AIG(2024)24

13 December 2024

Council of Europe Access Info Group (AIG)

Draft opinion on the definition of "official documents" according to the Council of Europe Convention on Access to Official Documents (CETS No.205)

Prepared by the Secretariat

Contents

I. Introduction

1. Based on Article 11, paragraph 1, sub-paragraph b, i, of the Council of Europe Convention on Access to Official Documents (CETS No.205, hereinafter "the Convention"), the AIG monitors its implementation by the Parties by means of, *inter alia*, expressing opinions on any question concerning the application of the Convention.

2. During the baseline evaluation of the implementation of the Convention by its first 11 Parties, including the process of adoption by the Consultation of the Parties of conclusions and recommendations, a number of questions arose concerning the meaning of "official document" under the Convention.

3. According to Article 1, paragraph 2, sub-paragraph b, of the Convention, a document which is not official falls outside its scope of application. Consequently, the right of access guaranteed by the Convention does not apply to that document. Denials of access to such a document will not be subject to the harm test and the overriding public interest test stipulated in Article 3, paragraph 2, of the Convention nor to the review procedure stipulated in Article 8 of the Convention.

4. The present opinion analyses relevant elements of Article 1, paragraph 2, sub-paragraph b, of the Convention.

II. The definition of official documents

5. Article 1, paragraph 2, sub-paragraph b, of the Convention states that:

> ""official documents" means all information recorded in any form, drawn up or received and held by public authorities."

6. The Explanatory Report to the Convention states in its paragraph 11:

> "Paragraph 2, sub-paragraph b also specifies the scope of the Convention by defining the notion of "official documents" for the purposes of this Convention. It is a very wide definition: "official documents" are considered to be any information drafted or received and held by public authorities that is recorded on any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, emails, information stored in electronic format such as electronic databases, etc.)".

a. Principal considerations

7. The Convention does not define the means that Parties must deploy to achieve the aims of the Convention and to fulfil its obligations. Nonetheless, limitations of the right of access must always be set down precisely in law, be necessary in a democratic society and be proportionate to the interests listed in an exhaustive manner in Article 3, paragraph 1, of the Convention.

8. Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, the definition of "official documents" must be interpreted in accordance with the ordinary meaning of the terms used therein, in the context of other provisions of the Convention as well as in the light of the object and purpose of the Convention.

9. The preamble of the Convention mentions “the importance in a pluralistic, democratic society of transparency of public authorities.” It further states that the “exercise of a right of access to official documents: i. provides a source of information for the public; ii. helps the public to form an opinion on the state of society and on public authorities; iii. fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy”.

10. The main principle of the Convention, also affirmed in its preamble, is “that all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests”. Thus, the rule should be that access must be ensured to all official documents held by public authorities, with refusal of access being the exception to that rule. Consequently, limitations ~~must~~may have to be construed and applied in a narrow manner so as not to defeat the application of the rule.

11. The definition of the concept of “official documents” given in Article 1, paragraph 2, sub-paragraph b, of the Convention is intentionally very wide, as explicitly stated in the Explanatory Report to the Convention (paragraph 11). Thus, the concept must be given an ~~broad~~ interpretation which takes into account subsequent technological developments. ~~A narrow interpretation would lead, indirectly, to a broadening of the scope of the exceptions to the right of access to official documents laid down in Article 3, paragraphs 1 and 2 of the Convention and would be at variance with the principle that exceptions should be interpreted narrowly.~~

b. Interpretative elements

12. The Convention applies to official documents which are defined together in Article 1, paragraph 2, sub-paragraph b, of the Convention. The terms “documents” and “official” are not defined on their own and no criteria are set out in the Convention for determining which documents should be regarded as official. This does not prevent the Parties from applying such criteria if their application does not unduly narrow the meaning of official documents according to the Convention, which will be elaborated in the subsequent paragraphs.

13. The definition given in Article 1, paragraph 2, sub-paragraph b, of the Convention contains three components. The first is “all information recorded in any form”; the second, and third are ~~is~~ “drawn up” “or received” by public authorities; and the ~~third~~ fourth is “held by public authorities.” Each of these ~~three~~ four components will be considered in turn, bearing in mind the objectives of other provisions of the Convention.

i. All information recorded in any form

14. The expression “all information” contained in the definition of official documents encompasses the greatest possible amount of content or material. This is in line with the statement of the Explanatory Report to the Convention (paragraph 11) that the definition of official documents is a very wide one.

15. The expression “in any form” means that the medium can be, in the words of the Explanatory Report to the Convention (paragraph 11), “any sort of physical medium whatever be its form or format (written texts, information recorded on a sound or audiovisual tape, photographs, emails, information stored in electronic format such as electronic databases, etc.)”. The term “etc.” implies that the drafters of the Convention contemplated that any new recording medium that may be developed after the Convention would, in principle, already be covered by the definition in question. Thus, the type, nature and form of the medium in which material or content is recorded has no bearing on the

Commented [JHH1]: The notions of "dawn up" and "received" should be treated separately.

Commented [AL2]: Inge: It may also be asked what is ”information”. Does this concept include statements of facts as well as views and opinions, but not purely linguistic statements?

As examples, with particular reference to para.s 16-18, it may be asked whether information on a) the height of a geographical site, b) whether a person has applied for a particular licence, c) the number of applications received or licences granted, d) how a legal provision is to be interpreted, is to be regarded as a document.

An additional question is whether physical artefacts, including blood samples, may be seen as documents in so far as they are bearers of certain messages. They are perhaps excluded from the definition by virtue of the word “recorded” but may anyway be seen as falling outside the scope of the Convention. Maybe there is no need for us to discuss this further.

question whether or not that material or content falls within the concept of official documents.

16. The Explanatory Report to the Convention states in its paragraph 12 that "[w]hile it is usually easy to define the notion [of "official documents"] concerning paper documents, it is more difficult to define what is a document when the information is stored electronically in data bases. Parties to the Convention must have a margin of appreciation in deciding how this notion can be defined. In some Parties access will be given to specific information as specified by the applicant if this information is easily retrievable by existing means. In some Parties, compilations in data bases of information that logically belong together are seen as a document."

17. It is clear from this statement that the term "data bases" refers to electronic databases. No definition of a database is given. The expression "specific information as specified by the applicant if this information is easily retrievable", implies that a database could be envisaged as a collection of information, data or material, whose constituent elements can be separated one from another and combined in compilations of information. Also, a database is equipped with technical capabilities for searching and retrieving information, data or material.

18. The use of the expression "easily retrievable by existing means" should be understood as search and retrieval capabilities which do not need to be created upon the submission of an access request, but which already form part of the database. A public authority is not obliged to provide to an applicant information contained in a database using search and retrieval means which are not already supported by the database. If this were to be the case, the public authority would in effect be required to create a new document, which as explained in paragraph 29 of the present opinion goes beyond the obligations of the Convention. In the case of such access requests, it would be acceptable to recognise the right of the public authority to respond that it does not hold the requested document.

ii. Drawn up ~~or received~~ by public authorities

19. The ordinary meaning of the term "drawn up", implying the past tense, presumes that the process of creating (drafting) the content of a document is completed. The term completed should be understood as meaning that the document is now ready to be used for the intended purpose. A document which is being worked on or amended, for example a draft, would not be considered as completed. A document on which the author/s has/have stopped working and do not intend to finish it (unfinished documents) would also not be considered as completed.

20. This interpretation is consistent, first, with other terms used in Article 1, paragraph 2, sub-paragraph b, of the Convention and, second, with the objectives of other provisions of the Convention.

21. First, as regards the other terms used in Article 1, paragraph 2, sub-paragraph b, of the Convention. The expression "recorded in any form" implies that the definition contained in this provision is based on the existence of content or material which is saved, and which is capable of being consulted or copied according to the requirements set out in Articles 3 to 8 of the Convention.

22. Second, as regards the consistency of the interpretation in paragraph 20 above with other provisions of the Convention. The public authority holding the requested document to which limitations of access apply must be able to carry out the tests foreseen in Article 3,

Commented [JHH3]: Under this notion we should also ddress the technical accessibility to information stored electronically; whether or not the authority has the necessary technical equipment in order to retrieve the information. For instance is a floppy disc sent in to an authority an official document there if the auhtority does not have the technical eqquipment to read it?

Commented [JHH4]: Separate headline

Commented [AL5]: Inge: Presumably, it follows from this that an internal document which has been prepared by a junior official for further consideration and amendments by a senior official, is not to be regarded as completed until it reaches the addressee (e.g. the Government Minister.

paragraph 2, of the Convention. The authority must be able to evaluate the possible harm that the disclosure of the requested document may cause to the interest protected by the limitation and to ensure a balancing of interests. In addition, Article 6 of the Convention presumes that a document must be capable of being transmitted as copy to the applicant or consulted in its original form. These provisions of the Convention presuppose that the document covered by the Convention must be fit for the purpose for which it was created.

23. Actions such as the signing of a document by the person authorised to do so in the public authority holding it or its transmission to one or more recipients may be considered as evidence of completion of that document. In certain cases, some of these actions may even be considered as conditions for the documents to be fit for purpose and, and thus, for their actual recognition as official documents. For example, an email will fulfil its purpose only if it has been transmitted to its recipient/s. A decision which must be signed to produce legal effects will be capable of fulfilling its purpose only when it has been signed by the person authorised to do so.

24. Another question is whether documents prepared in the course of decision-making on a subject matter are to be considered as drawn-up or not. Typically, such documents would be memoranda, opinions, advice, briefing notes, impact assessment reports, or other working documents. Nothing in the Convention suggests that documents whose content has been completed for examining and deciding upon a matter within a public authority, or as part of consultations within or between public authorities, should be considered as not "drawn up" in the meaning of Article 1, paragraph 2, sub-paragraph b, of the Convention. Yet, ~~T~~there is a legitimate interest in preserving the quality of the decision-making process by allowing a certain free "space to think" for public officials and in protecting the confidentiality of proceedings within and between public authorities.

25. This is recognised as a ground for limiting the right of access under Article 3, paragraph 1, sub-paragraph k, of the Convention (see paragraph 34 of the Explanatory Report to the Convention). That provision states that "[e]ach Party may limit the right of access to official documents. Limitations shall be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting: […] the deliberations within or between public authorities concerning the examination of a matter". The very existence of this exception in sub-paragraph k shows that the Convention does not intend to exclude documents prepared in the course of decision-making, deliberations or inter-institutional consultations from the definition of official documents. Instead, their disclosure may be limited pursuant to Article 3, paragraph 2, of the Convention by considering whether it would or would likely harm the confidentiality of proceedings and the quality of decision-making processes, and then by determining whether there is an overriding public interest in disclosure.

26. The fact that a decision on the matter to which a document relates has not yet been made by the competent public authority has no bearing on the question of whether the document is an official document and whether it falls within the scope of the right of access under the Convention. ~~The making of a decision may have a bearing on the question whether any limitation on access should be lifted in accordance with Article 3, paragraph 3, of the Convention which states that "[t]he Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply".~~

27. In conclusion, only documents which are in the course of completion and are, therefore, not yet fit for their intended purpose fall outside the scope of the concept of drawn up in Article 1, paragraph 2, sub-paragraph b, of the Convention. Parties to the Convention may

Commented [AL6]: Inge: As regards internal notes, it may be asked whether it becomes a document only when it has been transmitted to the addressee (cf. Comment to para. 19 above).

Commented [AL7]: Inge: In my view, it is rather Article 3 paragraph 2 that would be relevant for consideration here.

Commented [JHH8]: I believe we must keep separate what are the requirements of the Convention and the structure of national legislation. The Convention is not a model law, although some states have used it as such. There are in principle no retstraints on the domestic legislator when it comes to legislative techniques. Thus documents may to a limited extent be exempted from the scope of access by applying absolute exemptions.

apply criteria for determining when a document is considered as final as long as their application does not unduly narrow the scope of the right of access by excluding documents that are fit for purpose from the scope of their legal frameworks guaranteeing the right of access.

~~27.~~ *Received by public authorities*

28. As regards the term "received", it must be noted that its ordinary meaning is that a document has come into the possession of a public authority. Documents received by public officials as private persons and which are not connected to their duties will fall outside the definition of official documents (see Explanatory Report to the Convention, §13).

iii. Held by public authorities

29. Although the word "held" is not defined by the Convention, its Explanatory Report states in paragraph 14 that "[t]he right of access is limited to existing documents. The Convention does not oblige Parties to create new documents upon requests for information, although some Parties recognise this wider duty to some extent." Thus, documents covered by the Convention must exist at the time an access request is made without needing to be created. The Convention will apply only to documents which are in the possession of public authorities.

30. The registration of a document in the authority's system of management, storage or archiving of documents may be considered as evidence of it having been completed and/ or of it being held by a public authority. However, such registration is a consequence rather than a condition for the completion of a document or a defining characteristic of what is a document for the purposes of the Convention. Registration of documents in the record-keeping system of a public authority is a matter of practice; often documents may not be registered despite the fact that they have achieved the purpose for which they were created.

31. Thus, the question of whether a document is retained or registered in a public authority's system of management, storage or archiving of documents is relevant only to determine whether that document should be in the possession of a public authority. It is not relevant to determine whether or not that document falls within the scope of application of the Convention. The archiving and the registration of a document cannot be considered as a condition for the application of Article 1, paragraph 2, sub-paragraph b, of the Convention.

32. This approach is consistent with two other provisions of the Convention. Firstly, Article 9, sub-paragraph c, which provides that the Parties shall "take appropriate measures to manage their documents efficiently so that they are accessible"; and secondly, Article 9, sub-paragraph d, which provides that the Parties shall "apply clear and established rules for the preservation and destruction of their documents".

33. Implicit in these provisions of the Convention is the right of a Party to the Convention to determine which documents should be retained by their public authorities, for which periods of time and whether or not to register them in their record keeping systems. In doing so, the Parties have a certain degree of discretion which is supported by the use of the term "appropriate" before the term "measures" in Article 9, sub-paragraph d, as well as the fact that these provisions of the Convention do not specify the measures to be taken by the Parties to implement them.

Commented [JHH9]: Libraries are dealt with under the notion of "Held". We have to discuss whteher they should not be analyzed under the notion of "received"

Formatted: Heading 4, Left, No bullets or numbering, Adjust space between Latin and Asian text, Adjust space between Asian text and numbers

Commented [AL10]: Inge: This formulation appears quite adequate with respect with respect to civil servants. It is not equally clarifying with respect to politicians, who may receive petitions in their capacity as representatives of a political party as well as holders of public office. Petitions received in the former capacity should not be regardes as official documents, since the Convention does not apply to political parties.

Commented [AL11]: Inge: Do we need to valrify thet "possessing" is something different from "holding"?

34. The exercise of discretion conferred by the Convention must be consistent with the essential purpose of these two provisions, which is to ensure the accessibility of documents. It should not lead to restrictions of the right to access them. Measures to create systems of management, storage and archiving of documents by public authorities must be aimed at managing documents that those authorities possess efficiently and at facilitating access to them. Decisions on the preservation or destruction of documents in archives must be non-arbitrary, predictable and clear. As noted in the Explanatory Report to the Convention (paragraph 70) "[a] basic rule as regards destruction should be that it should not be allowed as long as there may be a public interest in the document and never during the processing of a request for it". ~~When a document is in the possession of public authorities it does not have to be registered in order to be considered as "held" by them. It would be contrary to the principle of transparency underlying the Convention to rely on the argument that a document in the possession of public authorities does not constitute an official document merely because it has not been registered in the record keeping systems of public institutions~~.

iv. The relationship between documents held by a public authority and the responsibilities of that authority

35. In its baseline evaluation report, the AIG analysed the legal provisions of various Parties which provide that a document or information held by a public authority must relate to the areas of responsibility, competence or activities of that authority in order for it to fall within the scope of application of the relevant laws of those Parties.

36. The AIG took the view that Article 1, paragraph 2, sub-paragraph b, of the Convention does not contain a condition according to which information held by a public authority, whether drawn up or received by it, must concern or relate to the activities or the area of responsibility of that public authority in order for it be considered as an official document and to fall under the scope of application of the Convention. It further noted that, in accordance with §13 of the Explanatory Report to the Convention, the only documents which cannot be considered as official documents under the Convention are those received by public officials as private persons, and which are not connected to their duties. The AIG found the relevant legal provisions as not being compatible with Article 1, paragraph 2, sub-paragraph b, of the Convention, noting that they are capable of being perceived as unduly limiting the scope of the relevant laws.

37. The AIG reiterates this position in the present opinion.

38. The legal provisions in question are formulated in broad terms and are not precise enough to comply with the strict exception from the concept of "official documents" permitted under the Convention. Their application would require that a public authority receiving a request for access to documents which it holds establishes that there is a connection between the requested documents and the role and functions of that public authority. The exercise of such a discretion is not consistent with the Convention's definition as official documents of "all information recorded in any form, drawn up or received and held by public authorities". Allowing it would recognise the possibility to unduly restrict the scope of the right of access to official documents.

39. Normally, most documents held by a public authority fall within its sphere of responsibilities. Nothing in Article 1, paragraph 2, sub-paragraph b, of the Convention suggests, however, that documents held by a public authority on behalf of another party, for example documents created by another public authority or created by a private person (e.g. a journal/diary), fall outside of the scope of the Convention. If the requested document

Commented [AL12]: Inge: This passage appears superfluous and irrelevant in paragraph 34.

Commented [AL13]: Inge: As I see it, the implication of such a provision would be a) any authority could refuse a request on the ground that the matter in question falls under the competence or responsibilities of another authority, and thus leave the applicant to lodge the request with that authority, b) documents falling outside the current responsibilities, competences or activities of the public bodies will fall outside the right of access even though they have been received by a public body. Whereas b) relates to the scope of application of the Convention, would I rather consider a) as related to the question of who should handle and decide on a request for access (Article 5 para 2).

Commented [AL14]: Inge: And if it does not, this does not preclude the document from being a "document" under the Convention - but gives rise to the question og which authority should handle the request, cf. my comment to para. 35 above.

Commented [AL15]: Inge: I am not convinced by this argument. The conclusion suggested would entail that, for example, private wills deposited in courts or administrative bodies, or private archives deposited in a public archive institution, are covered by the right of access under the Convention. I cannot see any sign that this was considered during the elaboration of the Convention and it would, arguably, og well beyond the purposes stated in para. 6 of the preamble. Similarly, if the Convention is to be read so as indicated in para. 39, would not letters and postcards sent by a public mail service be regarded as documents to which the right of access for everyone applies, as long as they are in the possession og ("held") by the postal service?

is held by a public authority, according to Article 5, paragraph 2, of the Convention, the public authority should as a matter of principle deal with the request. If the public authority is not authorised to do so it should, pursuant to the same provision of the Convention, wherever possible, refer the applicant or the application to the competent public authority. Article 5, paragraph 2, of the Convention thus presumes that documents held on behalf of another authority are also to be considered as official documents. Thus, the fact that a public authority holds a document which does not pertain to its competence has no bearing on the question of whether the requested document is an official document for purposes of the Convention.

~~3. Lastly, the AIG addresses the argument that material held in the libraries situated within a public authority do not constitute official documents because they do not relate to the responsibilities of the authority.~~

~~4. The concept of libraries can be considered as being comparable to the concept of databases (see paragraphs 17-18 of the present opinion). In its ordinary meaning, the term library would be understood as a collection of books, newspapers, journals or other materials, separable one from another without the value or integrity of their contents being affected. Libraries normally possess technical capabilities to search and retrieve independent material contained within them, such as an index, table of contents or any other method of classification.~~

~~5. Libraries maintained by public authorities which fall within the scope of the Convention would normally have been created to meet the research and training needs of their employees and may not be intended to be open to the public. The AIG does not see, however, a valid reason why specific content that can be searched and retrieved from a library within a public authority with its existing means would not be considered as official documents held by that public authority. By contrast, a request for access to the totality of the collection of a library or a request involving mass retrieval of individual books or other material contained in a library would render it practically impossible to meet the request without a disproportionate amount of searching or examination. In such a case, it appears the access request can be denied on the basis of Article 5, paragraph 5, sub-paragraph ii, of the Convention.~~

~~6. The AIG sees no basis in Article 1, paragraph 2, sub-paragraph b, of the Convention, for excluding books, newspapers, or training material held by a public authority from the concept of "official documents".~~

~~VII.~~III. Conclusions

To be completed

Commented [JHH16]: The purpose of Article 5.2 is to ensure that if several authorities have been the recipient of a documnt all of them should answer requests for access. But the precondition is that the document is official in the first place. - Furthermore some documents may for technical reasons be stored on another authority's premises, but are inaccessible by law for the storing authority and should therefore not be seen as held by the latter. How would we otherwise be able to exempt mail from access within those postal services that are domestic authorities?

Commented [JHH17]: Library material and other reference material should be discussed under the notion of "received" as it is a precondition for even considereing them as also held and thereby being official documents. It is understandable that books acquired by an authority may be seen to have been received by it. But could we make a distinction between documents that are normally handed in by outsiders and reference material that is being bought by an authority? Furthermore: Although most books may be easily accessible through alternative sources, some are not, and then the authority would be obliged to hand out a copy; what to do about immaterial rights in such a situation?

Commented [AL18]: Inge: On the other hand, an application for access to an individual item, e.g., a particular book or magazine, must be dealt with - and access granted.

Commented [AL19]: Inge: Again, I am at present unable to agree to that conclusion as regards books and newspapers (training material may be a different matter). To my knowledge, the question of applying the Convention to books and newspapers in general was never considered when the Convention was drafted. Books and newspapers that are generally accessible elsewhere, by purchase or from ordinary libraries, are rather different from documents relating to cases handled by public bodies. The right to obtain a copy under Article 6 para. 1 of the Convention would often (for books) infringe with copyrights that are protected even by international conventions. This is an indication that access to books and newspapers in libraries is not covered by the Convention.