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Council of Europe Access Info Group (AIG)

Comments submitted by Iceland on the AIG's Baseline Evaluation Report on the implementation of the Council of Europe Convention on Access to Official Documents (CETS No.205) in respect of Iceland

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Comments submitted by Iceland on the AIG Baseline Evaluation Report on the implementation of the Council of Europe Convention on access to official documents (CETS No. 205 –Tromsø Convention)

Iceland appreciates the Baseline Evaluation Report of the AIG and will carefully consider its conclusions and recommendations when revising the Information Act. However, Iceland would like to address the following conclusions and recommendations.

1.

AIG notes that the exclusion of working documents from the scope of the right of access is likely to render a wide range of documents inaccessible. Iceland considers that the exemption is very narrow in its scope. According to the explanatory notes to the Information Act, Article 8(1) specifies that for a document to be considered a working document, three criteria must generally be met. First, the document must be a preparatory document. Second, it must be written or prepared by government employees (or a legal entity) for their own use. Third, it must not have been handed over to others unless it was only turned over to a supervisory authority due to legal obligations.

The criterion of a "preparatory document" means that the exemption applies to documents that are created as part of the preparation of a decision, such as proposals, draft letters, or drafts of any kind of decision. Minutes of meetings may fall under this exemption, as well as memoranda written by government employees, only if the document was created for the preparation of a decision.

The second criterion stipulates that a preparatory document can only be considered a working document if it was written by government employees for the use of the governmental agency that they work for. It clarifies that documents prepared by external experts, such as contractors for the government, do not qualify as working documents under Article 8. The same applies to documents that a government agency prepares for the use of another government agency. The rule that a document is "created and used within a government" is subject to a narrow exception for limited types of government cooperation as stipulated in paragraph 2 of Article 8.

The third criterion, which stipulates that the document has not been handed over to others, includes instances where a document has been delivered to a private party or another government agency, e.g., via email or other means; in such cases, the document is generally no longer considered a working document. However, exceptions to this criterion are detailed in paragraph

2 of Article 8, as stated before. Iceland emphasises that each ministry is considered a separate government agency. Preparatory documents that are sent between ministries are therefore not "working documents" within the meaning of the Information Act, unless Article 8(2) applies.

It should be noted that even if a document fulfils all three criteria, access should be granted if paragraph 3 of Article 8 applies to the content of the document. As stated in paragraph 3, documents must be handed over if: 1) the documents include a final decision on the handling of a matter, 2) the documents include information which a government authority is obligated to file, according to the first paragraph of Article 27, 3) the documents include information on the circumstances of a case that does not appear anywhere else, or 4) the documents include a description of administrative procedures or practices in a particular field.

In view of all the above, the exemption of working documents appears to fulfil the requirements of Article 3(k) of the Convention.

2.

The AIG refers to Article 4(2) of the Information Act, stating that the Information Act does not apply to information which is to be kept confidential according to any international agreement to which Iceland is party, as a "blanket exemption" for international agreements containing a confidentiality clause. The AIG considers that the Article is not in line with the requirements of Article 1, paragraph 2, sub-paragraph b, of the Convention. It recommends that Iceland considers regulating legitimate public interests in preserving the confidentiality of information related to international relations in accordance with Article 3, paragraph 1, subparagraph a, of the Convention.

Iceland would like to clarify that this exception applies exclusively to information that is explicitly required to be kept confidential by specific clauses in international treaties. The scope and content of each confidentiality clause must be evaluated on an individual basis.[1]

This provision was also included in previous legislation, namely Information Act No. 50/1996. According to the explanatory notes accompanying that Act, the exception was justified by Iceland's obligations under international agreements to maintain secrecy regarding certain information beyond what is stipulated in the Information Act. Due to these commitments it was deemed necessary to specify that the Information Act does not apply to information that must remain confidential under international treaties to which Iceland is a party. As the wording suggests, it is always evaluated whether provisions in international agreements impose a confidentiality obligation regarding specific information or documents.

The rule acknowledges the nondisclosure obligations in international agreements. Disclosing

[1] For example, the ruling of the Information Committee No. 619/2016, where the Committee upheld a decision regarding documents deemed to fall within the scope of the Agreement between the Parties to the North Atlantic Treaty for the Security of Information. Additionally, Ruling No. 559/2014, where the Information Committee affirmed a decision concerning a document provided by the British tax authorities to the Icelandic tax authorities, citing the confidentiality clause of the Double Taxation Convention between Iceland and the United Kingdom. Furthermore, Ruling No. A-121/2001, in which the Information Committee determined that a document did not fall under the confidentiality clause of the Convention on International Civil Aviation.

information that is required to be confidential under such an agreement would constitute a breach of that agreement. AIG itself acknowledges in its report that member states "may be obliged to uphold confidentiality clauses found in other international treaties."

Iceland considers that preventing violations of nondisclosure clauses in international treaties, which mandate that certain data remain confidential, is a legitimate aim under Article 3(a) of the Convention.

3.

The AIG maintains that Article 15(4), which states that in exceptional cases a request may be refused if there are strong indications of the request being presented for an illegitimate purpose, is not in line with Article 4, paragraph 1 of the Convention. The AIG considers that the rule may require the person requesting the information to explain the reasons for their request and recommends considering its removal.

The Icelandic legislature, when enacting the Information Act, deemed it important to include a provision allowing for the refusal of document requests in exceptional cases where there are strong indications that the request is made for an illegitimate purpose. This provision is intended to prevent such misuse, aligning with the interests and considerations articulated in Article 3 of the Convention. The wording of the legal provision concerning "exceptional cases," "strong indications," and "illegitimate purpose" indicate that the application of this provision is highly limited and should be invoked only when there are compelling and legitimate reasons, which necessitate an interest assessment.

However, Iceland acknowledges the AIG's suggestion that the provision's wording could be clearer to emphasise that exemptions from access may be made in respect of information when this is required because access would facilitate the commission of criminal acts. Iceland proposes that the AIG recommend amending the provision rather than removing it entirely.

4.

The AIG states that "staff and service costs" cannot be classified as "delivery or reproduction costs" under Article 7 of the Convention. Iceland would like to emphasise that, given Icelandic legal norms regarding service fees—distinct from taxes under the Icelandic constitution—these fees should exclusively encompass expenses directly linked to the delivery and reproduction of information. The staff and service costs, therefore, must be directly linked to the cost of delivering and reproducing information. Iceland considers this to be in line with Article 7 of the Convention.