH-S-AC (27-29 September 2000).

Confidentiality of meeting Reports

39. In accordance with Instruction N° 39 of the Secretary General, the DH-S-AC decided against the word "Restricted" appearing on its reports.

Item 8 of the agenda: Date of next meeting

40. As it would not seem possible to complete its work in time for the Ministerial Conference, even if the CDDH should authorise an extra meeting of the Group, the latter decided to renounce its request for an extraordinary meeting

41. The DH-S-AC decided to hold its next meeting from Wednesday 27 to Friday 29 September 2000.

* * *

Appendix I

LIST OF PARTICIPANTS

BULGARIA/BULGARIE

Mr Peter KOLAROV, Counsellor at the Human Rights Department, Ministry of Foreign Affairs, Alexandre Jendov 2, SOFIA

FRANCE

M. Yves GOUNIN, Maître des Requêtes au Conseil d'Etat, Commission d'accès aux documents officiels (CADA), 66, rue de Bellechasse, 75007 PARIS

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POLAND/POLOGNE

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RUSSIAN FEDERATION/FEDERATION DE RUSSIE

Mr Jassen ZASSOURSKY, Dean of the Faculty of Journalism, Ulitsa Mokhovaya 9, 103914 MOSCOW, Russian Federation

SWEDEN/SUEDE

Ms Helena JÄDERBLOM, Associate Judge of Appeal and Legal Adviser, Ministry of Justice, S-10333 STOCKHOLM (Sweden)

TURKEY/TURQUIE

Mr Aykut KILIÇ, Judge, Deputy Director General of International Law and Foreign Relations, Ministry of Justice, Adalet Bakanligi, 06659 ANKARA

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Mr Alan KING, Policy Worker, Freedom of Information Unit, Room 912, 50, Queen Anne's Gate, LONDON SW1 9AT

* * *

European Committee for Legal cooperation / Comité européen de coopération juridique (CDCJ)

Mr Pekka NURMI, Director General, Ministry of Justice, PL 1, 00131 HELSINKI (Finland)

M. Michel CAPCARRERE, Magistrat, Services du Premier Ministre, Commissaire du Gouvernement Adjoint auprès de la CNIL, 56 rue de Varenne, F-75700 PARIS

Ms Teresa GÓRZYŃSKA, Institut des Sciences Juridiques de l'Acédémie polonaise des Sciences, Nowy Świat 72, 00-330 VARSOVIE
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Steering Committee on Mass Media / Comité directeur sur les moyens de communication de masse (CDMM)

Council for Cultural Co-operation / Conseil de la coopération culturelle (CDCC)

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* * *

European Commission / Commission européenne

Mme Véronique JANSSEN, Commission européenne, Secrétariat-Général (SG/C/2), Bâtiment Breydel, Bureau 7/197, Avenue d'Auderghem, B-1049 BRUXELLES

M. Jens MATTHIESSEN, Administrateur Principal, Commission européenne, EURO 1/176, rue Alcide de Gasperi, L-2920 LUXEMBOURG

Invited guests for the consultation/personnalités invitées pour l'audition

M. Robert ANDERSEN, Président de la Commission d'accès aux informations officielles, Conseil d'Etat, Ministère de l'Intérieur, Service de l'Information, c/o M. J. DE BEENHOUWER, Rue de la Loi 64-66, B-1000 BRUXELLES

Mr E.J. DAALDER, Postbus 11756, 2502 AT THE HAGUE, Netherlands

Mr Sean GARVEY, Freedom of Information Central Policy Unit, Department of Finance, Upper Merrion Street, DUBLIN 2, Ireland

Mr Alf LINDBERG, Member of the International Federation of Journalists, Bellevuevägen 11A, S-27132 YSTAD, Sweden

Mr Ian HARDEN, Head of Legal Department of the Europan Ombudsman, 1 avenue du Président Robert Schumann (SDM), 3rd Floor, Room 3/41, F-67001 Strasbourg Cedex

