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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

7th meeting
Strasbourg, 28 – 30 March 2001,

REPORT

Introduction

1. The Group of Specialists on access to official information (DH-S-AC) held its 7th meeting from 28 to 30 March 2001 at the Human Rights Building, Strasbourg, with Ms Tonje MEINICH (Norway) 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:
 - provisionally adopted the draft Recommendation of [the Committee of Ministers](#) to member States on access to official information (Appendix III); subject to possible amendments of a formal nature which may still be introduced at its 8th and final meeting (18-21 September 2001)
 - continued the elaboration of a draft explanatory memorandum to the Recommendation;
 - in the context of its present work, exchanged views with the representative of the Project Group on Data Protection (CJ-PD);
 - prepared the work for its 8th meeting during which it will finalise both the substance and the form of the draft recommendation and explanatory memorandum and draw up a draft final activity report for the attention of the CDDH.

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

4. See introduction.
5. The DH-S-AC congratulated Mme Tonje MEINICH (Norway) on her election by [the Steering Committee for Human Rights \(CDDH\)](#) as Chairperson of the Group. It took note that at its last meeting (27 February – 2 March 2001) the CDDH had taken note of the state of preparation of the draft legal instrument drawn up by the DH-S-AC and the nature of the draft, namely a draft recommendation together with a draft explanatory memorandum. The CDDH also expressed its support for the continuation of work by the DH-S-AC beyond 2001.

Item 2 of the Agenda: Information on [the European Ministerial Conference on Human Rights](#) (Rome, 3-4 November 2000)

6. The Secretariat reported on the importance given to the political texts adopted by the Conference as a framework for intergovernmental work on human rights in the years ahead. It particularly drew the experts' attention to paragraphs 37 and 43 of Resolution II ("*Respect for Human Rights, a Key Factor for Democratic Stability and Cohesion in Europe: Current Issues*") adopted during the Conference:
 - "37. Recalling that ensuring transparency within public administration and guaranteeing the right of access of the public to official information are requirements of a pluralistic democratic society";
 - "43. WELCOMES the ongoing drafting work within [the Council of Europe](#) concerning principles which could constitute a minimum basis for access to official

information, taking into account the new environment created by information and communication technology”.

7. The DH-S-AC noted that, during their 736th meeting (10-11 January 2001), the Ministers’ Deputies decided upon the follow-up to the Conference (document [CDDH \(2001\) 3](#)). In doing so, they set the CDDH the task, among others, *to make proposals to be submitted alongside the draft principles on access to official information, for continuing work in this field in the medium term.*

8. Finally, the DH-S-AC noted that the Ministerial Conference texts were declassified and were available on the Council of Europe website.

Item 3 of the agenda: Tour de Table on recent developments in member States

9. A “tour de table” provided information on various stages of legislation in member States. In November 2000, Norway broadened the scope of its Information Act and it has now been proposed to put the principle of freedom of access to official information into its Constitution. In Sweden, it has been proposed that a provision on archives and a right of access to documents by electronic means be included in its Constitution. Furthermore, The Secrecy Act of 1980 is undergoing revision. The United Kingdom’s Freedom of Information Act was passed in November 2000. It will be implemented in different stages and will be fully in force by November 2005. An office of the Information Commissioner has already been set up as the supervisory body, covering both official information and data protection.

10. Moreover, the DH-S-AC was informed of legislation that is currently under way in Germany, Poland, Russian Federation, Turkey and Scotland. In addition it was noted that some member States are currently in the process of implementing the Aarhus Convention¹ into their national legislation.

11. The DH-S-AC was also informed on the concerns expressed by the International Helsinki Federation for Human Rights on the Romanian law on protection of classified information. According to this body, this law may deprive Romanian citizens of access to information vital to a democracy and would contradict some standards set up by the Council of Europe, especially Article 10 of the [European Convention on Human Rights](#).

12. The representative of the European Commission reported on the progress of a regulation, based on the Treaty of Amsterdam, regarding public access to documents of the European Parliament, the Council and the Commission. The three institutions should reach at least an overall agreement on the draft regulation for May 2001 which was the date set for completion of this activity.

Item 4 of the Agenda: Further drafting of the draft recommendation and explanatory memorandum on access to official information

a. Examination of the observations submitted by the Project Group on Data Protection

13. The DH-S-AC considered the opinion of the Co-ordination Group of the Project Group on Data Protection (CJ-PD-GC) (Document [DH-S-AC \(2001\) 1](#)), following an oral presentation of this opinion by Mr Michel CAPCARRERE (France), representative of the Project Group on Data Protection (CJ-PD).

¹ 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.

