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Council of Europe Access Info Group (AIG)

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

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Paragraphs 14 and 15 of the revised report – FIA § 4, third paragraph

We do not share the AIG's view that the non-exhaustive nature of the list in FIA § 4, third paragraph, represents an undue risk of "expanding the list in a way that raises questions under the Convention" (cf. paragraph 15 of the report). We reiterate that the cases exemplified in the paragraph are listed therein due to their lack of material connection, and that the same result would have been reached through an independent application of the second paragraph of § 4.

Exemplifying certain documents that fail to meet the material requirement in FIA § 4, second paragraph, has a pedagogical function. This legislative technique, where non-exhaustive lists supplement the main rule, is not uncommon in Norwegian legal tradition, and increases efficiency as well as clarity and accessibility.

We would like to reiterate that the threshold for satisfying the material qualification set out in § 4, second paragraph, is very low. The underlying rationale for this qualification is to exclude documents received by public officials in a capacity unconnected to their official functions, typically documents received in a purely private capacity. In our view, this approach aligns with the Convention's notion of "official documents". We refer to the Explanatory Report to the Council of Europe Convention on Access to Official Documents, paragraph 13, which states that a clear distinction must be made between documents received by public officials in the course of their duties and those received by them as private persons. As the Explanatory Report explains, only the former category falls within the Convention's definition of "official documents".

Furthermore, we wish to clarify that the example whereby a document sent or delivered to a public agency by mistake may fall outside the material qualification in § 4, second paragraph (when assessing a request for access directed to that agency), does not entail that the document is excluded from the scope of application of the FIA. A document sent to a wrong agency will generally meet the material qualification and thus be accessible as a public document at the correct, responsible agency (when forwarded and received there). In brief, public agencies have, within their sphere of competence, a general duty to provide guidance according to § 11 of the Public Administration Act. This includes a duty to forward wrongfully received correspondence directly to the correct public agency, and to notify the sender of the transfer, as is further specified in § 4 of the Regulations relating to the Public Administration Act (FOR-2006-12-15-1456).

Further, an agency which has received a document by mistake, will in general be obligated to provide guidance to someone requesting access to the document by redirecting the request to the correct agency.

Paragraph 16 of the revised report – FIA § 4, third paragraph, sub-paragraph c

Paragraph 16 of the revised report address the FIA § 4, third paragraph, sub-paragraph c. The AIG questions the necessity of excluding documents "handed over to an administrative agency for disclosure in a periodical journal that is published by that agency" from the scope of "case documents" in § 4 in the period prior to publication. In this regard, we would like to comment that such documents are excluded, inter alia, due to reasons relating to intellectual property rights. Prior to publication the author will normally have disposal rights over the document, and thus be able to amend or withdraw the document. Furthermore, the provision is intended to avoid situations in which articles and similar documents are prematurely published on other platforms before publication by the agency in question, or published in multiple versions.

Further, we would like to underline that the scope of the provision in sub-paragraph c is limited to documents received from external sources. Manuscripts prepared by the agency itself for publication in its own journal will qualify as case documents.

We understand the AIG's comment as an invitation to consider amending the FIA § 4 third paragraph, so that such documents would be exempt from the main rule of access to information as a limitation, instead of excluded from the scope of "case documents" in the second paragraph of FIA § 4. Although Norway is of the opinion that the practical differences between these legislative techniques are limited, and thus also represent a minimal difference in relation to the Convention, we take note of the invitation by the AIG.

<u>Paragraphs 24 and 25 of the revised report – FIA § 5</u>

Paragraphs 23 to 25 of the revised report address the FIA § 5 on deferred access. Please note that the provision referred to in the report as § 5 third paragraph* is included in the fourth paragraph of § 5 in the current Act, following the adoption of a new provision as the third paragraph in June 2021 (concerning documents prepared by or for the EOS Committee**).

In paragraph 24 the AIG notes that the Convention "does not provide for time criteria" for the right to access to official documents, and that it does not provide for limitations "on grounds of time".

At the outset, we would like to note that although the Convention does not expressly regulate deferred access, a certain scope for doing so must, in our view, be regarded as implicit in Article 3, paragraph 3, of the Convention. This provision requires the Parties to consider time limits in relation to the grounds for exceptions. Further, paragraph 39 of the Explanatory Report makes clear that the temporal dimension is an integral factor in the harm test set out in Article 3, paragraph 2, noting that "the outcome of the harm test is closely connected with the lapse of time".

Nevertheless, we do not share the view that deferred access pursuant to § 5 constitutes a limitation "on grounds of time". Rather, the narrow authorisation to postpone access to official documents is situational in nature, and is connected to the potential damage caused by giving access, not by the passing of time itself. The provision is hence grounded on and justified by the particular context, not the temporal element as such. The requirement in § 5 first paragraph is strictly connected to the directly misleading impression created by a certain situation, and we reiterate that the requirements for deferral are no longer met once the situation creating the misleading impression has ceased, for instance when clarifying information has been added. Likewise, deferred access under § 5, fourth paragraph, is limited not only by a high threshold ("significant private or public interests"), but also by specific factual circumstances as access to a document can no longer be deferred when it has reached the person concerned, or the event at which it is to be made public has taken place.

In paragraph 25 of its revised report, the AIG holds that the requirement in FIA § 5, first and third (should read "fourth") paragraphs, are vague, and do not correspond to specific grounds for limitation as mentioned in Article 3, paragraph 1, of the Convention. In this regard, we note that although the considerations that may justify deferred access under § 5 are formulated in more general terms than the interests listed in Article 3, paragraph 1, of the Convention, the grounds for deferral pursuant to § 5 will in practice relate to considerations that fall within the scope of those recognised by the Convention. Further, we reiterate that in the application of the measure of deferred access in § 5, the qualifying conditions (“obvious/significant public or private interests”) must be interpreted in line with the Convention, pursuant to the Norwegian presumption principle. Cases encompassed by the requirement in FIA § 5 would typically correspond with sub-paragraphs c (the prevention, investigation and prosecution of criminal activities), d (disciplinary investigations), e (inspection, control and supervision by public authorities) and f (privacy and other legitimate private interests). The formulation of the provision has been chosen to encompass situations which are difficult to predict precisely beforehand. However, Norway will take the comments on the wording of the provision into consideration.

(*In other words, the FIA § 5 fourth paragraph reads: Where significant private or public interests so indicate, access to a document may be deferred until it has reached the person whom it concerns, or until the event at which it is to be made public has taken place.

** Office translation of the FIA § 5 third paragraph: For documents prepared by or for the EOS Committee in cases the Committee is considering submitting to the Storting as part of its constitutional control, the right of access applies only once the case has been received by the Storting. The EOS Committee shall notify the relevant authority that the case is of this nature. If such a case is concluded without being submitted to the Storting, the right of access applies once the Committee has notified the authority that the case has been concluded.)