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Secretariat

Directorate General of Human Rights - DG II / Direction Générale des Droits de l'Homme - DG II

M. Alfonso DE SALAS, Principal Administrator/Administrateur Principal, Secretary of the Committee/Secrétaire du Comité

Mr Philipp MITTELBERGER, Programme Adviser/Conseiller de Programme

Mrs Katherine ANDERSON-SCHOLL, Administrative Assistant/Assistante administrative

Mme Michèle COGNARD, Administrative Assistant/Assistante administrative

Mlle Haldia MOKKEDEM, Administrative Assistant/Assistante administrative

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Appendix II

AGENDA

1. Opening of the meeting and adoption of the agenda

2. Consultation concerning the work of the DH-S-AC
Secretariat memorandum
DH-S-AC (00) 2

3. Tour de table on recent developments in member States

4. Further examination of the elements to provide a basis for discussion on the future work of the DH-S-AC

- Report of the 4th meeting of the DH-S-AC, 5-8 October 1999)
DH-S-AC (99) 8

- Extracts of the report of the 47th meeting of the CDDH (30 November – 3 December 1999)
DH-S-AC (00) 1

- Letter sent by Mr Capcarrère to the Chairperson of the DH-S-AC on 9 October 1999
DH-S-AC (99) 9

Information documents

Available in the meeting room:

- Terms of reference of the Group of Specialists (as approved by the Ministers' Deputies at their 613th meeting,18-19 and 23 December 1997)
DH-S-AC (98) 1

- Recommendation No R (81) 19 on the access to information held by public authorities

- Recommendation No R (91) 10 on the communication to third parties of personal data held by public bodies

Available from the Secretariat:

- Green Paper from the European Commission on Public Sector Information in the Information Society
COM (1998) 585

- Collection of reports on official secrets law and free access to public records (reports prepared by national partners of the Programme on Security Services in a Constitutional Democracy) (English only) (Helsinki Foundation for Human Rights, December 1997)
DH-S-AC (98) 2 and Addendum

- Icelandic law on public access to information
MM-S-AC (97) 3 (English only)

- Italian law on access to administrative documents
  MM-S-AC (97) 4 (French only)

- The Swedish approach to the issue of access to public documents
  MM-S-AC (97) 5 (English only)

5. Information on the preparation of the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000)

6. Organisation of forthcoming work

7. Any other business

8. Date of next meeting

* * *

Appendix III

Elements identified by the DH-S-AC at its 5th Meeting (22 – 25 February 2000) as a basis for discussion on its future work

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Introduction

This Appendix lists a number of elements, which emerged from discussions of the Group of Specialists on access to official information (DH-S-AC), during its first, second, third and fourth meetings (4-6 March 1998 and 21-23 October 1998, 9-12 March 1999, 22 – 25 February 2000).

For practical reasons, the elements are set out in the form of a draft recommendation. However, the DH-S-AC has not taken a position on the final legal form to be taken by the instrument that is in preparation. In particular, it has not ruled out the possibility of moving, at a later stage, towards drafting a binding instrument such as a convention. It is awaiting guidance from the CDDH on this point.

* * *

Preamble

[*A reference in the preamble shall be made to certain key legal instruments adopted by the Committee of Ministers in the field of information policy, namely: the Convention on the protection of individuals with regard to automatic procession of personal data of 28 January 1981 (ETS no 108); the Declaration on the freedom of expression and information adopted on the 29 April 1982; Recommendation No. R (81) 19 on the access to information held by public authorities; Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes.]

i. Considering the importance in a pluralistic, democratic society of adequate information for the public on issues of common interest;

ii. [Considering that the public's right of access to official information should be analysed in human rights terms, particularly in the light of Articles 8 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law pertaining thereto];

[*A study of the relevant case-law concerning Articles 8 and 10 has to be made before deciding whether this text should be deleted or not.]

iii Considering the importance of transparency in public administration;

iv. Considering that wide access to official documents, on a basis of equality and in accordance with clear rules:

- allows the public to have an adequate view of, and to form a critical opinion on, the state of the society in which they live and on the authorities that govern them, whilst encouraging responsible participation by the public in matters of common interest;

- encourages internal control within administrations and helps maintain its integrity by avoiding the risk of corruption;

- contributes to affirming the legitimacy of administrations as public services and to reinforcing citizens' confidence in public authorities;

v. Considering therefore that the utmost endeavour should be made to ensure the fullest possible availability to the public, subject to the protection of other legitimate rights and interests, of documents;

vi. Stressing that the principles set out hereafter constitute a minimum base, and that they should be understood without prejudice to domestic laws and regulations which already recognise a wider right of access to official documents;

vi. Considering that, whereas this instrument concentrates on access to existing administrative documents, public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any infomration which is deemed useful in a transparent democratic society;

Definitions

For the purposes of this recommendation:

- "public authorities" shall mean:

[*Concerning the definition of “public authorities” the group decided to consult other legal instruments of the Council of Europe. The term will be further elaborated in the Explanatory memorandum.]

i. national, regional or local administration;

[*It was decided to explore the concept of “governments”, both in its political and administrative notion, in the Explanatory Memorandum.]

ii. natural or legal persons performing public functions or public administrative functions insofar as they perform on this capacity or exercise administrative authority under national law; [unless excluded by national law]

[*It was decided to develop this principle further in the Explanatory Memorandum.]

- "official documents" shall mean all information recorded in any form, prepared or received by public authorities and linked to any public function, with the exception of documents under preparation;

[*The Explanatory Memorandum could indicate that:

Documents under preparation are being understood as being documents (drafts, proposals etc.) which were not yet approved definitely by the public authorities.

It has to be kept in mind that there are different traditions and practices in member States concerning the qualification of documents as “official documents”. In principle, a document is “official” only after it has been finally approved. This being the case, there are certain countries which declare documents as being official which have not been officially approved, such as draft proposals and regulations, with a view to notably associating the public opinion to the decision process.

Private letters and letters received by members of the administrations in their capacity as politicians are also excluded from the notion of “official documents” in the sense of this recommendation.”]

Scope

This recommendation concerns only official documents held by public authorities as defined above. However, the member States should examine, in the light of their domestic law and practice, to what extent the principles of this recommendation could be applied to information held by legislative and judicial authorities.

> [* The Explanatory Memorandum could indicate that the concept of "official information" (informations publiques) covers all recorded information held by the various public authorities. This means essentially documents in the broad sense: printed documents, computerised documents in a retrievable form, documents recorded on audio or video tape, etc. The documents may contain texts, images etc.]

Principle 1

The member States should guarantee the right of everyone to have access, on request, to official documents held by public authorities.

[* At this stage the DH-S-AC decided to limit the scope to documents that are requested. The group will further examine whether the scope shall be extended to cover also the individuals right to receive public information]

Principle 2

1. Member States may derogate from the right of access to official documents. Limitations or restrictions must be applied sparingly, set down precisely in the law, be necessary in a democratic society and be proportionate to the aim of providing protection on:

[*The DH-S-AC is working towards the preparation of an exhaustive list. For the moment, the following list of elements is intended to be provisional, as a basis for discussion.]

i. national security, defence and international relations;
ii. public safety
iii. prevention, investigation and prosecution of criminal activities;
iv. personal privacy and other legitimate private interests, in particular the protection of personal integrity;
v. commercial and other economic interests, be they private or official;
vi. equality of parties concerning court proceedings;
vii. nature;
viii. inspection, control and supervision by public authorities;
ix. governmental economic, monetary and exchange rate policy;

x. confidentiality of governmental deliberations (on local, regional or national level).

[The DH-S-AC decided to come back at a later date to this issue of state obligations following the receipt of documents entrusted to it confidentially.]

2. Access may be refused only if the disclosure of the document or of the information contained therein :

i. risks harm to the interests mentioned in paragraph 1 and
ii. if there is no public interest attached to the disclosure.

3. The evalution of the risks and of the possible public interest has to be assessed at the time of the request.

Principle 3

[Unless exceptional cases demand otherwise, Member States should set maximum time limits for the restrictions mentioned in Principle 2.]

[*As regards the "exceptional cases" mentioned in Principle 3, the Explanatory Memorandum could indicate that the Group preferred to limit itself to mention the practice of certain member States: Thus, in the Netherlands, all the documents have to be accessible after twenty years, the only possible exceptions being in the protection of privacy and the national interest.]

[*The Explanatory Memorandum could indicate that, with regard to documents classified as confidential, the public authorities should ensure that they are made accessible as soon as circumstances permit or, if the law sets a time limit on confidentiality, as soon as that limit is reached.]

[*Moreover, the Explanatory Memorandum could indicate, in a convenient place, that, with regard to registers or inventories of documents, the public authorities should ensure that they are always made available, this being a prerequisite for the exercise of the right of access to official information. It is, however, open to public authorities to determine the type of information to be included in such registers or inventories, with the aim of protecting legitimate interest and, in particular, respect for private life].

Principle 4

1. An applicant for a document does not need to specify any reason for having access to the document [and he or/she may be anonymous].

2. Formal requirements for requests should be kept to a minimum.

3. Any request should be sufficiently descriptive, within reasonable limits, so that the public authorities can determine which document the request concerns.

Principle 5
Treatment of requests of access

Any public authority holding a document is competent to decide on the request for access concerning that document.

2. Any request for access to a document shall be dealt with promptly. The decision should be reached and communicated within a given time limit [which is known to the applicant beforehand].

[The Explanatory Memorandum could indicate that if the handling of the request needs more time, the authorities will inform the applicant of the date on which his/her request will be satisfied.]

3. Any definitive decision to grant access to a document has to be executed immediately.

[The Explanatory Memorandum will give details on this subject].

4. Access to information shall be provided on the basis of equality.

[The Explanatory Memorandum could indicate: This principle refers to non-discriminatory treatment of requests. The authorities holding the document, while enjoying a certain margin of appreciation, should, in any event, bear in mind the requirements of Article 14 ECHR (Prohibition of discrimination). [In principle, requests should be dealt with in a chronological way.]]

No specific sub-paragraph on formalities.

[The Explanatory Memorandum could indicate: The formalities have to be as simple as possible. In many cases the authority holding the document will be in a position as to transmit it directly, without supplementary formalities. It can be useful to establish a documentation and information centre within the national administration in order to speed up the treatment of requests. In any event, the establishment of such structures should never complicate this treatment, take the applicant away from the original authority which is at the origin of the information or even operate as a (political) filter of requests.]

5. If the public authority does not hold the document it should, wherever possible, guide the applicant to the competent authority.

6. The authority should help the applicant to be more specific, if the request is not descriptive enough.

7. [All requests for access to a document must be dealt with, unless they are manifestly unreasonable.]

8. Any public authority refusing access to information [a document] shall give the reasons on which the refusal is based, according to law.

[*At its 46th meeting (22 - 25 June 1999, CDDH (99) 10, paragraph 50), the CDDH, responding to the request expressed by its Working Group on the right to the satisfaction of basic material human needs at its 2nd Meeting (2-4 June 1999, GT-DH-MAT (99) 2), asked the DH-S-AC to consider at a future meeting the problems arising for instance from illiteracy or through the particular circumstances of minorities with regard to access to official documents ; the question of access to official information through NGOs ; the specific issues encountered by persons in situation of extreme hardship (homeless people, etc.) when trying to have access to official information.]

Principle 6
Forms of access

1. When access is to be granted to a specific document the applicant has the right to receive a copy of the document or to inspect the original. The public authority must take into account, within reasonable limits, the preference expressed by the applicant.

2. If a restriction applies to some of the information in a document, the public authority shall grant access to the remainder of the information contained in the document and any deletions should be clearly indicated. However, if the remainder of the document is misleading or meaningless such access may be refused1.

