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DH-S-AC(2004)003

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

REPORT

11th meeting
Strasbourg, 22-24 September 2004

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

1. The Group of Specialists on Access to Official Information (DH-S-AC) held its 11th meeting in Strasbourg, on 22-24 September 2004. The meeting was chaired by Mr Frankie SCHRAM (Belgium). The list of participants appears in Appendix I. The agenda, as adopted, appears in Appendix II.

Item 2: Advisability of elaborating a draft legally binding instrument on access to official documents

2. The Chair recalled that the Ministers' Deputies assigned ad hoc terms of reference to the CDDH, instructing it to "evaluate, in the light of Recommendation Rec(2002)2 on access to official documents, the existing national legislations in this field with a view to examining the advisability of elaborating a legally binding instrument on access to official documents, accompanied by an explanatory report"¹.

3. In pursuance of these terms of reference, a questionnaire on the implementation of Recommendation Rec(2002)2² at national level had been sent to each of the member States in late 2003, as well as to a number of non-governmental organisations. The aim had been to gather information for an initial overview of the situation in each country in relation to the provisions of the recommendation. At its 58th meeting (15-18 June 2004), the CDDH welcomed the number of replies received. To date, the Secretariat has received replies coming from 36 member States³, which clearly showed the interest taken in the question of access to official documents.

4. The DH-S-AC noted that a fairly significant number of replies mentioned the content of national law. Fewer replies described the practice of the public authorities concerned, however. Although most of the laws appeared to be consistent with the spirit and the letter of the principles set forth in Recommendation Rec(2002)2, albeit with a number of shortcomings, which should be rectified, their implementation appeared to be more complicated in some cases.

5. Most of the experts considered that international efforts to strengthen the legal status of the principles recognised by the recommendation should not encounter any significant opposition from most of the member States, since many of them already recognised these principles in their national legislation.

¹ Ad hoc terms of reference adopted at the 850th meeting of the Deputies on 3 September 2003, reproduced in document [DH-S-AC\(2003\)002](#).

² [Recommendation Rec\(2002\)2](#) of the Committee of Ministers to member States on access to official documents, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies.

³ Albania, Andorra, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Moldova, the Netherlands, Norway, Poland, Portugal, the Russian Federation, San Marino, Slovakia, Slovenia, Sweden, Switzerland, "the former Yugoslav Republic of Macedonia", Turkey and the United Kingdom.

6. Two experts regretted that the idea of a second, more detailed, questionnaire had been dropped. They thought that such a questionnaire would provide a fuller picture of existing national laws in the field of access to official documents, and that it was thus too soon to consider the advisability of preparing a legally binding instrument. They thought that Recommendation Rec(2002)2 was very recent and that States should be given enough time to implement it before another instrument was prepared.

7. However, a majority of experts thought that the results of the questionnaire were sufficient to show that the advisability of a binding instrument could be considered now, particularly since preparation of such an instrument might take a considerable time, if this course of action was decided.

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8. After this first exchange of views, a great majority of DH-S-AC experts decided to devote this meeting to an examination of the advisability of elaborating a legally binding instrument in this field.

9. The DH-S-AC noted that the interest of adopting a legally binding instrument on access to official documents had been acknowledged by the participants in the Seminar “*What Access to Official Documents?*” (Strasbourg, 27-29 November 2002) as well as by the members of the CDDH. The former had “strongly encouraged [the Council of Europe](#) to elaborate a binding instrument on access to official documents, further to the rules laid down in Recommendation(2002)2, together with a monitoring system in order to help States to adopt appropriate legislation and to implement it”⁴. As for the CDDH, it had been indicated at its 55th meeting (17-20 June 2003) that “the overwhelming majority of the CDDH also considered that it would be useful for the Council of Europe to envisage such an instrument and for the corresponding work to continue”⁵. As indicated earlier in paragraph 2, [the Committee of Ministers](#) had later given the CDDH ad hoc terms of reference.

10. The Group took the view that the best approach would be to single out those arguments which would point towards or against such an exercise. It bore in mind the fact that it was not for it to decide on these questions: its role was to identify elements for reflection to facilitate the discussions at the plenary meeting of the CDDH in November 2004, where the experts from all member States would have the opportunity to express their position.

11. While two experts, bearing in mind the fact that Recommendation Rec(2002)2 was relatively recent, and that States needed to be given the necessary time to implement it, considered it preferable not to embark at this stage on new discussions about the advisability of another instrument, the other experts considered it necessary to

⁴ See the Conclusions of the Seminar “*What Access to Official Documents ?*”, in document [Sem-AC\(2002\)009def](#), para. 5.

⁵ Para. 33 of the report of the 55th meeting of the CDDH , document [CDDH\(2003\)018](#).

prepare a binding instrument at once in order to strengthen the protection of access to official documents as soon as possible.

12. At the end of the exchange of views on these points, the Group as a whole expressed the opinion that the content of the recommendation was a set of common basic standards. All the experts except one considered that it would be difficult to go further in a binding instrument, something which did not prevent each State which so wished from going further at domestic level⁶.

13. The Group as a whole also welcomed the flexibility which characterised the text of the recommendation and expressed the opinion that this flexibility should in no circumstances be lost in future, as it enabled each State to adapt the common basic standards to national realities.

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14. Starting the examination of the advisability of elaborating a legally binding instrument proper,

(i) All the experts expressed the opinion, first of all, that the right of public access to official documents was, for most European countries, a relatively recent right. This explained why it was not for the moment part of any general international human rights instrument;

(ii) It was now clear, however, that this right had become a very important one for citizens in a modern democracy. What is more, given the complexity of today's society, having a transparent government is very important for developing and maintaining a relationship based on mutual trust between public authorities and citizens, as well as for ensuring the integrity of public authorities and officials and avoiding corruption as far as was possible. It was also recognised that improved access to official documents contributed to public awareness of matters of general interest and to enlightened public discussion of such issues.

15. It was recognised that having an open society was particularly important, and most of the experts thought that it would be useful to make this point in a binding legal instrument, especially in view of the new context created by the fight against terrorism. In fact the authorities might be tempted to restrict access to certain documents unduly, invoking the danger of terrorism, at the risk of closing their own society. This illustrates clearly that the public's expectations of openness and accountability on the part of their public authorities had increased over time.

16. While noting that, in the space of three years, Recommendation Rec(2002)2 had already proved very useful in helping governments to draft or up-date laws, most of the

⁶ On this point, see the preamble to the recommendation, which clearly states that "the principles set out hereafter constitute a minimum standard, and (that) they should be understood without prejudice to those domestic laws and regulations which already recognise a wider right of access to official documents".

experts took the view that the adoption of a legally binding instrument on access to official documents could strengthen this appraisal and better ensure that the rules included in this recommendation would be taken into account at national level. In particular, in countries which currently had no laws consistent with the principles of Recommendation Rec(2002)2, national judges required to rule on cases of access to official documents would have to take account of those principles in their decisions, to the extent that the binding instrument incorporating these principles would have become part of national law.

17. One expert expressed his opinion that a legally binding instrument could weaken the recommendation. Others, for their part, pointed out that it was not unusual for Committee of Ministers recommendations to be made the basis of legally binding instruments, in order to increase the importance of the rights recognised in those recommendations.

18. The majority of the experts of the DH-S-AC also took the view that such an instrument would establish the obligation that each member State of the Council of Europe has to facilitate the access of each individual to documents emanating from its public services, in particular to those that contained information needed to take decisions on issues of public interest. It should be noted in this respect that of the 36 States that had replied to the first question of the questionnaire on the implementation of [Recommendation Rec\(2002\)2](#) on access to official documents, two States do not recognise the right of public access to official documents in their country. A legally binding instrument would therefore make it possible, for those States which would ratify it, to recognise an enforceable right for any individual to have access to official documents. The experts accepted that this instrument would, of course, not provide an absolute right, but one which was balanced by appropriately framed protection arrangements for particular interests.

19. The DH-S-AC also noted that neither Article 8 nor Article 10 of [the European Convention on Human Rights](#) provided clearly for a right of access to official documents. Most of the experts accordingly thought that action of some kind should be taken to give the right of access to official documents a stronger place in the legally binding international instruments on human rights protection. This did not prejudice the nature of the legally binding instrument best suited to this propose.

20. Moreover, several experts expressed the opinion that there would be a need for a balance between the right of access to official documents and personal data protection. They consider that these two rights should have the same legal value, inter alia to make it easier to strike a balance between them. Indeed, since the latter was protected by a legally binding instrument, the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*⁷, it would be appropriate for the former also to be the subject of a legally binding instrument.

21. The experts of the DH-S-AC also noted that a large number of member States of the Council of Europe recognised public access to official documents in environmental

⁷ ETS No 108, 28 February 1981.

matters, since they were already bound by the Aarhus Convention⁸. Some of them considered that there was no justification for access to be limited to such documents and not to cover all official documents.

22. All the DH-S-AC experts also thought that a better knowledge of the principles relating to access to official documents was necessary, for the public at large as well as for public servants. The existence, from now on, of the [*Guide on Access to Official Documents*](#) was to be welcomed, but this Guide could not be enough. Most of the experts thought that the necessary internal discussions on whether or not to adopt a legally binding instrument would help to disseminate the principles contained in Recommendation Rec(2002)2 to a maximum number of people in every member State, familiarise those people with them, and raise their profile.

23. The experts noted, finally, that Recommendation Rec(2002)2 had been translated in 14 member States. Some experts inferred from this a lack of interest for the moment in the subject in member States, as two years after the adoption of the text, only one-third of member States had the text available in their national language. The others, in contrast, pointed out that it was rare for recommendations of the Committee of Ministers to be translated into national languages, and that the existence already of such a large number of translations demonstrated the interest taken in the question. All, anyhow, request the Secretariat to renew, vis-à-vis the States concerned, the appeal made by the CDDH to have Recommendation Rec(2002)2 translated in their respective national language.

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24. In conclusion, a majority of the DH-S-AC experts thought that work on elaboration of a legally binding instrument should now begin.

25. The great majority of experts did not favour an additional protocol to the European Convention on Human Rights. They took the view that:

- Such an instrument would not make it possible to include all the rights currently detailed in Recommendation Rec(2002), to which the members of the DH-S-AC were attached;
- Access to official documents was a complex question and, since the national administrative solutions adopted to implement this right were very varied, only a flexible legally binding instrument would be suitable. They thought that an additional protocol to the Convention would not admit this flexibility;
- Only actionable rights could be included in such a protocol, and not positive obligations binding on States;
- The procedure for adoption of a protocol was long and difficult, which would delay the coming into force of the text, and accordingly protection of the right of access to official documents by a legally binding instrument;

⁸ *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. To date, 25 of the 45 member States of the Council of Europe are already bound by this Convention, while 13 others have signed it.

- The judicial control machinery of [the European Court of Human Rights](#) was very ponderous, only began to operate long after the facts, and so did not seem appropriate to access to official documents. In addition, one expert underlined the increase in the workload of the Court which would result from the adoption of an additional protocol on such an issue as access to official documents.

26. A majority of the experts thought it would be useful to discuss the type of legally binding instrument required in detail at a later date. They thought that this would be a convention, either a traditional convention, a framework convention or another type of treaty. In this connection, they noted with great interest the presentation given them by the Executive Secretary of the Framework Convention for the Protection of National Minorities, Mr Mark NEVILLE, who explained the nature of that instrument and the workings of its advisory Committee.

27. A majority of the Group recommended that the CDDH ask the Committee of Ministers to give it new terms of reference, allowing it to pursue its work, with a view to discussing the best type of convention, the possibility of monitoring machinery, and possibly preparing a draft convention matching the conclusions it will have reached.

Item 3: Other business

28. The Dutch expert informed the participants that a conference entitled “Public access to documents in the European Union” will be held on 25-26 October 2004 in the *Congrescentrum* in The Hague. He invited all DH-S-AC members to participate.

29. The Secretariat told the experts that the following dates had so far been chosen for the meetings of the DH-S-AC in 2005,

- 12th meeting: 9-11 March 2005;
- 13th meeting: 8-10 November 2005.

30. These dates would depend on confirmation by the CDDH and on the taking of a favourable decision on elaboration of a legally binding instrument.

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Appendix I**List of Participants / Liste Des Participants****BELGIUM/BELGIQUE**

M. Frankie SCHRAM, Secrétaire de la Commission d'accès aux documents administratifs, Service Public fédéral « Intérieur », Rue des Colonies 11, B-1000 BRUXELLES, Président du DH-S-AC, Chair of the DH-S-AC.

