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Council of Europe Group on Access to Information (AIG)

**Report submitted by Norway
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of the Council of Europe Convention
on Access to Official Documents (CETS No.205)**

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Introduction

This report has been prepared by the Norwegian Ministry of Justice and Public Security. The report describes the legislative situation in Norway concerning public access to official documents and the measures taken by Norway to give effect to the Council of Europe Convention on Access to Official Documents.

Article 1 – General provisions

The fundamental rules on public access to official documents are found in the Freedom of Information Act of May 19, 2006 (hereby the FIA). The Act applies to the state, county authorities and municipal authorities. Moreover, the Act applies to other legal persons in cases where the legal person issues regulations or makes administrative decisions relating to the rights or duties of other legal persons (section 2 first paragraph).

Furthermore, the FIA applies to legal persons in which the state, county authority or municipal authority directly or indirectly has an equity share that gives it more than half of the votes in the highest body of that legal person. The Act also applies if the state, county authority or municipal authority has the right to elect more than half of the voting members in the highest body of the legal person (section 2 first paragraph subparagraphs a and b). If the legal person in question mainly does business in direct competition with private legal persons and on the same conditions as private legal persons, the legal person is not subject to the obligation to provide access to case documents pursuant to the FIA (section 2 first paragraph second sentence). However, this exception only applies if the legal person faces direct competition in its core markets. For instance, Oslo's main airport, which is organised as a separate legal person, is not considered to be exposed to sufficiently direct competition to be exempted, even though there are other airports in Oslo's vicinity. As a consequence, the legal person Oslo's main airport is obligated to comply with the FIA.

In the FIA the term "administrative agency" refers to all public authorities and legal persons that the Act applies to (section 4 fourth paragraph). The term "administrative agency" will have the same meaning in this report.

The FIA establishes the right to access to "case documents of an administrative agency". According to the FIA section 4 first paragraph the term "document" encompasses any logically limited amount of information stored in a medium for subsequent reading, listening, presentation or transfer. This includes, but is not limited to, texts, pictures and sound, regardless of how the information is stored. The FIA section 4 second paragraph contains a legal definition of the term "case documents of an administrative agency". These are documents which have been received by or submitted to an administrative agency or drawn up by the agency itself, and which relate to that agency's area of responsibility or activities. If a document is not addressed to the agency directly, but to an employee in the agency, the document is still regarded as a "case document" if it relates to the agency's activities. If, on the other hand, a document is sent to or drawn up by an employee (or a politician in a ministry) in a capacity other than that of being an employee of the administrative agency, it is not considered to be a "case document" (section 4 third paragraph subparagraph e).

A document is considered to be "drawn up" by the agency itself either when it has been dispatched by the agency, or when it has been finalized (section 4 second paragraph). Preliminary outlines and drafts are usually not considered to have been drawn up. Hence, they are normally not considered to be case documents.

The FIA does not apply to the Parliament, the Office of the Auditor General, the Parliamentary Ombud for Scrutiny of the Public Administration (formerly the Ombudsman) or other institutions

of the Parliament (section 2 third paragraph). The Parliament has adopted its own rules on public access to official documents which apply to the Parliament and its institutions. The rules were adopted March 16, 2009, by plenary decision. The rules concerning public access to official documents from the Parliament are mainly consistent with the rules in the FIA. However, the rules do not apply directly to members of parliament or the parliamentary groups. In addition, some documents concerning internal budgetary and administrative affairs of the Parliamentary independent supervisory bodies are exempted from access.

Section 18 of the Office of the Auditor General Act of May 7, 2004 contains the rules on access to documents from the Office of the Auditor General. The public may get access to documents received by or sent from the Office of the Auditor General. With some exceptions, the rules in the FIA apply (section 18 first paragraph). However, if the Office of the Auditor General is considering whether to submit a case to the Parliament, access to documents belonging to that case may only be given after the Parliament has received the case. If a case is not submitted to Parliament, access may be given when the case is completed (section 18 second paragraph).

The Parliamentary Ombud for Scrutiny of the Public Administration also has its own rules concerning public access to documents. These are found in section 26 of the Act relating to the Parliamentary Ombud for Scrutiny of the Public Administration of June 18, 2021. Documents that have been prepared as part of the Parliamentary Ombud's activities are public, except documents and information subject to a statutory duty of confidentiality. In addition, documents prepared or obtained during the public administration's processing of cases concerning complaints to the Parliamentary Ombud and cases brought up on the Parliamentary Ombud's own initiative prior to the Ombud's own processing are also exempted (section 26 first paragraph).

