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Council of Europe Access Info Group (AIG)

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

Received by the Secretariat on 29 February 2024

Sweden has been invited to comment on the Council of Europe Access Info Group Draft Baseline Evaluation Report ('the Draft Report') on the implementation of the Council of Europe Convention on Access to Official Documents (CETS No. 205) by Sweden. The Access Info Group ('the Group') has expressed that the Draft Report focuses on whether the Parties have reflected the requirements of the Convention in their main legal frameworks on access to information. The comments below focus on the parts of the Draft Report where the Group has raised questions on whether Swedish legislation meets the requirements of the Convention, as well as parts where the Group has found the provided information lacking.

Article 1 – General Provisions

The Draft Report states that, as not all state-owned companies or private bodies exercising such authority have been listed in the Appendix of the Public Access to Information and Secrecy Act (2009:400), the provisions are not fully in line with the requirements of Article 1(2) a, i, 3 of the Convention, to the extent that the recognition of legal persons exercising administrative authority is conditional upon registration in the appendix.

The Appendix of the Public Access to Information and Secrecy Act is by no means static. According to the legislative history of the Act, when a body is tasked with duties of administrative authority, it is also considered whether the right of access to information should apply when the body performs such duties (Govt Bill 1986/87:151). If this is found to be the case, the Appendix should be amended. A natural starting point when a body has been tasked to exercise administrative authority is that the same right of access to information should apply as it would if a public authority had handled the same function. However, extending the right of access to information to natural or legal persons who exercise administrative authority has practical and principal implementations. For example, these could be to do with the reasons for the function being run by a legal person, or the need for secrecy for certain kinds of information. An additional problem related to an order where the right of access to information applies to legal persons is the requirement of certain expertise and administrative routines, which can lead to an increase in cost. If it is of very limited practical meaning it can be put into question whether it is well-proportioned to extend the right of access to information to such a person. This could for example be the case for a body that to a very limited extent exercises administrative authority, or that the level of transparency in practice would be heavily limited or fully repealed by regulations of secrecy. When a public authority still exercises the main handling of the processing of a matter, the right of access to information can also often be ensured by the authority even if the function is handed to another body to a limited extent. The specific circumstances must therefore be carefully regarded when considering which bodies should be included in the appendix of the Public Access to Information and Secrecy Act.

The Draft Report furthermore states that the notion of official documents which is regulated in detail by the Swedish legislation generally meets the requirements of Article 1(2)b of the Convention. However, a number of exceptions are made that would exclude preparatory/working documents which are not used in a final document of a public authority from the scope of application of the Freedom of the Press Act.

It is noted that the Group will adopt a final position on the concept of "drawn up" provided for in Article 1(2) after its baseline evaluation round. However, the following can be highlighted. When preliminary outlines, drafts and memoranda are retained for filing, they are considered to be drawn up according to the Freedom of the Press Act. This is also the case if such a document contains new factual information on a matter. The consequences of all such documents, regardless of whether they were retained for filing or contained new factual information, being included in the term "drawn up" would be substantial and disproportionately challenging. The practical difficulties for a public authority to have knowledge of and locate drafts that have not been retained for filing should not be understated. It must also be presumed that the level of interest and need for transparency regarding such documents is very limited.

Article 3 – Possible limitations to access to official documents

The Draft Report mentions that even though the Public Access to Information and Secrecy Act contains very few secrecy provisions which include an explicit overriding public interest test, this is taken into account when considering new legislation on secrecy. However, the Group concludes that this raises questions of its compatibility with Article 3(2).

As mentioned in the Swedish report, the legislator is meticulous when formulating new secrecy provisions. When considering new regulations on secrecy the public interest in the type of information in question is a circumstance of significant importance to the assessment. A vital part of the legislative process is circulating legislative products for consultation. A product containing suggestions of regulations on secrecy is circulated to consultation bodies that guard matters of transparency. As well as the Chancellor of Justice and the Parliamentary Ombudsmen, the perspective of the media is usually a necessity. Examples of consultation bodies representing this perspective are the Swedish Union of Journalists and the Swedish Media Publishers' Association. The consultation responses are taken into careful consideration in the further work. Hence the concern of overriding public interest is sufficiently regarded and assessed in the legislative process. This provides for a transparent and consistent application on the laws regarding access to information.

Article 5 – Processing of requests for access to official documents

The following is noted in the Draft Report. The Party reports that those who wish to obtain official documents need not describe the document precisely, for example, by date or registration number but authorities are not liable to make extensive inquiries to obtain the document for the applicant when he or she cannot provide the authority with further details. However, the Administrative Procedure Act lays down the public authorities' duty of service which applies to request for access to official documents. While in principle this provision seems to be in line with Article 5(1) of the Convention, its scope of application is limited to administrative authorities and courts and does not include all other legal entities which fall within the scope of the Act.