3. The authority does not have to give access toan official document if the document is easily accessible to the applicant by other means.

[Explanatory memorandum could:

develop the notion of "within reasonable limits" – for example if the form of access required:

- is practically impossible as the technical facilities are not available (for audio or video copies)
- will unreasonably increase costs
- may endanger intellectual property rights or may provide conditions for unlawful use of the document

explore the term "copy" as being used for an electronic version of a document. Should authorities guarantee authenticity of such a document.

could suggest conditions in which it would be appropriate to refuse access to the original if it is physically fragile, especially in relation to historical archives.

emphasise that the term "easily accessible" has to be evaluated for each individual case – what may be easily accessible for one individual will not be for another eg. access to internet, geographical situation etc. and consequently consider the issue of positive discrimination

address the obstacles that could arise from "on-the-spot" consultations: opening hours, several persons wanting to consult the same document at the same time, etc)

refer to data protection legislation]

Principle 7
Costs

1. Access to original documents on the premises of the public authority shall be free of charge.

2. When a copy of the document is supplied, a fee may be charged to the applicant. The fee must be reasonable and not exceed the actual costs incurred by the authority.

[Explanatory Memorandum:

The cost of access may be charged to the applicant but the authorities should not make any profit, the fees should be reasonable and kept to a minimum. The issue of indirect charges could be raised eg. for research, technical recordings, electronic transmissions, etc (value-added services)]

Principle 8
Possible review

1. An applicant whose request for a document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit set out in principle 5.2, shall have access to a review procedure before a court of law or another independent and impartial body established by law.

2. An applicant shall always have access to an expeditious and inexpensive procedure, whether that be reconsideration by an authority or review in accordance with paragraph 1.

[The Explanatory Memorandum could

- mention that the aim of principle 8 is to provide for an unsatisfied applicant to have an inexpensive and expeditious review procedure available to them.]

- mention that, in certain national systems, an internal review procedure is seen as an intermediary step before a Court appeal.

- point out that excessive access to information or to an administrative document may result in an appeal by a third party before a competent judge in accordance with legislation which protects such and such private interests, and in particular private life.]

Principle 9
Support systems

1. Member States shall take the necessary measures to inform the public about the way in that right may be exercised.

2. Member States shall take the necessary measure to ensure that public officials are trained in their duties and obligations in this right;

3. Member States shall take the necessary measures to ensure that applicants can exercise their right. To this end, public authorities shall

(i) manage their documents efficiently so that documents are easily accessible.

(ii) apply clear and established rules for preservation and destruction of their documents.

(iii) set up, as far as possible, publicly available lists, registers or files of the documents held by the public authorities.

4. The public authorities shall take appropriate measures to facilitate the access to official documents notably for persons having special needs for economic, social, linguistic or cultural reasons. This is not in contradiction with Principle 5.4.

5. [If necessary, the public authorities shall help the applicant to understand the contents of the documents issued.]

[The Explanatory Memorandum could point out, that among the methods used in providing access to documents, the authorities could indicate a contact point which, within a given department of an Administration, could facilitate access to documents in that department.]

[The Explanatory Memorandum could refer to Recommendation (93) 1 regarding access to law and justice of persons in extreme poverty.]

[The Explanatory Memorandum could point out that public authorities should make available the necessary material to allow easy access to documents (availability of appropriate technical equipment, including necessary

equipment incorporating new information technology and communication; well-adapted premises, preservation and physical security of original documents, etc.]

* * *

Appendix IV

Summary of the consultation held with representatives of sectors concerned by access to official information

(Tuesday, 22 February 2000, during the 5th meeting of the Group of Specialists on Access to Official Information (DH-S-AC))

Introduction

1. The Chairperson presented a short background to the consultation, pointing out that the aim of the consultation was to obtain the reactions, opinions, information and suggestions of the sectors concerned early enough so that the DH-S-AC would be able to take them into account before continuing the drafting of the legal instrument. Individual presentations and an exchange of views with the DH-S-AC then took place.

II. Individual Presentations

2. Mr Ian HARDEN, Head of the Legal Department of the European Ombudsman gave a brief presentation of the office of the European Ombudsman, its terms of reference and its existing and future legal framework concerning access to official information. He emphasised that the European Ombudsman has sought to promote openness in the Union institutions and bodies, both in dealing with complaints about lack of access to official information and documents and through inquiries launched on his own-initiative. He had also recently called for the proposed Charter of Fundamental Rights of the European Union to include the right to an open, accountable and service-minded administration, that it be drafted and adopted in a form which enables the citizen to apply to the Community Courts if fundamental rights are infringed by the activities of the Union institutions and for those institutions also to accept international supervision through accession to the ECHR.

3. He presented the Code of Good Administrative Behaviour and Council and Commission Code of Conduct respectively which address the principle of openness and access to official information. He also mentioned the draft Regulation published by the Commission on 26 January 2000 which addresses the rights of access to documents of the European Parliament, Council and Commission subject to « general principles and limits on grounds of public or private interest » and which should be finalised by 1 May 2001[1].

4. Mr Andrew PUDDEPHATT representing Article XIX, and referring to the scope of the draft instrument, was of the opinion that applicants are not always sure of what exactly they are looking for. He suggested therefore, that the draft instrument should deal with access to information, rather than access to documents. On Principle 1, he mentioned that there is a duty of the public administration to make some documentation available to the general public or at least to facilitate access (register, costs,etc.).

5. On Principle 2.1, he was of the opinion that restrictions have to be complete, and that, certain sectors of the public service (for example the security services) should not be exempt. On Principle 2.2. he suggested changing the wording to "substantial harm" in order to restrict the limitations set out. Concerning Principle 5, Mr. Puddephatt felt that a public official should be designated to ensure compliance with the law and to advise public bodies and applicants.

6. Regarding the issue of costs under Principle 7, he felt that they should not be so high as to prohibit the applicant from making his request. On the contrary, the fee to be paid should be reasonably low, though perhaps graduated in relation to the amount of research required. In this

[1] Mr Harden's full presentation, as well as the above mentioned draft Regulation, are available from the Secretariat and the activities of the European Ombudsman can be consulted on the internet (http://www.euro-ombudsman.eu.int).

context, he asked, whether it would be feasible to distinguish between requests relating to commercial interests and individual requests. He suggested providing for an appeal system of two instances and supported the idea of the appeal body having the power to compel the release of documents to be consulted during a meeting held "in camera". Finally, Mr. Puddephatt would like the issue relating to "whistleblowers" to be included in the draft instrument.

7. Mr Alf LINDBERG representing the European Federation of Journalists and the International Federation of Journalists, stressed his opinion that access to documents, together with freedom of speech, media pluarlism and editorial independence give a strong foundation for a society where citizens' voices can be heard. The IFJ/EFJ would like any instrument on Access to documents to include the following points:

- Applicability of the draft legal instrument to all institutions in society, including judicial institutions ;
- All documents held by the institutions should be covered, including documents at a preparatory stage, to allow citizens to participate and influence decisions ;
- Existence of open registers, electronically accessible, which also includes classified documents ;
- No motive required for a request and the right to remain anonymous ;
- Exemptions to be kept to the minimum, and be precise and narrowly defined ;
- The process of handing out documents must be speedy, with on-the-spot decisions
- There must be a right to appeal, to an independent institution, free of charge ;
- Civil servants must have the right of « whistle-blowing », when there is adequate public interest

8. In addition, he also stressed the importance of access to documents as a working tool for journalists (and in particular rapid access) but that such access is a right for all citizens and should never be a privilege for any particular category of society such as journalists.

