AIG/Inf(2024)19

Council of Europe Access Info Group (AIG)

Comments submitted by Norway 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 Norway

Received by the Secretariat on 26 September 2024

Published on 27 September 2024

ROYAL NORWEGIAN
MINISTRY OF JUSTICE AND PUBLIC SECURITY

Council of Europe -
Directorate General of Human Rights and Rule of Law – DGI

Your ref.	Our ref.	Date
	24/5154 - OKL	26.09.2024

Norway's reply regarding the Baseline Evaluation Report on the implementation of the Council of Europe Convention on access to official documents

1. Background

The Council of Europe Access Info Group (the AIG) published on the 16th of July 2024 a baseline evaluation report concerning Norway's implementation of the Council of Europe Convention on access to official documents.

The AIG has raised questions regarding, in particular, three subjects regulated in the Norwegian Freedom of Information Act. Norway will here give a reply to these questions.

2. The qualification "case documents"

In paragraphs 16 and 63 of the report it is argued that the qualification contained in § 4, second paragraph, of the Freedom of Information Act, is not fully in line with Article 1, paragraph 2, sub-paragraph b, of the Convention. That provision in the Freedom of Information Act makes clear that official documents are the documents relating to a public authority's area of responsibility or activities. These documents are in the Freedom of Information Act called "case documents", i.e., documents relating to a case.

On the 1st of March 2024 we provided additional information regarding the draft baseline evaluation report, explaining that documents held by public agencies, but not considered as "case documents", will most typically be those referred to in the third paragraph of § 4 of Freedom of Information Act. This provision provides that the following documents are not to be regarded as "case documents":
(a) any document forming part of a library or museum collection,
(b) any documents which a private legal person has handed over to public archives for safekeeping,
(c) any document handed over to an administrative agency for disclosure in a periodical journal that is published by that agency,
(d) any newspaper, journal, advertising matter and the like which an administrative agency receives without being connected to a specific case at that agency, and

(e) any document which an employee of an administrative agency has received in a capacity other than that of employee of that administrative agency.

The documents mentioned in subparagraphs b and c are only kept by the agency on behalf of private legal persons and may therefore not be considered as “official documents” held by the agency. The documents mentioned in subparagraph d and documents forming part of a library as mentioned in subparagraph a are documents that the agency buys or otherwise receives in the same way as anyone else. It has never been an option to give public access to an agency’s books, newspapers, magazines etc. owned by a public agency, except if such documents are connected to a specific case.

Documents that are part of a museum collection as mentioned in subparagraph a may belong to private legal persons, and thereby not being official documents. If such documents belong to another public agency, they may – depending on the circumstances – be case documents of that other agency. The documents mentioned in subparagraph e are not connected to the agency in any other way than being kept by an employee or a politician of the agency. They may for instance be private documents, documents related to private activities or documents related to activities in a political party. Such documents are not to be considered as “held by” the agency.

Documents that are sent or delivered to wrong agency are generally not to be considered as case documents of the agency receiving them by mistake. However, such documents shall, if possible, be sent or delivered to the correct agency, and will then be regarded as case documents of that agency. According to the Public Administration Act § 11, fourth paragraph, any person who applies to the wrong authority shall, if possible, be referred to the correct agency. It is specified in the Public Administration Regulation § 4, first paragraph, that if a written inquiry is sent or delivered to a wrong agency, the inquiry shall normally be sent directly to the correct agency, and simultaneously the sender shall be informed thereof. The same is also specified for electronic communication in the regulation concerning electronic communication with and within the public administration § 4, first paragraph.

Most written inquiries are sent by email or other ways of electronic communication. Such documents are normally sent to the correct agency within a very short while. Even if a document has to be sent by ordinary mail or delivered directly, it will normally arrive at the correct agency within a few days. When the document arrives there, it becomes a case document if it relates to that agency’s area of responsibility or activities, and the agency has to consider to register it in a journal.

Based on the above, the qualification “case documents” can hardly raise concerns regarding documents sent at the wrong agency.

Neither can we see any reason why documents that do not have anything to do with an agency’s area of responsibility or activities should have to be considered as public documents at that agency. This agency generally has no prerequisites for considering public access to such documents, and it would be necessary to get information from other agencies. It is much more effective and should be in the best accordance with the Convention that public access is considered by an agency that knows the field and is better suited to make the right decisions.

Public agencies may also receive emails, letters or other documents that are completely irrelevant to their activities. Individuals may for instance, for some reason, write about themselves, their interests or other subjects completely unrelated to the agency’s activities. These kinds of documents have never been considered as public documents, and there is no obligation to keep such documents or register them in a journal. Public access to these kinds of

documents is generally therefore not applicable.

Hence, Norway is of the opinion that the qualification “case documents” meets the requirements of Article 1, paragraph 2, sub-paragraph b, of the Convention.

3. Exemptions from public access in certain budget matters
In paragraphs 27 and 67 of the report from the AIG it is argued that § 22 of the Norwegian Freedom of Information Act does not comply with Article 3, paragraph 1, of the Convention.

As set out in the Norwegian Report of the 3rd of May 2022 and also mentioned as part of the additional information provided on the 1st of March 2024, Norway is of a different opinion as this exemption is set out precisely in law. The formulation and scope of this exemption will nevertheless be subject to further consideration.

4. Enhanced access to information
In paragraphs 32 and 68 of the report from the AIG it is argued that § 11 of the Norwegian Freedom of Information Act is not fully in line with the overriding public interest principle enshrined in Article 3, paragraph 2, of the Convention. This position is based on the fact that the provision leaves room for the authority’s discretion whether to release the requested information or not.

Norway is of a different opinion. It is recalled that § 11 provides that the public body must consider granting access to the documents even when there is an opportunity to make an exception, and that access must be granted if the need for public access outweighs the need for an exception. We find that the combination of the exemptions provided by statute and the enhanced access to information based on § 11 meets the requirements of Article 3, paragraph 2, of the Convention. Nevertheless, also the formulation of § 11 of the Freedom of Information Act will be subject to further consideration.

Yours sincerely

Ketil Bøe Moen
Director General

Ole Knut Løstegaard
Legal Adviser

The document is approved electronically, as such no handwritten signatures are required.

The Permanent mission of Norway to the Council of Europe