Further, the Ombud may exempt documents and information if it has "special grounds to do so" (third paragraph), or if the documents in question are internal case documents or concern budgets and internal administration and have been exchanged between the Ombud and the Parliament (second paragraph). The Ombud also has a public journal that contains publicly available information about sent or received documents. The public may request access to the publicly available information in the journal (fourth paragraph).

Further, the FIA does not apply to the functions of courts of law pursuant to the statutes relating to the administration of justice (section 2 fourth paragraph). Consequently, the Act will not apply to documents in civil or criminal cases or bankruptcy proceedings etc. Documents concerning the administrative functions of the court, i.e. personnel management, internal administration, notary business etc., are however subject to the right to access to official documents. The Act does not apply to the functions of other public agencies pursuant to the statutes relating to the administration of justice in their capacity as justice administration agencies. Functions exercised by the police or the prosecuting authority pursuant to The Criminal Procedure Act of May 22, 1981 are also exempted.

However, if documents in civil or criminal cases, bankruptcy proceedings etc., or documents which concern an agency's functions in its capacity as a justice administration agency, are sent to an agency to which the FIA applies, the Act also applies to the received documents.

Access to documents in civil cases is regulated by The Dispute Act of June 17, 2005 chapter 14. The public may get access to court records, records of judicial mediation, judicial rulings and statements of costs (section 14-2 first paragraph). In cases that are not heard entirely in writing, the public is also entitled to access to closing statements (section 14-2 second paragraph point a), written submissions relating to the case (point b), evidence that is invoked at an oral hearing (point c) and supporting written documents (point d). There are exceptions to the public's right to access in section 14-3 and 14-4. Section 14-3 states that if publication of the judgement is prohibited, the public may only have access to the conclusion if the ruling is not more than five years old. In addition, access may be restricted to the conclusion of the

judgment if publication of the whole judgement would harm national security or relations with a foreign state, or “if there is reason to fear that the information will be used in an unlawful manner”. Section 14-4 contains the exceptions to the public's right of access to case documents other than the judgement itself.

The public does not have a similar right to access to documents used in criminal cases. Most documents in criminal trials contain sensitive information that is subject to a duty of confidentiality. The public may, however, as a general rule require transcripts of judgments. The Criminal Procedure Act section 28 third paragraph provides that “any person may require a transcript of a judgment in a specific criminal case as long as no ban applies against public reproduction of the judgement” (third paragraph, first sentence.) If the judgement is subject to a ban against public reproduction access is restricted to the conclusion of the judgement. Access may be refused for public security reasons, if the judgement is more than five years old, or if the person who requires the transcript identifies the judgement only by the name of the accused person.

Article 2 - Right of access to official documents

The right to access to official documents is enshrined in the Norwegian Constitution. Article 100 paragraph five holds that “[e]veryone has a right of access to documents of the State and municipalities and a right to follow the proceedings of the courts and democratically elected bodies. Limitations to this right may be prescribed by law to protect the privacy of the individual or for other weighty reasons.”

The main rules on public access to official documents are found in the FIA. According to section 1, the purpose of the Act is to “facilitate an open and transparent public administration, and thereby strengthen freedom of information and expression, democratic participation, legal safeguards for the individual, confidence in the public authorities and control by the public. The Act shall also facilitate the re-use of public information”.

Section 3 states that case documents, journals and similar registers of an administrative agency are public except as otherwise provided by statute or by regulations pursuant thereto. The right to apply for access to case documents, journals and similar registers applies to everyone. This includes legal persons, public authorities and foreign nationals. The FIA also guarantees the right of access to official documents irrespective of the intended use of the information by the requestors of access. The information may be used for any purpose unless such use is prevented by other legislation or infringes the rights of a third party (section 7 first paragraph). Discrimination is expressly forbidden in the first paragraph of section 6.

Article 3 – Possible limitations to access to official documents

Case documents, journals and similar registers of an administrative agency are public. As a result, an administrative agency may not exempt such documents from public access unless a statute or regulation gives a legal basis to do so. Provisions that exempt certain documents or information from the right to access can be found in the FIA itself, in other statutory provisions and in regulations.

Chapter 3 of the FIA contains important exemptions from the right of access. Although the FIA does not contain a list of the interests that may be invoked in order to limit the right of access to information, the exemptions in chapter 3 aim to protect one or more of the interests listed in Article 3 paragraph 1 of the Convention. It is an underlying principle of the FIA that access to information contained in an official document may only be refused if its disclosure could harm one or several of such interests. The only exception is section 17, which contains exemptions in respect of certain documents relating to the Norwegian Royal Court. When ratifying the Convention the Government of Norway declared that “communication with the reigning Family

and its Household shall also be included among the possible limitations” under article 3 of the Convention, see the instrument of approval deposited on September 11, 2009.

All of the exclusionary provisions in chapter 3 are subject to prerequisites regarding their applicability, which require that certain specific conditions are met. Some of the provisions contain a condition that is formulated as a ‘requirement of damage or harm’. Such a requirement means that the exclusionary provision applies provided that some stated risk of damage or harm arises if the information is disclosed. Other provisions do not contain such conditions, but a risk of damage or harm is nevertheless usually presupposed, but not included explicitly as a condition in these provisions.

Section 13 of the FIA regulates situations where access cannot be given, whereas section 14 to 26 regulate situations where the administrative agency may make an exemptions from the right to access. In the situations where an exemption from access may be made, the administrative agency must, however, pursuant to section 11 consider allowing full or partial access. Section 11 stipulates that the administrative agency should allow access if the interest of public access outweighs the need for an exemption.

There are three main categories of exemptions from the right of access. Documents, or parts of documents, can be exempted from the right of access because they contain information that is subject to a duty of confidentiality by or pursuant to law, because they are a part of an administrative agency’ internal preparation of a case, or because they contain information which, if disclosed, could harm certain public or private interests.

Information that is subject to a duty of confidentiality by or pursuant to law is always exempted from access (section 13). An administrative agency is obliged not to disclose information subject to a duty of confidentiality. However, a duty of confidentiality ceases if and when an agency obtains the consent of the person entitled to confidentiality to disclose the information. Even if a document contains information subject to a duty of confidentiality it is usually possible to give access to the remaining parts of the document, as long as the confidential information is redacted.

The FIA does not itself contain provisions regarding what information is subject to a duty of confidentiality. Provisions on duties of confidentiality can be found in several different statutes and regulations, and they aim to protect different interests. Some provisions aim to protect public interests, such as national security and defense. Others apply to public officials and aim to protect private interests. A third category of provisions concern the duty of confidentiality that applies to certain professionals, such as medical personnel, lawyers and priests.

The rules on duty of confidentiality for public officials in the Public Administration Act of February 10, 1967 section 13 to 13 g are of practical importance. According to section 13 of that act public officials have a duty of secrecy regarding an individual's “personal affairs”. The term «personal affairs» is broad and includes for instance information about physical and mental health, certain family relations, criminal cases and some information concerning economic status. Further, public officials have a duty of secrecy concerning information on technical devices and procedures and operational and business matters. This includes, but is not limited to, information concerning methods of production, marketing strategies and contractual terms. The duty of confidentiality only applies to information which is important to keep secret for competition reasons.

Sections 14 and 15 of the FIA regulate to what extent administrative agencies may exempt documents used in their internal preparation of a case from public access. Documents that are drawn up by the agency itself, which do not contain the final decision of a case, are regarded as internal documents, and may be exempted from access (section 14 first paragraph). Furthermore, an agency may under certain circumstances exempt documents from a

subordinate agency from access if such exemption is deemed necessary in order to ensure a proper internal decision process (section 15 first paragraph, first sentence). The same applies to documents which a ministry has obtained from another ministry for use in its internal preparation of a case.

Exemptions may also be made in respect of parts of documents obtained for use in the agency's internal preparation containing advice regarding, and assessments of, the position that an administrative agency should stand on a case, if such exemption from public access is required to ensure a satisfactory protection of the government's interests in that case (section 15 second paragraph). The third paragraph in section 15 extends the exemption from access to documents concerning the acquisition of a document that is covered by the exemption in the first or second paragraph. In addition, the exemption from access applies to notices of and minutes from meetings between a superior and subordinate agency, between ministries and between an administrative agency and any person who gives advice or assessments as mentioned in the second paragraph.

Section 16 contains detailed rules on access to internal documents of the municipal authorities and county authorities. Section 16 ensures that section 14 and 15 are not used to withhold important information concerning the municipal and county authorities' work. For instance, section 16 expressly stipulates that meeting agendas of publicly elected bodies and documents from audit bodies and appeals boards cannot be exempted from access as internal documents (section 16 first paragraph).

Sections 17 to 26 of the FIA contain exemptions that aim to safeguard different public and private interests. The sections cover several different situations and types of information. For instance, sections 20 and 21 contain exemptions due to Norway's foreign policy interests and national defense and security interests. Exemptions from access are here subject to detailed rules, and may only be made if disclosing the information would harm Norway's foreign policy interests or national defense and security interests in a way that is not insignificant. Section 19 ensures that exemptions from access may be made in respect of documents that are exchanged between state agencies and the Sami Parliament and Sami organisations as part of consultations in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Article 6.

According to section 22 of the FIA exemptions from access may be made in certain budget matters. Section 23 provides a legal basis for exemptions in order to protect inter alia the government's negotiating position. Exemptions from access may, for instance, be made if this is required to ensure proper execution of the financial, pay or personnel management of an agency (first paragraph), or it is necessary for the proper execution of negotiations on framework agreements with agriculture, fishery or reindeer husbandry organisations (second paragraph). According to section 24 an administrative agency may also make exemptions in respect of regulatory or control measures, documents relating to offences and information liable to facilitate the commission of an offence. If, for instance, the disclosure of certain information would counteract a public regulatory or control measure, or endanger its implementation, an agency may refuse public access to said information.

Furthermore, section 25 contains exemptions relating to cases concerning appointments or promotions and to salary statements etc., while section 26 contains exemptions regarding different kinds of documents and information. This includes examination papers, grades, prize rewards, some kinds of photos and intelligence information, information about research ideas and research projects and personal identification numbers. Section 17 allows exemptions to be made in respect of certain documents relating to speeches by or travel itineraries for members of the Royal Family. Section 18 provides that exemptions from access may be made in respect of documents which an administrative agency has drawn up or received as a party in legal proceedings in a Norwegian court of law.

Article 4 – Requests for access to official documents

An applicant is not required to provide any reason in order to obtain access to an official document under the FIA. The right to access to information also applies regardless of the intended use of the information. Further, the FIA does not require that a person requesting access identifies him or herself. It is therefore possible to require information anonymously.

Requests for access are subject to few formalities. The request may be made orally or in writing. According to section 28 second paragraph, a request must, however, specify a case or cases of a specific type, unless where access is requested to a journal or similar register.

Article 5 – Processing of requests for access to official documents

According to the FIA, the administrative agency that receives a request for access shall consider the request (section 29 first paragraph). It is not expressly specified in the FIA that an administrative agency must help the applicant to identify the requested official document. However, administrative agencies have a general duty to provide guidance under the Public Administration Act (section 11), and this duty also applies to cases concerning requests for information. An administrative agency will therefore be obliged to help the applicant, within reasonable limits, to identify a requested document. If, however, the request remains too vague to allow the official document to be identified despite the assistance from the administrative agency, the request may be refused.

The FIA section 6 first paragraph expressly stipulates that no discrimination may be made between comparable requests for access and that no agreement may be made granting any person an exclusive right to information.

There are no fixed time limits for administrative agencies to reach a decision on a request for access to an official document or request for information. However, a request for information must, in accordance with FIA section 29 first paragraph be decided “without undue delay”. According to the preparatory works of the FIA this means that an administrative agency must decide the request as soon as practically possible, preferably on the same day as the request was made, and normally no later than three working days after the request was made.

The FIA section 31 first paragraph states that a refusal of a request for access to information must be written. Further, the administrative agency is required to indicate the section on which the refusal was based, and where refusal is based on a duty of confidentiality, the agency shall also refer to the section imposing the relevant duty of confidentiality. Where refusal is based on regulations, the agency must state this and indicate the item in the regulations on which the refusal is based. In addition, the second paragraph of section 31 states that a person whose request for access has been refused, may within three weeks request further justification for the refusal in which the main considerations that were decisive for the refusal are to be mentioned.

Article 6 – Forms of access to official documents

Section 30 first paragraph, first sentence of the FIA states that the relevant administrative agency decides how to provide access to a document following a request. However, the first paragraph, second sentence states that an applicant may request either a paper copy or an electronic copy (or both) of the document. The right to a copy does not apply to formats or versions of a document that are already publicly available (fourth sentence). If a copy cannot be provided, access may be given by allowing the applicant to study the original document (or a copy held by the agency).

