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Strasbourg, 14 February 2006

DH-S-AC(2006)004

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

ABRIDGED REPORT

**12th meeting
Strasbourg, 18 - 20 January 2006**

Introduction

1. The Group of Specialists on access to official documents (DH-S-AC) held its 12th meeting in Strasbourg from 18 to 20 January 2006, with Mr Frankie SCHRAM (Belgium) in the chair. The list of participants appears in Appendix I. The agenda, as adopted, is reproduced in Appendix II.

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2. In the course of the meeting, and in accordance with its terms of reference (Appendix III), the DH-S-AC began the preparatory work necessary to draft a free-standing legally binding instrument establishing the principles of access to official documents. Its first task was to prepare a draft interim report (Appendix IV) for the CDDH setting out specific proposals for the content (i) and form (ii) of the instrument and considering the question of a possible mechanism for monitoring compliance with the instrument (iii).

Content

3. The majority of the experts of the DH-S-AC considered that the main purpose of the instrument was to enshrine, as an individual, enforceable right, the principle of universal access to official documents. Some experts would have preferred a more flexible approach. Considering that the principles set out in Recommendation Rec(2002)2 on access to official documents served as a standard in this respect¹, the DH-S-AC examined each of these principles in detail in order to identify (a) those that should be transposed into the future instrument as binding provisions ("hard core" of minimum basic standards with which all countries' legislation must comply); (b) those that should remain flexible (provisions indicating objectives to be attained while leaving the Parties free to choose the means of achieving them); and (c) those that would be proposed to the Parties in the form of "*à la carte*" provisions. These "*à la carte*" provisions should make possible to adapt the instrument in the light of national systems (in particular with regard to the distinction between "access to official documents" and "access to information").

4. At the end of this initial examination, the DH-S-AC made specific proposals to the CDDH, reflected in the draft interim report, without at that stage submitting drafting proposals. The latter proposals would be drawn up at a later date, with due regard, in particular, for domestic law and practice in this field and the need for co-ordination with other relevant legal instruments, in particular Convention No. 108 for the Protection of Individuals with Regard to Automatic Processing of Personal Data.

¹ Reproduced, with the explanatory memorandum to it, in document DH-S-AC(2002)003.

Form

5. A great majority of the experts of the DH-S-AC rejected the idea of an additional Protocol to the ECHR. It held a detailed discussion with a representative from the Legal Advice Department and Treaty Office about the various forms the draft legally binding instrument might take². The DH-S-AC was in favour of a convention *sui generis* (see the draft interim report below).

Mechanism

6. The DH-S-AC considered the extent to which a follow-up mechanism would add value to the convention. The Group felt that any follow-up mechanism would need to take account of both budgetary constraints within the Council of Europe and the regulatory impact on those public authorities subject to that follow-up.

7. The majority of the experts of the DH-S-AC would wish a classic mechanism in the form of a convention-based committee responsible for monitoring application of the convention. It was, however, aware of the cost of such a proposal. On a preliminary basis, the DH-S-AC consequently studied other alternatives. It therefore indicated that the future convention could contain a provision whereby a report would be submitted every five years to the Committee of Ministers on the state of implementation of the convention. One of the options that the DH-S-AC suggested concerned a practical, complementary means to be used for preparing the report: (a) continuing to hold an annual two-day meeting of the DH-S-AC in Strasbourg to monitor, in practice, the implementation of the convention and co-ordinate the tasks necessary for the preparation of the five-yearly report; (b) setting up a network of experts (appointed by each of the Council of Europe member States) to (i) share good practice, (ii) help those State Parties that so requested to deal with specific problems they encountered in implementing the convention and (iii) send in information for the report. They could, for instance, meet in Strasbourg every five years when the report was adopted, for example on the occasion of a seminar or conference on access to official documents.

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8. The DH-S-AC noted that, in accordance with the timetable adopted by the CDDH, the 13th meeting of the Group of Specialists would take place from 31 May to 2 June 2006 and the 14th meeting from 6 to 8 December 2006.