9. Mr. E. J. DAALDER, a legal practitioner, opened by stressing the importance for the legal sector of having a fully comprehensive Explanatory Memorandum for such an instrument. Referring to the scope of the draft instrument and in relation to the term "documents held by public authorities", he specified that there was a difference between documents produced within the authority and those received from a third party. Concerning the latter, he suggested differentiating between documents given to the administration voluntarily and those surrendered involuntarily. Perhaps a lesser degree of access should also be considered for those documents emanating from a third party.

10. On Principle 2.2, he raised the issue of whether the harm test was necessary in every case or if some refusals could be absolute. In relation to Principle 4.1, whereby no specific reason for a request is needed, and contrary to Mr. Lindberg's opinion, he felt that there should be a clear difference between representatives of media and the general public as shown in ECHR case-law. Lastly, concerning Principle 8 on appeal, he questioned whether the appeal body should be a court, the parliament, a body of the parliament or an ombudsman. Mr. Daalder was also of the opinion that in camera meetings of a court would be compatible with Article 6 ECHR.

11. Mr. Robert ANDERSEN, representing the Belgian commission on access to official information, first remarked on the definition of "official documents" and raised the question whether this includes preparatory documents and/or working papers. He suggested that perhaps a difference should also be made between documents containing personal data and other documents. Furthermore, Mr. Andersen agreed that the draft instrument should also include, contrary to Recommendation No. (81) 19, documents held by legislative bodies and judicial authorities. Concerning the scope, he thought that the term "documents held by public authorities" was too vague. It would be better to specify what is meant by "authority", be it an authority in a narrow or a wide sense (the latter including public companies) or a structural sense (local, regional, national ones).

12. Concerning Principle 1 he mentioned that it would be useful, if it was specified what was to be understood by the term "everyone". When doing so, he suggested explaining that foreigners as well as citizens, natural as well as legal persons are covered by the instrument. Concerning Principle 2, he said

that restrictions have to be interpreted narrowly, and on Principle 2.2, he agreed with Mr. Daalder and questioned whether the harm test was necessary in every case. Mr. Andersen raised some doubts on the advisability of including anonymity further to the point that no specific reason for a request is needed under Principle 4.

13. On the question of remedies under Principle 8 he agreed again with Mr. Daalder that in camera meetings should be possible, but admitted, nevertheless, that questions in relation to Article 6 ECHR could be raised, especially under the perspective of equality of arms. Concerning the treatment of requests (Principle 5), Mr. Andersen was of the opinion that, if more than one public authority should hold a document, the producer of it should be responsible for the request. Moreover, he asked, if the deadline set out in Principle 5.2. is not respected and, therefore, no answer given to the applicant, would this amount to a positive or a negative reply to the request. Furthermore, again on the deciding authority, he was of the opinion that, once a judicial proceeding had started, the judge dealing with the case alone could decide whether a document in relation to the proceedings be released or not, this being the case in several member States. Finally, Mr. Andersen asked what exactly is envisaged to be contained in the registers foreseen in Principle 9.

14. Mr Sean GARVEY of the Freedom of Information Central Policy Unit in Dublin gave a brief presentation of Ireland's Freedom of Information Act 1997 covering various pertinent aspects (definitions, scope, time limits, cost, exemptions, appeal system).[2] He went on to explain the importance of training public officials. At present there are three training programmes proposed in Ireland:

- a half day awareness training course, which 10% of all civil servants have already attended ;
- a dedicated decision-makers course, a detailed training on operating specific parts of the Freedom of Information Act
- advanced training for key decision makers who have been identified for implementing the Act in « sensitive » areas and for those appointed « reviewers » in public bodies.

A further follow-up training programme is under consideration. He added that it had been found that the most efficient way of training public officials is to train trainers in each public body who will consequently train personnel within his or her organisation.

15. Mr Garvey explained that since April 1998, 15000 requests for information had been processed, 46% for individuals requesting information on personal files and 54% for non-personal reasons (media, business, public representatives, etc.) He explained that difficulties had been encountered more from the complex nature of requests rather than from the volume of requests. There is also a number of unreasonable or abusive applicants for which the Act does not provide suitable provisions. The Act has put direct and sustained pressure on public bodies to produce efficient information and has highlighted the fact that many public bodies need fundamental reforms.