Several of the exemptions from access to information only provide legal basis to exempt certain parts of a document, not the whole document. According to section 12, an administrative agency may, however, also exempt the remainder of a document if the remaining parts of the document would give a clearly misleading picture of the content, it would be unreasonably demanding for the agency to separate the different parts of the document from each other, or the exempted information constitutes the most essential part of the document.

Article 7 – Charges for access to official document

Access to official documents is, according to the FIA, as a main rule given free of charge (section 8 first paragraph). The government may issue regulations concerning payment for transcripts, printouts or copies (second and third paragraph). However, the income from such payments must, as a general rule, not exceed the actual costs of copying and dispatching documents. Further, payment may only be required when a request for information concerns some particular kinds of documents.

Article 8 – Review procedure

Under the FIA section 32 first paragraph, a person whose request to access to a document has been rejected, or granted subject to reservations, may appeal to the administrative agency that is immediately superior to the administrative agency that has made the decision (first paragraph). If the decision has been made by a municipality, the person may appeal to the County Governor. There are also some further regulations concerning which agency a person may appeal to.

The applicant may also file an action before the courts for a judicial review of the decision. The courts can overturn decisions made by administrative agencies. It is also possible to file a complaint with The Norwegian Parliamentary Ombud for Scrutiny of the Public Administration. All possibilities of appeal available in the public administration must be exhausted before such complaint is filed. Although decisions by the Parliamentary Ombud are not legally binding, public authorities usually comply with the Ombud's criticism.

Article 9 – Complementary measures

The first act concerning access to official documents was passed in 1970, and the Norwegian public is therefore relatively familiar with rights of access to official documents and how those rights may be exercised. Nevertheless, there are several measures in place to facilitate public access to official documents, and ensure that administrative agencies abide by the rules on freedom of information. As mentioned under Article 5, administrative agencies have a general duty to provide guidance to private persons, both natural and private legal persons. The duty of guidance pursuant to the Public Administration Act includes a duty to give advice and guidance on how to exercise the right of access to official documents. Furthermore, several administrative agencies have published information on how to access information on the website of the respective authority.

In addition, the Ministry of Justice and Public Security has issued guidelines on the interpretation and application of the FIA in order to provide the public with further information on the right to access to official documents, and ensure that administrative agencies understand their obligations under the Act and implement the FIA correctly.

For administrative agencies, court rulings on access to public documents also provide guidance on the application of the legislation. The case law regarding the application of the FIA is, however, somewhat limited. In addition, guidance on the application of the FIA is provided in decisions by the Parliamentary Ombud which has been tasked with, amongst other things, ensuring that the public sector does not infringe on the basic freedoms and rights of the

citizens, including the right of access to official documents.

Management and storage of official documents is regulated by the Norwegian Archives Act and associated regulations. Administrative agencies are obliged to keep a journal pursuant to the rules of the Norwegian Archives Act and associated regulations. A reminder of this has been included in FIA section 10 first paragraph. The journal contains case documents received by or submitted to an administrative agency, in addition to some internal documents the agency itself has drawn up. The purpose of the journal is to lead to an open and transparent public administration, and thereby strengthen the right to freedom of information. The Archives Act and the associated regulations contain detailed rules on the preservation of documents, including which documents to preserve and the method of preservation, and provisions regarding the disposal of official documents.

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

Publishing documents that are deemed to be of special interest to the public can both increase transparency and improve efficiency in public administration. Administrative agencies are given discretionary competence to publish documents online (the FIA section 10 third paragraph). At its own initiative and where appropriate, an administrative agency should make official documents public in order to promote the transparency and efficiency of public administration, and encourage informed participation by the public in matters of general interest. There are several examples of administrative agencies taking initiative to publish such documents digitally. For instance, the government ministries publish a wide range of documents on the Government's website, from legislative products to consultation responses. A number of municipalities also publish an extensive collection of documents, ranging from building applications to reports from political meetings. Many municipalities publish their journals or similar registers as well.

In addition, government ministries, including the Office of the Prime Minister, several state directorates and state supervisory authorities, and the County Governors are required to publish their journal on the internet (The freedom of information Regulation of October 17, 2008 section 6 first paragraph). The public is free to search archived mail and documents in the journals. The search and requests for information may be done anonymously.