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² The Department's analysis is set out in document DH-S-AC(2006)003.

Annexe I**List of participants****(a) Member States / Etats membres****BELGIUM / BELGIQUE**

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6. Article XIX

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Interpreters / Interprètes

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

- Report of the 11th meeting of the DH-S-AC (22-24 September 2004) DH-S-AC(2004)003

Item 2: Elaboration of a draft legally binding instrument on access to official documents*i. Examination of the various possible forms*Working documents

- Terms of reference with a view to preparing a draft legally binding instrument on access to official documents DH-S-AC(2006)001
- Extracts from the reports of the 60th and 61st meetings of the Steering Committee for Human Rights (CDDH) (14-17 June and 22-25 November 2005) DH-S-AC(2006)002
- Analysis of the Council of Europe's Legal Advice Department and Treaty Office concerning the various possible forms of the draft legally binding instrument on access to official documents DH-S-AC(2006)003
- 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

*ii. Adoption of an interim report to be transmitted to the CDDH with precise proposals as to the content and form of the instrument***Item 3: Organisation of future work: working methods for the next meeting and dates of this meeting**

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Appendix III

Terms of reference of the CDDH for the DH-S-AC with a view to drafting a legally binding instrument on access to official documents

Adopted by the CDDH at its 60th meeting (14-17 June 2005)
on the basis of the *ad hoc* terms of reference adopted by the Ministers' Deputies at their 925th meeting (3-4 May 2005)

1. Name of the Group:

Group of Specialists on access to official documents (DH-S-AC)

2. Type of Group:

Group of Specialists

3. Source of terms of reference:

Steering Committee for Human Rights (CDDH)

4. Specific terms of reference:

To begin work on drafting a free-standing legally binding instrument establishing the principles on access to official documents, accompanied by an explanatory report, based on Recommendation Rec(2002)2 on access to official documents, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies. Such an instrument should take due account of domestic law and practice in this field.

When elaborating such an instrument, the DH-S-AC will take into account any further instructions from the Committee of Ministers, as well as the need to ensure compatibility and coherence between any new instrument and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (CETS No. 108). It will also take into account Recommendation Rec (2000) 13 of the Committee of Ministers to Member States on a European policy on access to archives, adopted by the Committee of Ministers on 13 July 2000 at the 717th meeting of the Ministers' Deputies.

The DH-S-AC is requested to present an interim report to the CDDH before 15 March 2006 in which it will make precise proposals as to the content and form of the instrument.

5. Membership of the Group of Specialists:

- a. The Group shall be composed of representatives of the following Member States: Belgium, Bulgaria, Denmark, France, Germany, Italy, the Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, Turkey and the United Kingdom.
- b. two representatives of the European Committee on Legal Co-operation (CDCJ), as observers.

- c. one representative of the Steering Committee on the the Media and New Communication Services (CDMC), as observer.
- d. one representative of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [CETS 108] (T-PD), as observer.
- e. The Council of Europe budget will bear the travel and subsistence expenses for the above-mentioned persons.
- f. The European Commission, the International Council on Archives Article XIX and Open Society Justice Initiative may participate in the work of the Group of Specialists, as observers and without defrayal of expenses.

6. Working structures and methods:

In order to carry out its functions, the Group may seek advice of external experts, have recourse to consultants and consult with relevant non-governmental organisations and other members of the civil society.

The CDDH may authorise the admission of other observers to the Group of Specialists.

7. Duration:

These terms of reference shall expire on 30 June 2007. The DH-S-AC will submit an interim report before 15 March 2006.

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Appendix IV

Interim report

Introduction

1. The Group of Specialists on access to official documents (DH-S-AC) held its 12th meeting on 18-20 January 2006, with Mr Frankie SCHRAM (Belgium) in the chair. In accordance with its terms of reference (see Appendix III), the DH-S-AC began the preparatory work necessary to draft a free-standing legally binding instrument setting out the principles relating to access to official documents. Its first task was to prepare this interim report, in which it makes proposals as to the contents and the form of the instrument. At the meeting the Group considered that it was preferable not to discuss both issues separately, i.e. the different forms a legally binding instrument could take and, on the other hand, the contents of such an instrument and the possible monitoring mechanism to be set up. It was of the view that the last two aspects would have a direct influence on the type of instrument to be chosen.

