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Council of Europe Access Info Group (AIG)

Comments submitted by Albania 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 Albania

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1- Referring to the comment in Section II Article 1 – General Provisions, point 8: Any data recorded in any form or format during the exercise of public functions, regardless of whether it was drafted by the public authority, is considered as public information (Law on the Right to Information, Article 2(2)). This definition reflects the requirements of Article 1, paragraph 2, sub-paragraph b, of the Convention. However, the qualification "during the exercise of public functions" raises questions of compatibility with this provision of the Convention. The AIG notes that only documents received by public officials as private persons and which are not connected to their duties fall outside the definition contained in Article 1, paragraph 2, sub-paragraph b, of the Convention (see Explanatory Report to the Convention, §13). The Party should clarify what is the purpose of the qualification "during the exercise of public functions".

Comment of the Party: To determine what is implied by "exercise of public functions" we must refer to the Administrative Procedures Law. In the above law commentary, public functions is described as: (page 17) 2. Exercising public functions. This criterion requires a distinction to be made between the actions of a public body that are subject to private law and those that are regulated by public law. During the exercise of public functions, only the second category is realized, while the administrative act is the wrong instrument for activities determined by private law. The dichotomy of public and private law is not simply a theoretical issue, but it has considerable practical importance as follows:) public law disputes fall within the competence of administrative courts, while private law disputes fall within the competence of ordinary courts; i) the Code of Administrative Procedures applies only to the public law administrative activities of a public body (see point l, of Article 2,); i) a different law applies to the execution of administrative acts (see Part Eight of this Code). Therefore, the answer to the question of whether an action is or is not subject to the exercise of a public function depends on the nature of the legal provision on which the action is based. For administrative practice, a distinction can be made between private and public law in relation to the difference in the subjects to whom they are exercised, that is, the bodies or persons to whom the rights and duties are granted. The norms of private law are those that can authorize or oblige anyone. Thus, such a measure of a public body as the cancellation of a draft or the conclusion of a contract for the procurement of office equipment are not administrative acts because they are based on private law. In contrast to the above, public law is the sum of these legal rules the subject of the exercise of which is exclusively the holder of sovereign public authority. But this alone is not enough for the sovereign action of the public body to 'belong to the field of public law' in relation to the interpretation of the "exercise of a public function" in the context of the definition of an administrative act, but it must also be the subject of administrative law (see the requirement "administrative functions" in point 1 of Article 2).

2- Referring to the comment in Section III - Possible limitations to access to official documents, Article 3 point 18 and Section 12, Conclusions and recommendations, point nr. 52: Article 17, paragraph 3, of the Law on the Right to Information provides that the right to information shall be restricted as long as it is indispensable, proportional and as long as the dissemination of information would infringe the professional secret sanctioned by law. The Party has informed the AIG that professional secrecy refers to

the ethical and legal obligations of practitioners to maintain the secrecy of information entrusted to them by clients or patients. Sensitive data must not be disclosed without their consent except in cases provided by law. For example, the attorney-client relationship is guaranteed by the special law on the lawyer's profession. In case of denials of access on this ground, the public authority concerned must provide the legal basis and a reasoning in a decision which is subject to appeal before the office of the Commissioner for the Right to Information and the Protection of Personal Data (the Commissioner).3 Noting that professional secrecy is not a specific ground of limitation under Article 3, paragraph 2, of the Convention, the AIG considers that in certain cases it may fall within the scope of the restrictions listed therein. However, it still remains unclear how large the scope of professional secrecy is in the legislation of the Party, and whether and how the principles of Article 3, paragraph 2, of the Convention apply. Against this background, the AIG invites the Party to re-consider the general exemption based on professional secrecy.

Comment of the Party: The professional secrecy, or professional confidentiality or the duty of confidentiality, refer to the ethical or legal obligations of practitioners to maintain the secrecy and security of information entrusted to them by clients or patients. This obliges them not to disclose sensitive data without the consent of the person who has entrusted them with this information or without a legal obligation. Professional secrecy is essential in many fields such as law, medicine, psychology and finance. It guarantees trust between practitioners and clients, guaranteeing the most honest communication that is essential for the service. The essential aspects of professional secrecy are: confidentiality: the practitioner shall not disclose any confidential information that the client has entrusted him with, except in cases provided for by law. Trust: Clients can share information with practitioners without concern that this information will be disclosed to third parties. Legal or ethical obligation: in many professions, maintaining confidentiality is not only an ethical obligation but also a legal one. By violating confidentiality, the practitioner may face disciplinary measures, legal consequences and loss of license. Limits of Secrecy: In some cases, there are exceptions when practitioners may disseminate such information, such as when a threat to someone's safety is posed, or when this is required by a court ruling. The aim of professional secrecy and exceptional cases vary by profession. Professional secrecy, mainly applies to relationships between parties such as, for example, the "attorney– client privilege", which is guaranteed by a special Law no. 55/2018 "On lawyer's profession in the Republic of Albania", the bank secrecy, the "physician –patient privilege", etc., who (save in exceptional cases), may not disseminate information received in confidence from the client/patient. However, the Public Authorities, in case of decline to provide information, must provide the legal reasoning and grounds for such decline. In any case, the final decision on whether the reasoning and legal basis are just and justified by Article 17, shall remain with the Commissioner's Office. Article 14 of the Law on the Right to Information would benefit from re-formulation to reflect the practice explained by the Party concerning the right to inspect originals of documents. However Professional secrecy can be excluded from the law 119/2014, "For the right of information", if in contrast with the principles of Article 3, paragraph 2, of the Convention.

However must be clear that special Law no. 55/2018 "On lawyer's profession in the Republic of Albania" provides in article 10 that: "Article 10 - Confidentiality 1. The lawyer shall maintain the professional secrecy and confidentiality of data disclosed to him by the client or of documents made available by the latter, in order to ensure the protection requested, except in cases where the client has given written consent. 2. The lawyer shall also require the respect of confidentiality from other lawyers of the same law firm and the administrative staff employed by it."

3- Referring to the comment in Section 12, Conclusions and recommendations, point nr. 54: Article 14 of the Law on the Right to Information would benefit from re-formulation to reflect the practice explained by the Party concerning the right to inspect originals of documents.

Comment of the Party: Article 14 provides that: "Ways of making the information available 1. The entire applications for information shall, normally, be dealt with through the consultation of the information at the premises of the public sector body free of charge, through the unique governmental portal ealbania.al or, as appropriate, through the official internet site. 2. The applications pertaining to written documents shall be processed by making available to the applicant: a) a full copy in the same format as the one used by the public sector body, except in specific cases; b) a full copy of the information via e-mail, as long as the information exists or is convertible to such a format. 3. With regard to the applications referring to other formats, the information shall be provided in the most efficient way and at the lowest cost for the public sector body. 4. The negative decision concerning the requested format shall always be provided in writing and provided with grounds."
14 (2.a) specifies that the applications pertaining to written documents shall be processed by making available to the applicant: a) a full copy in the same format as the one used by the public sector body. This includes the right to inspect originals of documents (full copy in the same format as the one used).