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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)**

Contents

- I. **Introduction**3
- II. **The definition of official documents**3
 - a. **Principal considerations**3
 - b. **Interpretative elements**.....4
 - i. *All information recorded in any form*.....5
 - ii. *Drawn up by public authorities*6
 - ~~iii.Received by public authorities~~
~~7~~
 - iv. *Held by public authorities*7
 - v. *The relationship between documents held by a public authority and the responsibilities of that authority*8
- III. **Conclusions**9

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, 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, i.e., the concept of “drawn up”.
3. The right of access guaranteed by the Convention applies to an official document unless it is covered by an exemption in national law which is in line with the Convention. Any request for access to a purported official document must be handled in accordance with the procedural rules laid down in the Convention and a denial of the request must be subject to a review procedure.
4. The Convention has no explicit provision on the scope of application, but the concept of “official documents”, which is defined in Article 1, paragraph 2, sub-paragraph b of the Convention, can be seen as determining its scope of application. The right of access guaranteed by the Convention does not apply to a document which is not an “official 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 except for determining whether the document is covered by the Convention.
5. The present opinion analyses relevant elements of Article 1, paragraph 2, sub-paragraph b, of the Convention pertaining to the concepts of “drawn up” and “held”.

II. The definition of official documents

6. 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.”
7. 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

8. The determination of the scope of application of the Convention must be distinguished from the question of access where the Convention applies. Limitations of access to

documents that fall within the scope of the Convention 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.

9. The definition of “official documents” must be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties, which states:

“Article 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

10. In Article 32, the Vienna Convention provides for supplementary means of interpretation:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

11. It follows that the wording of the Convention, including its preamble and the provisions seen in context, is the primary means for ascertaining the meaning of a provision in the Convention. In addition, regard must be had to any other relevant international instruments adopted by the Council of Europe or other international treaties that are binding on the Parties to the Convention. In accordance with Article 32 of the Vienna Convention, the

Explanatory Memorandum may serve as a pointer, but only as a subsidiary means of interpretation.

12. The preamble of the Convention emphasises “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”.

b. Interpretative elements

13. The definition of the concept of “official documents” given in Article 1, paragraph 2, sub-paragraph b, of the Convention, is very wide, as explicitly stated in the Explanatory Report to the Convention (paragraph 11). The examples given in that paragraph suggest that a main purpose of the definition was to make it clear that the Convention applies equally to digital and paper-based public administration. Thus, the concept must be given an interpretation which, for instance, takes into account subsequent technological developments.

14. 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.

15. The definition given in Article 1, paragraph 2, sub-paragraph b, of the Convention consists of three elements, including four components. The first element is “all information recorded in any form”; the second, which consists of two alternative components, is “drawn up” “or received” by public authorities; and the third element is “held by public authorities.” Each of these 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

16. The expression “all information” contained in the definition of official documents encompasses any item of knowledge regardless of content or material. Both statements of facts and expressions of views are included. 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.

17. The term “documents” nonetheless suggests that the concept “official documents” primarily covers information in writing even though by no means is it necessarily limited to this. ~~It may be asked, for instance, whether it covers blood samples and other physical artefacts which do not by themselves convey information but from which relevant information can be deduced, or purely oral information that public servants may possess. The Group does not at present see a need to explore this question fully, but notes that it may partly be resolved by the elements of the definition that are examined below.~~

18. Information is “recorded” if it is represented in some permanent form. The expression “recorded 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 new recording media that may be developed after the adoption of the Convention will, in principle, be covered by the definition in question.

19. 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."
20. 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.
21. 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 31 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.
22. The definition of "official documents" does not clarify whether a register or journal of documents is to be regarded as a document itself. The existence of such a register or journal is essential for the efficient management of official documents as required by Article 9, c, of the Convention. Access to a register or journal will be most helpful for anyone wishing to make a request for access to a document. The AIG is of the opinion that access to a register or journal should be assured by States Parties, which must be given some discretion as to how this should be carried out. This applies to paper-based as well as electronic registers.
 - ii. *Drawn up by public authorities*
23. 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 person/s has/have stopped working and do not intend to finish it (unfinished documents) would also not be considered as completed.
24. It follows that a document is "drawn up" once it is ready to be dispatched to the addressee.

25. As regards documents drafted for internal use only 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.
26. Internal documents prepared in the course of decision-making on a subject matter – such as memoranda, opinions, advice, briefing notes, impact assessment reports, or other working documents – are to be considered as “drawn up” once they have been completed. For example, a document for the attention of a government minister prepared in the ministry by a junior official and further considered by one or more senior officials, will only be regarded as completed when it is transmitted to the minister.
27. The 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 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 all documents prepared in the course of decision-making, deliberations or inter-institutional consultations from the definition of official documents. Instead, once they have been completed for the internal purpose they shall serve, 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.
28. The fact that a decision on the matter to which a document relates to has not yet been made by the competent public authority is not decisive for 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.
29. 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 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 under the Convention.

iii. — Received by public authorities

- ~~30. 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 through being given or presented with. Documents received by public officials as private persons or in their capacity of being representatives of another organisation and which are not connected to their duties will fall outside the definition of official documents (cf. Explanatory Report to the Convention, §13). Similarly, petitions received by a politician in his or her capacity as~~

~~a representative of a political party, will fall outside the Convention's definition of official documents even where he or she holds public office, since the Convention does not apply to political parties.~~

iv. Held by public authorities

31. 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 applies only to documents which are in the possession of public authorities. This does not, however, need to be the particular authority to which a request for access is addressed.
32. The registration of a document in the authority's system of management, storage or archiving of documents may be considered as evidence 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, or they may be registered once the drafting of them starts and long before they are completed. Thus, 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, but if a document is registered and retained, it is also "held" by the public authority.
33. 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".
34. 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.
35. 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".