2. This interim report is submitted to the Steering Committee for Human Rights (CDDH) in accordance with the terms of reference received from it.

3. As requested in the terms of reference, the DH-S-AC based its work on the elements contained in Recommendation Rec (2002)2 on access to official documents, adopted by the Committee of Ministers on 21 February 2002, at the 784th meeting of the Ministers' Deputies.

4. Another element which the DH-S-AC kept in mind was the balance to find between the need to ensure the effectiveness of the follow-up mechanism and the budgetary constraints of the Council of Europe.

5. Moreover, the Group considered that it will be of prime importance to ensure that the future instrument be compatible with other existing international instruments, notably the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (CETS No.108) and to take into account Recommendation Rec (2000) 13 of the Committee of Ministers to Member States on a European policy on access to archives, adopted by the Committee of Ministers on 13 July 2000 at the 717th meeting of the Ministers' Deputies.

6. The DH-S-AC's approach in its interim report is threefold: (i) contents of the legally binding instrument; (ii) possible follow-up mechanism to set up; (iii) legal form of the instrument.

I. CONTENTS OF THE LEGALLY BINDING INSTRUMENT

7. As indicated above, the principles of the legally binding instrument should be based on those contained in Recommendation Rec(2002)2. The Group considered that, because of its subject, the legally binding instrument should not be limited to set out rights and obligations. Provisions should be added to specify modalities for their implementation (conditions of access, possible exceptions, ...). The DH-S-AC examined all the principles contained in Recommendation Rec(2002)2 in order to determine those which should be considered as “core principles”, those for which a more flexible application would be possible and those which would be proposed to Parties as “à la carte” provisions. The Group did not, at this stage, take any formal decision on the classification of the principles in those three categories. It, however, started to sort out provisions that should be included with the “core principles” from others which could be applied in a more flexible way. It will come back on this classification at its next meeting and will refine it when drafting the legally binding instrument.

8. On a provisional basis, the experts considered that the following principles of the recommendation should be among the “core principles” of the provisions of the legally binding instrument. This would therefore form a minimum compulsory basis for States Parties for their legislation and their national practice³:

- (i) *access of everyone to official documents*⁴. This principle was accepted by all the experts. Most of them considered in addition that it should be recognised as an individual subjective and accountable right. Others, on the contrary, would have preferred a more flexible approach which would be limited to state the principle as an obligation for the public authorities;
- (ii) *exhaustive list of possible limitations*⁵;

³ The Group did not discuss, at this stage, the precise wording of the principles that it recommended to be retained in the future legally binding instrument. Therefore, the list below only concerns principles and not drafting suggestions.

⁴ Principle III of the recommendation (General principle on access to official documents):

“Member states should guarantee the right of everyone to have access, on request, to official documents held by public authorities. This principle should apply without discrimination on any ground, including that of national origin.”

⁵ Principle IV, paras 1 and 2 of the recommendation (Possible limitations to access to official documents):

“1. Member states may limit the right of access to official documents. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting:

- i. national security, defence and international relations;*
- ii. public safety;*
- iii. the 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. the equality of parties concerning court proceedings;*
- vii. nature;*
- viii. inspection, control and supervision by public authorities;*
- ix. the economic, monetary and exchange rate policies of the state;*

- (iii) possibility of *partial access* to the document⁶;
- (iv) principle according to which the applicant for an official document should not be obliged to give *reasons* for having access to the said document⁷;
- (v) *prompt processing* of any request for communication of an official document⁸;
- (vi) refusal of a request for an official document if the *request is manifestly unreasonable*⁹;
- (vii) *motivation for the possible refusal* by a public authority to grant access¹⁰;
- (viii) setting up an *appeal procedure*¹¹;
- (ix) provision specifying that nothing prevents Parties from regulating *access in a more favourable way* than what is provided for in the instrument and that, on no account, provisions from this instrument can be interpreted so as to restrict a more favourable access regime already recognised in a State Party¹².