14. In the light of these observations, the Group held an in-depth exchange of views for the purpose of finding a balance between the right of access to official information and the protection of personal data and how this balance could be reflected in the draft recommendation. In this respect, the Chair noted that access to official documents had to be provided, even when they contained data of a personal nature. However, it was clear that, in this case, treatment of requests for access would be in accordance with the provisions of the Convention on the protection of individuals with regard to automatic processing of personal data (ETS N° 108).

15. The DH-S-AC agreed with this approach. It was decided to elucidate it under the section on the Recommendation's scope in adding a paragraph 2 stating:

“2. This Recommendation does not affect the right of access or the restrictions on access provided for in the Convention on the protection of individuals with regard to automatic processing of personal data (ETS N° 108)”.

In addition, it was decided that the explanatory memorandum will specify with regard to the scope that:

11bis. Documents containing personal data are also within the scope of the Recommendation. In this context, it should be noted that the aforementioned Convention No. 108 does not preclude granting third party access to official documents containing personal data. However, when giving access to such documents, this must be done in accordance with the rules laid down in the Convention.

13bis. This Recommendation applies to the right of *everyone* to have access to official documents. A person might also have a specific right to access official information deriving from other legal instruments. For example, a person has the right to seek information concerning himself/herself, according to the Convention n°108. In the same vein, some member States provide a wider right to access to official documents in administrative procedure to which the person is a party.

16. It was also requested that the explanatory memorandum indicate that Convention N° 108 covered the applicant's right of access to data that concerned him or her as well as limitations on access to such personal data for third parties. Some experts pointed out that their authorities only apply Convention N° 108 in the framework of automatic processing of personal data and not with regard to paper documents which contain such data. According to these experts, the principles of the Recommendation (for example, the possible limitations, principle IV, 1, iv) could be applied in these cases. Otherwise, there would be a gap in the protection of information of a personal nature.

17. The representative of the CJ-PD expressed his satisfaction with the changes made to the draft recommendation and the draft explanatory memorandum in response to the concerns he had voiced.

b. Further examination of the draft recommendation and of the draft explanatory memorandum on access to official information

18. The DH-S-AC resumed examination of the draft recommendation on access to official information. It took as a departure point for discussion, the text appearing in Appendix III of the report of its last meeting ([DH-S-AC \(2000\) 7](#)). The Group also discussed the draft explanatory memorandum to accompany the draft recommendation, based on the text appearing in Appendix IV of the report of its last meeting (DH-S-AC (2000) 7).

19. Following this examination, the DH-S-AC provisionally adopted the text as it appears in Appendix III. Several proposals were made with a view to completing the draft explanatory memorandum (which will be examined at the next meeting). A number of the points which were developed during the meeting appear hereafter.

II - Scope

20. See above, paragraphs 14-16.

IV – Possible limitations on the right of access to official documents

21. The DH-S-AC decided to make clear in the explanatory memorandum that the list of possible limitations in paragraph 1 was exhaustive. It was for this reason that particular mention had been made to protection of privacy and other legitimate reasons, even if, as already stated with regard to the Recommendation's scope, these specific limitations would be governed by the relevant provisions of Convention N° 108.

22. It was also pointed out that paragraph 2 of this principle, which contained the concept of risk evaluation ("harm test") and the weighing up of two interests, namely the interest of disclosure of the information and one or other of the interests set out in paragraph 1, was one of the clearest examples of added value in this draft recommendation. The explanatory memorandum should make it clear that this assessment and weighing of interests could be carried out either for each individual case or by legal provisions or regulations.

VII – Forms of access

23. Firstly, some experts stated that, as far as their authorities were concerned, it was mainly a question of ensuring access to the *information* contained in the documents rather than access to the documents themselves. A discussion was held on whether a public authority could provide the applicant with a summary instead of giving him or her access to the document requested. It was pointed out that the principle, clearly set out in paragraph 1, was that once access to the document had been granted, the applicant had the right to consult the document "on-the-spot" or to receive a copy. According to some experts, provision of a summary would not satisfy this right. Others, on the other hand, considered that a summary drawn up by the public authorities could have added value in comparison to the document itself, in that it could assist the applicant in obtaining easier access to the essential information.

24. In this respect, it was noted that in some member States the public authorities were obliged, in certain cases, to provide a summary instead of granting access to the document. It was also pointed out that the applicant could, if he or she wished, request a summary instead of access to the document, but that the public authorities were at liberty to grant or refuse this request. At the same time, the applicant should not be forced to accept a summary instead of access to the document; right of access to the document must be maintained (on-the-spot consultation or receipt of a copy). The DH-S-AC decided to bring out these considerations in the explanatory memorandum.