BULGARIA/BULGARIE

Apologised/Excusé

FRANCE

M. Laurent VEYSSIERE, 1/Conservateur du patrimoine, Direction des Archives de France, Centre historique des Archives nationales, 60 rue des Francs-Bourgeois, F-75003 PARIS

2/ Rapporteur à la CADA, Commission d'Accès aux Documents Administratifs, 35 rue Saint-Dominique, F-75007 PARIS

GERMANY/ALLEMAGNE

Mr Arne SCHLATMANN, Senior Principal Administrator, Federal Ministry of the Interior, Alt Moabit 101D, D-10559 BERLIN

ITALY/ITALIE

Ms Stefania CONGIA, International and Community Service, Servizio relazioni comunitarie ed internazionali, Garante per la Protezione dei dati Personali", Piazza Monte Citorio 121, 00186 ROMA

NETHERLANDS/PAYS-BAS

Mr Jan van SCHAGEN, Senior Legal Adviser, Ministry of the Interior and Kingdom Relations, Department of Constitutional Affairs and Legislation, P.O. Box 20011, 2500 EA THE HAGUE

NORWAY/NORVEGE

Mr Magnus Hauge GREAKER, Legal Adviser, Legislation Department, Ministry of Justice, Postbox 8005 Dep, N-0030 OSLO

POLAND/POLOGNE

Ms Renata KOWALSKA, Legal Adviser, Ministry of Foreign Affairs; Al. Szucha 23, PL-WARSAW 00580

RUSSIAN FEDERATION/FEDERATION DE RUSSIE

Mr Yassen ZASSOURSKY, Dean and Professor, Faculty of Journalism, Ulitsa Mokhovaya 9, 103914 MOSCOW

SWEDEN/SUEDE

Apologised/Excusé

TURKEY/TURQUIE

Apologised/Excusé

UNITED KINGDOM/ROYAUME-UNI

Apologised/Excusé

* * *

European Commission / Commission européenne

M. Marc MAES, Administrateur Principal, Secrétariat Général, Unité « Transparence et déontologie », B2, Brey 9/199, B- 1049 BRUXELLES

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

Apologised/Excusé

Project Group on Administrative Law / Groupe de projet sur le droit administratif(CJ-DA)

Mme Teresa GÓRZYŃSKA, Maître de Conférence, Institut des Sciences Juridiques, Académie polonaise des Sciences, Nowy Świat 72, PL - VARSOVIE 00-330

International Council of Archives / Conseil International des Archives (CIA)

Mme Sylvie CHAUPART, Chef du bureau des affaires juridiques, Direction des Archives de France, 56/60 rue des Francs-Bourgeois, F-75003 PARIS

* * *

SECRETARIAT

Directorate General of Human Rights - DG II / Direction Générale des Droits de l'Homme – DG II, Council of Europe/Conseil de l'Europe, F-67075 Strasbourg Cedex

M. Alfonso DE SALAS, Head of the Human Rights Intergovernmental Cooperation Division / Chef de la Division de la coopération intergouvernementale en matière de droits de l'homme

M. Mikaël POUTIERS, Administrator / Administrateur, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme, Secretary of the Committee / Secrétaire du Comité

Mme Severina SPASSOVA, Lawyer / Juriste, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme

Mme Michèle COGNARD, Assistant / Assistante

Interpreters/Interprètes:

Mme Martine CARALY

Mme Chloé CHENETIER

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Appendix II**Agenda****Item 1: Opening of the meeting and adoption of the agenda**Working documents

- Report of the 10th meeting of the DH-S-AC (17-19 September 2003) [DH-S-AC\(2003\)003](#)

Item 2: Advisability of elaborating a draft legally binding instrument on access to official documentsWorking documents

- Ad hoc terms of reference with a view to preparing a draft legally binding instrument on access to official documents [DH-S-AC\(2003\)002](#)
- Analysis of the questionnaire on the implementation of Recommendation Rec(2002)2 on access to official documents [DH-S-AC\(2004\)001](#)
- Compilation of the replies to the questionnaire [DH-S-AC\(2004\)001add bil](#)
- Elements for reflection prepared by the Secretariat on the advisability of elaborating a draft legally binding instrument [DH-S-AC\(2004\)002](#)

Information documents

- Recommendation Rec (2002) 2 of the Committee of Ministers to member states on access to official documents and Explanatory Memorandum [DH-S-AC\(2002\)003](#)
- Access to official documents: Guide
- The Freedominfo.org Global Survey - Freedom of Information and Access to Government Record Laws Around the World

Item 3: Other business

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