x. *the confidentiality of deliberations within or between public authorities during the internal preparation of a matter.*

2. *Access to a document may be refused 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, unless there is an overriding public interest in disclosure.*”

⁶ Principle VII, para. 2 of the recommendation (Forms of access to official documents):

“2. *If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, such access may be refused.*”

⁷ Principle V, para. 1 (Requests for access to official documents):

“1. *An applicant for an official document should not be obliged to give reasons for having access to the official document.*”

⁸ Principle VI, para. 3 of the recommendation (Processing of requests for access to official documents):

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

⁹ Principle VI, para. 6 of the recommendation (Processing of requests for access to official documents):

“6. *A request for access to an official document may be refused if the request is manifestly unreasonable.*”

¹⁰ Principle VI, para. 7 of the recommendation (Processing of requests for access to official documents):

“7. *A public authority refusing access to an official document wholly or in part should give the reasons for the refusal.*”

¹¹ Principle IX of the recommendation (Review procedure):

“1. *An applicant whose request for an official document has been refused, whether in part or in full, or dismissed, or has not been dealt with within the time limit mentioned in Principle VI.3 should have access to a review procedure before a court of law or another independent and impartial body established by law.*

2. *An applicant should always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1 above.*”

¹² Preamble of the recommendation:

“*Stressing 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.*”

9. Conversely, the following principles should be drafted in a way that allows a flexible application:

- (i) setting-up of *time limits* beyond which the possible limitations to access to official documents would no longer apply¹³;
- (ii) *referral of the applicant* to the competent public authority when the public authority from which the official document was requested does not hold it¹⁴;
- (iii) *help* given by the public authority to the applicant to identify the requested official document¹⁵;
- (iv) referral of the applicant to easily accessible *alternative sources*¹⁶;
- (v) *information of the public* about its rights of access to official documents and how that right may be exercised¹⁷;
- (vi) *training of public officials* on their duties and obligations with respect to the implementation of the right of access to official documents¹⁸;
- (vii) *efficient management of documents* so that they are easily accessible¹⁹;
- (viii) application of clear and established rules for the *preservation and destruction of documents*²⁰;

¹³ Principle IV, para. 3 of the recommendation (Possible limitations to access to official documents):

“3. *Member states should consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.*”

¹⁴ Principle VI, para. 4 of the recommendation (Processing of requests for access to official documents):

“4. *If the public authority does not hold the requested official document it should, wherever possible, refer the applicant to the competent public authority.*”

¹⁵ Principle VI, para. 5 of the recommendation (Processing of requests for access to official documents):

“5. *The public 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.*”

¹⁶ Principle VII, para. 3 of the recommendation (Forms of access to official documents):

“3. *The public authority may give access to an official document by referring the applicant to easily accessible alternative sources.*”

¹⁷ Principle X, para. 1, i. of the recommendation (Complementary measures):

“1. *Member states should take the necessary measures to:*
i. inform the public about its rights of access to official documents and how that right may be exercised;”

¹⁸ Principle X, para. 1, ii. of the recommendation (Complementary measures):

“1. *Member states should take the necessary measures to: (...)*
ii. ensure that public officials are trained in their duties and obligations with respect to the implementation of this right;”

¹⁹ Principle X, para. 2, i. of the recommendation (Complementary measures):

“2. *To this end, public authorities should in particular:*
i. manage their documents efficiently so that they are easily accessible;”

²⁰ Principle X, para. 2, ii. of the recommendation (Complementary measures):

“2. *To this end, public authorities should in particular: (...)*”

- (ix) *information* on the matters or activities for which public authorities are responsible (for example, drawing up of lists or registers of the documents they hold)²¹;
- (x) proactive action to make public *information of interest to the general public*²².