XI – Information made public on the initiative of the public authorities

25. The DH-S-AC decided to include a final principle referring to the merit in the public authorities making certain information public on their own initiative, particularly for the sake of facilitating informed public participation in matters of general interest. The explanatory memorandum could give some examples (such as information on administrative files

concerning public works). It would be up to member States to choose the most appropriate means of attaining the relevant goal (billboards, official publications, websites or any other medium easily accessible to the public).

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26. As already stated, the draft recommendation as provisionally adopted by the DH-S-AC appears in Appendix III to the present document.

27. The DH-S-AC took note that the members of the CDDH to whom the present report will be sent, have been invited to send in their reactions to it (see report of the 51st meeting of the CDDH, 27 February – 2 March 2001, paragraph 37, reproduced in document [DH-S-AC \(2001\) 3](#)). Any possible comments they may have will be forwarded to the experts of the DH-S-AC in good time for their 8th and final meeting (18-21 September 2001).

Item 5 of the Agenda: Date of next meeting and organisation of forthcoming work

28. The DH-S-AC will hold its 8th and final meeting from 18 to 21 September 2001. At this meeting, it is proposed to:

- examine any observations which may have been submitted by the members of the DH-S-AC or of the CDDH on the draft Recommendation (see paragraph 27 above);
- finalise both the substance and the form of the draft recommendation and explanatory memorandum and
- prepare a draft final activity report.

Draft Explanatory Memorandum

29. The Secretariat will prepare a revised version in consultation with the Chair. This version will be sent to members of the Group at the end of April 2001 for any written observations, which should be submitted to the Secretariat for the end of May 2001. On this basis, and in consultation with the Chair, the Secretariat will prepare a consolidated version which will be used as the working document for the next meeting. It will be sent to members of the Group in good time to prepare for the 8th meeting.

Draft Final Activity Report

30. The DH-S-AC will have to prepare, at its 8th meeting, a draft final activity report for the attention of the CDDH. This document should, in particular, contain proposals for the continuation of work in the medium term. In this regard, several ideas were voiced during the present meeting, it being understood that no decision would be taken at this stage.

- With regard to the possibility of drawing up a legally binding instrument which, on the basis of the draft recommendation, would be devoted to the right of access to official information at a European level, several experts considered it premature to examine the question.
- On the other hand, they felt that the next step after the adoption of the Recommendation would be to monitor its implementation in the law and practice of member States. They considered that it would be useful to prepare a handbook which could help public authorities in such a task. In addition to the text of the recommendation and the explanatory

memorandum, the manual could include, for example, references to relevant national provisions and practices. The possibility of organising a seminar in 2002 was also raised in this context. It would allow for an exchange of information, by bringing together representatives of all member States and various sectors and bodies concerned by the issues addressed in the Recommendation.

- Other suggestions were made pointing to new activities for the DH-S-AC, concerning for example, possible limits on the dissemination by internet of administrative documents, or ways which would ensure that there is a “historical memory” of administrations’ activities (ensure the preservation of electronic documents, such as e-mails, that contain information which could be important at a later date for a full understanding of the procedure leading to the adoption of a public document). The Secretariat was instructed to prepare for the next meeting an information document describing the various activities, currently being carried out by the Council of Europe, which may have a link to the problems raised. In the light of this document, the DH-S-AC will decide on what may be appropriate to propose as a future activity, while avoiding any duplication of work.

The DH-S-AC noted that:

- the Secretariat will prepare, for the end of June 2001, a preliminary draft final activity report, which will in particular take up the various suggestions mentioned above. Those CDDH experts who so wish, may send in to the Secretariat any comments they may have (see paragraph 27 above);

- on this basis, the DH-S-AC will prepare a draft final activity report at its 8th meeting (18-21 September 2001) and will forward it to the CDDH;

- the CDDH will examine this text at its 52nd meeting (3-6 November 2001) with a view to its adoption and transmission to the Committee of Ministers, at the same time as the draft recommendation and explanatory report. In doing so, it will have responded to the request made by the Ministers’ Deputies in the framework of the follow-up to the Ministerial Conference in Rome (see paragraph 7 above).