36. The Convention does not explicitly address whether a document is to be regarded as “held” even if its contents are unintelligible to the authority. This may be the case where the information is stored electronically in a manner which the authority is unable to read because it does not have the necessary technical equipment. The wording of the Convention does not leave such documents outside the scope of its application. However, a right of access where the authority is unable to consider the contents of the document raises the question of whether there should be any reason to grant access to a document in which no information has been or could be of any use in the workings of the authority. The AIG considers [that it should be left to the discretion of States Parties to resolve such situations].

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

37. In its baseline evaluation reports, the AIG analysed the legal provisions of some 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 – or other public authorities – in order for it to fall within the scope of application of the relevant laws of those Parties. The Consultation of the Parties has asked the Group to expand its analysis (see paragraph 15 of the meeting report from the 4th meeting of the Consultation of the Parties (TC-CP(2024)R4)).

38. 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 to 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.

39. Some of the national legal provisions in question are couched in broad terms. Among these, some are linked to the mandate of the particular public authority to which a request for access is made, while others relate to the competence of public authorities in general. 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, or of public authorities in general. Such a condition is not consistent with the Convention’s general definition as official documents in Article 1, second paragraph, sub-paragraph b. Nor will it be in keeping with the general purpose of the Convention, as it will exclude from the right to access documents going beyond the existing mandates of the authorities. The effect could, for example, be to curtail information on petitions for new action requiring a revision of current mandates or attempts at influencing an authority to act unlawfully by bribes or other means. The AIG therefore maintains its view that these provisions are not consistent with the Convention.

~~40. A national legal provision stating that the right of access only applies to documents held by the authority to which the request is made does not preclude the right of access, since a request can be made to the authority holding the document. Such a provision does not~~

~~appear to restrict unduly the scope of application of access rights but needs to be considered in the light of Article 5, second paragraph, of the Convention. The same goes for a provision which limits the right of access to documents falling under the particular authority's mandate in so far as these documents fall under the mandate of another public authority to which a request for access can be made. But as a national provision of this kind is so broad as to cover documents falling beyond the mandates of all authorities, it cannot be regarded as consistent with the Convention, as explained in para. 37 above.~~

- ~~41. Some national legal provisions are more specific and relate to certain documents or materials which are not linked to the authority's handling of public matters, at least not particular matters. While documents held by a public authority usually fall within its sphere of responsibilities, or, as the case may be, the responsibilities of other public authorities, there are instances where documents are held on behalf of private persons. Examples of this are private wills deposited with a court of law or public authority, private diaries deposited with public archives, and lost property brought to the police or another public office. There is nothing in the deliberations preceding the adoption of the Convention to indicate that the definition of "official documents" was intentionally drafted so as to cover documents held on behalf of private persons, and the documents in question here fall outside the ordinary meaning of the words "official document". Moreover, access may conflict with privacy obligations under international and EU law. Even if such concerns may be accommodated by applying the exemption in Article 3, first paragraph, e, of the Convention, the application of the Convention's rules for handling of requests would lead to an inefficient use of administrative resources which hardly conforms with the statement in paragraph 6 (iii) of the preamble to the Convention. The AIG therefore concludes that the Convention does not apply to documents which are kept by a public authority on behalf of private persons~~
- ~~42. Another issue regarding the scope of application is whether the Convention applies to the collections in public archives, libraries and museums in so far as the collections are public property. It is common practice, and foreseen when the Convention was adopted, that official documents after some time will be transferred to public archives. While this is for States Parties to decide, it must infringe access rights. Official documents remain under the scope of the Convention when they have been transferred by the public authority to public archives, as stated in paragraph 15 of the Explanatory Memorandum.~~
- ~~43. Public libraries are of two kinds: lending libraries open to the general public, and administrative libraries primarily for the use by public authorities themselves. The question of access to the collections of public libraries does not seem to have been addressed during the preparation of the Convention, and it appears unlikely that States Parties apply their freedom of information legislation on the question of access to such collections. For a lending library, a particular question is whether an item can be regarded as "held" by the library as long as it is in the possession of a borrower. For both kinds of libraries, as well as for reference material on the internet, the Convention's procedural rules appear unsuitable, especially the applicant's right to choose between inspecting the original and obtaining a copy, and the review procedure. Moreover, items such as books, periodicals and newspapers may be accessible by purchase on the open market, and an obligation for the library to produce a copy of an item may violate international law on copyright. For administrative libraries, access rights which may cause the item to be loaned to the applicant conflict with the primary purpose of the collection, namely to serve the public authority and thus promote good administration. Against this context, the AIG has come~~

~~to the conclusion that libraries and reference material on the internet fall outside the scope of application of the Convention as regards the items in their collections.~~

III. Conclusions

To be completed