10. Finally, other provisions of the future legally binding instrument could be proposed to Parties as “*à la carte*” provisions.

11. The DH-S-AC retained the idea that States Parties would be encouraged to go further than simply accepting the minimum standards contained in the “core principles” of the future legally binding instrument.

12. In addition, the DH-S-AC considered, that the explanatory report of the legal instrument could provide examples of good practice from which States Parties would be encouraged to draw inspiration. These examples could be drawn, in particular, from Recommendation Rec(2002)2 and its explanatory memorandum as well as the *Guide on access to official documents*, the relevant replies to the questionnaire on national practice²³ and any more recent practice.

13. Finally, the Group took note that some national systems are based on the recognition of a right of access to official documents whereas some others rely on the recognition of a right of access to information which public authorities have in their possession. It noted that this difference could raise difficulties in the implementation of the principles recognised in the legal instrument. The DH-S-AC thus considered that the instrument should be sufficiently flexible to cover both approaches.

ii. *apply clear and established rules for the preservation and destruction of their documents;*”

²¹ Principle X, para. 2, iii. of the recommendation (Complementary measures):

“2. *To this end, public authorities should in particular: (...)*

iii. *as far as possible, make available information on the matters or activities for which they are responsible, for example by drawing up lists or registers of the documents they hold.*”

²² Principle XI of the recommendation (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 the transparency of public administration and efficiency within administrations or will encourage informed participation by the public in matters of public interest.”

²³ See documents DH-S-AC(2004)001, Analysis of replies to the questionnaire on the implementation of Recommendation Rec(2002)2 on access to official documents and DH-S-AC(2004)001add bil, Compilation of the replies to the questionnaire.

II. FOLLOW-UP MECHANISM

14. When considering this question, the DH-S-AC had regard to the added value which such a follow-up mechanism would bring to the legally binding instrument. The Group felt that, when this issue is discussed, both budgetary constraints within the Council of Europe and its impact on those domestic authorities responsible for the follow up of the domestic legislation on access to official documents will need to be kept in mind.

15. The majority of the experts of the DH-S-AC would wish a classic mechanism in the form of a convention-based committee responsible for monitoring application of the legally binding instrument. However, aware of the cost of such a proposal, it studied possible alternatives. It indicated that the future instrument could contain a provision whereby a report would be submitted every five years to the Committee of Ministers on the state of implementation of the instrument.

16. The DH-S-AC suggested practical, complementary means to be used for preparing the five-year report:

- (a) continuing to hold an annual two-day meeting of the DH-S-AC in Strasbourg to monitor the implementation of the instrument and co-ordinate the tasks necessary for the preparation of the five-year report;
- (b) setting up a network of experts (appointed by each of the Council of Europe member States) to (i) share good practice, (ii) help those State Parties which requested assistance to deal with specific problems they encountered in implementing the instrument, and (iii) send in information for the report. They could, for instance, meet in Strasbourg every five years when the report is adopted, for example on the occasion of a seminar or conference on access to official documents.

III. LEGAL FORM OF THE INSTRUMENT

17. A great majority of the experts of the DH-S-AC rejected the idea of an additional Protocol to the ECHR. After a detailed discussion with a representative of the Legal Advice Department and Treaty Office about the various forms that the draft legally binding instrument might take²⁴, the DH-S-AC considered that the instrument should have the form of a convention *sui generis*, which would notably include:

- a minimum basis with compulsory provisions;
- provisions that allow a more flexible application that do not prejudge means to be used to reach it;
- “à la carte” provisions;
- a follow-up mechanism which could take the form of, for example, a five-yearly report / possible assistance to those State Parties that so wish / a forum of exchange of good practice.

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²⁴ The Department's analysis is set out in document DH-S-AC(2006)003.

18. The DH-S-AC considers that the proposals contained in this interim report are a good starting point for the elaboration of a draft binding instrument.

19. In submitting this interim report to the CDDH, the DH-S-AC considers that it fulfilled its terms of reference.

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