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Appendix II**AGENDA**

- 1. Opening of the meeting and adoption of the agenda**
- 2. Information on the European Ministerial Conference on Human Rights (Rome, 3-4 November 2000)**
- 3. *Tour de Table* on recent developments in member States**
- 4. Further drafting of the draft recommendation and explanatory memorandum on access to official information**

Report of the 6th meeting of the DH-S-AC
(22 – 25 February 2000)
[DH-S-AC \(2000\) 7](#) Appendices III and IV

Opinion of the CJ-PD-GC on the draft recommendation on access to official information currently being prepared by the DH-S-AC
[DH-S-AC \(2001\) 1](#)

Terms of reference for the Group of Specialists (approved by the Ministers' Deputies at their 736th meeting, 10-11 January 2001)
[DH-S-AC \(2001\) 2](#)

Extract of the report of the 51st meeting of the CDDH
(27 February – 2 March 2001)
[DH-S-AC \(2001\) 3](#)

- 5. Date of next meeting and organisation of forthcoming work**

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Appendix III

**Draft Recommendation No R (...) ...
of the Committee of Ministers to member States
on access to official information**

elaborated by the DH-S-AC
at its 7th meeting (28 – 30 March 2001)

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

- i. Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;
- ii. Bearing in mind, in particular, Article 19 of the Universal Declaration of Human Rights, Articles 6, 8 and 10 of [the European Convention on Human Rights and Fundamental Freedoms](#), the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters², and the Convention on the protection of individuals with regard to automatic processing 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; as well as [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 and [Recommendation No. R \(2000\) 13](#) on a European policy on access to archives;
- iii. Considering the importance in a pluralistic, democratic society of transparency of public administration and of the ready availability of information on issues of public interest;
- 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 informed participation by the public in matters of public interest;
 - encourages the efficiency and effectiveness of administrations and helps maintain their integrity by avoiding the risk of corruption;
 - contributes to affirming the legitimacy of administrations as public services and to strengthening the public's confidence in public authorities;
- v. Considering therefore that the utmost endeavour should be made by member States to ensure availability to the public of information contained in official documents, subject to the protection of other legitimate rights and interests;

² Adopted in Aarhus, Denmark, on 25 June 1998.

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

vii. Considering that, whereas this instrument concentrates on requests by individuals for access to official documents, public authorities should commit themselves to conducting an active communication policy, with the aim of making available to the public any information which is deemed useful in a transparent democratic society.

Recommends the governments of member States to be guided in their law and practice by the principles appended to this Recommendation.

Appendix to Recommendation n° R (...) ...

I Definitions

For the purposes of this recommendation:

- "public authorities" shall mean:

i. government and administration at national, regional or local level;

ii. natural or legal persons insofar as they perform public functions or exercise administrative authority and as provided for by national law.

- "Official documents" shall mean:

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.

II Scope

1. 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 bodies and judicial authorities.

2. This Recommendation does not affect the right of access or the restrictions on access provided for in the Convention on the protection of individuals with regard to automatic processing of personal data (ETS N° 108).

III General principle

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

IV Possible limitations

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

- i. national security, defence and international relations;
- ii. public safety;
- iii. prevention, investigation and prosecution of criminal activities;
- iv. privacy and other legitimate private interests;
- v. commercial and other economic interests, be they private or public;
- vi. equality of parties concerning court proceedings;
- vii. nature;
- viii. inspection, control and supervision by public authorities;
- ix. economic, monetary and exchange rate policies of the state;
- x. confidentiality of deliberations within or between public authorities for an authority's internal preparation of a matter.

2. Access may be refused only if the disclosure of the information contained in the official document would or would be likely to harm any of the interests mentioned in paragraph 1 and if the interest in question overrides the public interest attached to the disclosure.

3. Member States should consider setting maximum time limits beyond which official documents covered by the limitations mentioned in paragraph 1 would become accessible.

V Requests for access to official documents

1. An applicant for an official document does not need to specify any reason for having access to the official document.

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

VI Treatment of requests for access

1. Any public authority holding an official document must deal with the request for access to that document.

2. Requests for access to documents shall be dealt with on an equal footing.

3. Any request for access to an official document shall be dealt with promptly. The decision should be reached, communicated and executed within any time limit which may have been specified beforehand.

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

5. The authority should help the applicant, as far as possible, to identify the requested official document, but the public authority is not under a duty to comply with the request if it is a document which cannot be identified.

6. A request for access to a document may be turned down if it is manifestly unreasonable.

7. Any public authority refusing access to an official document wholly or in part shall give the reasons for the refusal.

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

VIII Costs

1. Access to original documents on the premises of the public authority shall, in principle, 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.

IX Review Procedure

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 VI.3 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.

X Complementary measures

1. Member States shall take the necessary measures to inform the public about its rights of access to official documents and the way in which that right may be exercised.
2. Member States shall take the necessary measures 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) as far as possible, make available information on the matters or activities for which they are responsible, for example by setting up lists or registers of the documents they hold.

XI Information made public at the initiative of the public authorities

A public authority should, at its own initiative and where appropriate, take the necessary measures to make public information which it holds when the provision of such information is in the interest of promoting transparency of Public Administration and

efficiency within administrations or will encourage informed participation by the public in matters of public interest.

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