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Council of Europe Access Info Group (AIG)

Opinion on the definition of “official documents” according to the Council of Europe Convention on Access to Official Documents (CETS No.205)

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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 Council of Europe Access Info Group (“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 AIG’s baseline evaluation of the implementation of the Convention questions arose in respect of the concept of “drawn up” contained in Article 1, paragraph 2, sub-paragraph b, of the Convention. During the Consultation of the Parties’ consideration of the AIG’s baseline evaluation reports, the question of the relationship between documents held by public authorities and their responsibilities as a condition for such documents to be considered as official ones, was raised.
3. The present opinion addresses these questions and provides some interpretative elements on the definition of “official documents” contained Article 1, paragraph 2, sub-paragraph b, of the Convention, focusing on the concept of “drawn up”.

II. The definition of official documents

4. 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.”

5. 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*

6. 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.”

7. 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.”

8. 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 AIG uses the Explanatory Report to the Convention as a subsidiary means of interpretation of the Convention.

9. The Parties to the Convention have an obligation under Article 2, paragraph 1, of the Convention to guarantee to everyone the right of access to “official documents” as defined in Article 1, paragraph 2, sub-paragraph b, of the Convention. They must ensure in law and in practice that the right of access applies to all the information which under Article 1, paragraph 2, sub-paragraph b, of the Convention is considered as official documents.

b. Interpretative elements

10. The definition of the concept of “official documents” given in Article 1, paragraph 2, sub-paragraph b, of the Convention, is very wide, as explained in paragraph 5 of the present opinion. It is thus clear that the Convention is technologically neutral and applies equally to, for instance, digital and paper-based documents. Thus, the concept must be given an interpretation which takes into account subsequent technological developments.

11. The definition of official documents in respect of those that are “drawn up” consists of three basic components. The first is “all information recorded in any form”; the second is “drawn up or received” by public authorities; and the third is “held by public authorities.” Each of these components will be considered in turn, bearing in mind the objectives of other provisions of the Convention. However, the term “received” is not covered in the present opinion.

i. All information recorded in any form

12. The expression “all information” contained in the definition of official documents encompasses any item of knowledge or data regardless of content. Both statements of facts and expressions of views are included (cf. Explanatory Report to the Convention, paragraph 11, where it is stated that the definition of official documents is a very wide one).
13. 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.
14. 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.”
15. 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.
16. 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. 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.
17. The definition of “official documents” does not explicitly state whether a register 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. The AIG is of the opinion that access to a register or journal must 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

18. 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 which they do not intend to finish (unfinished documents) would also not be considered as completed.

19. 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 outside of the authority 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 once it has been transmitted to its recipient/s. It follows that a document that has been dispatched to the addressee can be considered as drawn up.
20. 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.
21. 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). The very existence of this exception in sub-paragraph k shows that the Convention does not intend to exclude from its scope documents that were prepared in the course of decision-making, deliberations or inter-institutional consultations, once they have been completed for their internal purpose.
22. The fact that the competent public authority has not yet taken a decision on the matter to which a document relates is not decisive for the questions of whether the document is an official document and whether it falls within the scope of the right of access under the Convention.
23. 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 that authority. However, such registration is a consequence of the completion of a document rather than a condition for it being considered as completed; nor is it a defining characteristic of what is an official 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.
24. In conclusion, documents which are in the course of completion fall outside the scope of the concept of “drawn up” in Article 1, paragraph 2, sub-paragraph b, of the Convention.

iii. Held by public authorities

25. The Convention applies to documents which are in the possession of public authorities. 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 already exist at the time an access request is made, and not need to be created in order to meet the request.
26. As stated in paragraph 23 above, 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. However, if a document is registered and retained, then it would necessarily be considered as “held” by the public authority. This approach is consistent with two other provisions of the Convention. Firstly, Article 9, sub-paragraph c, which provides that the Parties shall “[also 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 “[also take appropriate measures to] apply clear and established rules for the preservation and destruction of their documents”.

27. 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.

28. The exercise of discretion allowed 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 should pursue efficiency and facilitate access. 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”.

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

29. 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. Some of these provisions 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.

30. 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. Such a condition is not consistent with the definition of “official documents” in Article 1, paragraph 2, sub-paragraph b, of the Convention. 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. If so, there might be a risk of curtailing 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 concluded that the provisions in question were not 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. It further noted that, in accordance with paragraph 13 of the Explanatory Report to the Convention, documents received by public officials as private persons, and which are not connected to their duties fall outside the scope of the Convention.

III. Conclusions

31. The Parties to the Convention must ensure in law and in practice that the right of access applies to all information which under Article 1, paragraph 2, sub-paragraph b, Convention is considered as official documents.
32. The definition of “official documents” is very broad and includes any item of knowledge regardless of content or material whatever the form in which it was recorded.
33. The term “drawn up” should be understood to mean that the process of creating the content of a document has been completed and that the document is ready to be used for the intended purpose. Documents which are in the course of completion fall outside the scope of the concept of “drawn up” in Article 1, paragraph 2, sub-paragraph b, of the Convention. Once a document has been dispatched to its addressee it must be considered to have been “drawn up”.
34. 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. The fact that the competent public authority has not yet taken a decision on the matter to which a document relates to is not decisive for the question of whether the document is an official document and thus falls within the scope of the right of access under the Convention.
35. 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 completed or held by a public authority. However, such registration cannot be considered as a condition for the application of Article 1, paragraph 2, sub-paragraph b, of the Convention. If, on the other hand, a document has been registered and retained, then it must also be considered as “held” by the public authority.
36. Article 1, paragraph 2, sub-paragraph b, of the Convention does not contain a condition 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 for it to fall within the scope of application of the Convention.