II. General Discussion

16. A general discussion ensued where it was pointed out by the Chairperson and confirmed by the European Commission that resistence to transparency of public authorities, very apparent at one time, has in recent years been diminishing.

17. The draft instrument was then discussed principle by principle.

18. ***Principle 1*** The issue of what is meant by « preparatory documents » was raised by one of the consultants. The Group of Specialists confirmed that they had encountered difficulties in deciding on the terminology to be used, and that the term retained at this stage was indeed still ambiguous and in need of further clarification as to what scope should be given to « a preparatory document « (working paper yet to be completed, draft completed document, etc.) Given the varying legislations of member States, it would be necessary to find a compromise solution. One expert expressed the desirability that documents be available in their preliminary form, before the decision for which the document is being

[2] Copies of the Act are available from the Secretariat.

prepared is taken, to enable participation in the decision making process. The Chairperson confirmed that this idea of « early public opinion » on deliberations is still to be addressed.

19. On the issue of documents emanating from third parties, and held by public authorities, one expert said that in general one should have full access to documents concerning oneself. As soon as other persons were concerned, restrictions must be possible, especially if documents were not given to public authorities on a voluntary basis. The Chairperson concluded that this will have to be looked into.

20. Mr Puddephatt reiterated that public authorities should provide information on their activities as a guide to possible applicants. Other participants supported the idea, but found it difficult to envisage a separate principle concerning the pro-active disclosure of documents and preferred to consider its inclusion in the preamble. Another possibility was imposing obligations on public authorities to « publish » certain defined materials, possibly in electronic form. It was pointed out that the text in question is not about positive obligations of authorities but about access to information – and it would be wise not to address the two notions in the one instrument.

21. The issue of training of officials was raised by one expert who agreed that it was an important issue but not necessarily to be included in a legal text. The Chairperson suggested that it could perhaps be considered under ***Principle 9*** « Support System ».

22. Referring to ***Principle 2.1***, one consultant questioned whether the list is complete. He mentioned the example of intellectual property which was not mentioned and asked if it should be included or if it was not more advisable not to draft an exhaustive list. One expert suggested coming back to this in relation to the question of copyright. Several experts maintained that copyright protection could be upheld even if a document is handed out in accordance with access legislation. Mr. Cadell mentioned that in the UK documents received by applicants could only be used for the use of the applicant.

23. Mr. Daalder questioned whether it was a good idea to address the application of the limitations/restrictions already in paragraph 1 of Principle 2. One of the experts agreed that there is a drafting problem and that this relates rather to the harm test in paragraph 2 of Principle 2. The Chairperson agreed that this point needs to be clarified.

24. One consultant referred to the *anonymity* issue **of *Principle 4.1***. and felt that it would be sufficient if one does not have to specify the reasons for a request, without needing to provide for the possibility of remaining anonymous. An expert agreed and pointed out that should an anonymous request lead to an appeal, the identity of the applicant would have to be revealed or the case would be rejected. Another expert said that anonymity in theory did not cause any problems for her country's authorities, but on a practical level, as requests and replies to requests have to be in a written form, such an option is not very realistic. The representative of the IFJ/EJF supported the possibility for requests to be anonymous, namely in cases of simple, on the spot requests.

25. Concerning ***Principle 6*** Mr. Garvey mentioned that in Ireland partial release of documents is possible. Mr. Lindberg suggested that the issue of electronic access to documents be addressed. This was agreed.

26. Mr Garvey said that in Ireland, for the time being, there are no *costs* ***(Principle 7)***, but following certain problems arising from unclear requests or from a cases where a large volume of information is requested by a single applicant, a fee is now being considered.

27. An expert finally mentioned the delicate problem that *appeals* ***(Principle 8)*** could raise issues under Article 6 ECHR and especially on the equality of arms.