Article 5(1) of the Convention requires the public authority to help the applicant, as far as reasonably possible, to identify the requested official document. The duty of service as regulated in the Administrative Procedure Act, goes beyond such a requirement. As noted by the Group, those who wish to obtain official documents need not describe the document precisely, for example, by date or registration number. When such a request is less specific efforts must be made to help the applicant identify the relevant official document. Extensive inquiries are not required, such as archive research or taking comprehensive investigative measures. However, national case law established that there is a far reaching responsibility to assist an applicant in identifying the requested document. If a request is too unspecific, the applicant must be informed that more information is needed to identify the document. Active assistance must be provided to, with the use of registers, seek to clarify if the requested document is held by the authority. This requirement applies to all bodies that fall within the scope of the Freedom of the Press Act and the Public Access to Information and Secrecy Act.

Article 6 – Forms of access to official documents

The Group concludes in the Draft Report that the provisions regarding forms of access to official documents generally seem to be in line with Article 6(1) of the Convention. However, the right of the applicant to choose the form of access is not envisaged and limitations apply to accessing official documents in electronic form. As a general rule, authorities are not obliged to disclose an official document in electronic form, but they are nevertheless often able to do so as a service, where appropriate. There is no information as to the justification for such limitation.

As noted by the Group, official documents are often provided in electronic form when this is requested. In some cases sectoral legislation can also provide an obligation to do so. Access to information in electronic form is of value for the public to have insight into the activities of authorities, as well as for the possibility of re-using the information for different purposes, e.g. for creating

innovation for new products and services. When disclosing a document in electronic form however, there are often consequences both in terms of the personal integrity and aspects of security on a societal level. Processing of personal data must comply with regulations, principally the General Data Protection Regulation[1]. There is extensive national law complementing the Regulation, primarily regarding the processing of personal data by public authorities. A public authority must consider any legal implications that prohibit such a disclosure before disclosing a document in electronic form. There may also be practical difficulties to consider when documents aren't readily available in electronic form. Legal and practical implications justifies public authorities not being obliged to disclose documents in electronic form.

Article 8 – Review procedure

The Group has commented that no information has been provided as to the special provisions that apply to appeals against decisions by Parliamentary authorities, notably as to whether they can be appealed in courts.

Provisions regarding appeals against decisions by Parliamentary authorities on right of access to information are found in the Act on Appeals against Administrative Decisions of the Riksdag Administration and the Parliamentary Authorities (1989:186). The provisions also apply to the Parliamentary board authorities (Section 1). A rejection of a request for access or the release of official documents with limitations can be appealed to the Supreme Administrative Court (Section 4). Decisions by the Parliamentary Ombudsmen on right of access to information cannot be appealed. As noted in the Draft Report, Sweden has lodged a reservation, in relation with Article 8, paragraph 1, of the Convention, on access to a review procedure before a court or another independent and impartial body established by law, as regards decisions taken by the Government, ministers and the Parliamentary Ombudsmen.

Article 9 – Complementary measures

The Draft Report states that no information has been provided on measures taken to provide information on the matters or activities for which they are responsible under Article 9, b of the Convention.

There are often legislative obligations for public authorities to provide information on matters and activities for which they are responsible. For government agencies, this is regulated in the Government Agency Ordinance (2007:515) (Section 6). The preconditions for an individual government agency's operations is decided by the Government. This is effected on the one hand in the annual appropriations directives and, on the other, by ordinances. This provides clarity in terms of obligations.

Bodies that fall within the scope of the Freedom of the Press Act and the Public Access to Information and Secrecy Act often publish information on their websites on the right of access to information and how to submit such a request. For example, the Government Offices provide extensive and accessible information on both the legislation and practical matters on how to access information held by the Offices. The publishing of the brochure with information concerning public access to information and secrecy legislation by the Government Offices also provides information on the matters and activities for which those who fall within the scope of the Freedom of the Press Act and the Public Access to Information and Secrecy Act are responsible.

Article 10 – Documents made public at the initiative of the public authorities

As noted in the Draft Report under Article 10, the Government has considered a new act on open data. The Public Sector Data Accessibility Act (2022:818) entered into force on the 1st of August

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

2022. The legislation is an implementation of the PSI Directive[2]. The Directive establishes a set of minimum rules governing the re-use and practical arrangements for facilitating the re-use of information held by public sector bodies. The Public Sector Data Accessibility Act is e.g. applicable when someone, who has the right to access data on the basis of other legislation, makes a request to access the data for the purpose of re-use. The Act further regulates, among other things, available formats, time frames for a request to be handled and applicable fees. Information can only be made available to the extent that requirements of information security and the protection of personal data can be upheld and provided there are no risks to national security.

[2] Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast).