TECHNICAL PAPER:

TROMSØ CONVENTION STANDARDS:

STUDY GIVING OVERVIEW OF THE ACCESS TO INFORMATION REGULATORY FRAMEWORKS WITHIN THE STATES PARTIES TO TROMSØ CONVENTION

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Author of the study: Helen Darbishire, Executive Director of "Access Info Europe", Council of Europe expert

Cover design and layout: Irma Liparteliani

This document is an unofficial Georgian translation and, in cases where there is a difference between two language versions of the study, preference is given to the English version.

TABLE OF CONTENTS

1

SUMMARY

This report, developed as part of the Council of Europe cooperation project on "Strengthening Freedom of Media, Internet Governance and Personal Data Protection in Georgia", surveys the comparative legal frameworks of the thirteen countries which have, to date, ratified the Council of Europe Convention on Access to Official Documents, CETS 205, known as the Tromsø Convention after it was opened for signature in the Norwegian city of the same name. The Convention came into force on 1 December 2020.

The focus of this report is how the requirements of the Tromsø Convention are reflected in the legal framework of the states which have either ratified or signed it, drawing in also best practice from other countries in Europe.

The specific focus is on timeframes for responses and other aspects of processing requests, on forms of access, on limitations and how to apply them, and on appeals procedures and oversight bodies.

1.1 Timeframes

The Tromsø Convention requirement is that requests should be responded to as rapidly as possible and within a maximum time limit (Article 5.4), although the precise timeframe is not defined in the text itself. The Convention also permits for extensions in exceptional circumstances. There are then a series of other timeframes which can be identified based on comparative law and practice.

As soon as possible: It is recommended to make clear in the text of any access to information law that requests should be answered swiftly – some laws state "rapidly" or "as soon as possible".

- **Responses**: The timeframe for responses in most of the laws of the countries which have ratified the Convention is under fifteen (15) working days, with an average time of eleven (11) working days for responding to initial requests.
- **Extensions**: The average extensions timeframe for in countries which have ratified the Convention is 16 working days. Extensions can be applied just once.
- **Acknowledgements:** Confirmation of receipt of requests should be provided immediately or inside 5 working days;
- **Clarifications** should be issued within 5 working days, giving the requester 15 working days to respond;
- **Transferrals or referrals** of a request to another public bodies should be done inside 5 working days;
- **Appeals:** Requesters should be allowed time to submit an appeal as expert advice and support might be needed, so at least 40 working days is recommended, but timeframes range up to 5 years for an Ombudsman appeal. The response to the appeal should be swift, with 15 working days being recommended.

In order to comply with the timeframes set clearly by the legislator in law, all public officials should be trained on what the timeframes are and how to meet them. Internal and records

management systems should be designed to permit the speediest possible response. One way to achieve this is by giving the relevant government departments and independent oversight body the mandate to monitor compliance with timeframes and to carry out trainings and make recommendations to public bodies and even to sanction failures to respond to requests on time.

1.2 Forms of access

The Tromsø Convention sets out (Article 6), the forms in which the requester may obtain the information once access is granted. These are inspection of originals and/or copies in the format of preference whenever possible and reasonable. If the information is already public, then the public authority may refer the requester to that source.

The majority of countries which have ratified the Tromsø Convention to date provide for inspection of originals (9 out of 13), and all provide for receipt of a copy in any available format. The modalities for onsite inspections are provided for in a number of laws and should be included by the legislator.

It is noted that some laws such as Armenia and Finland also provide for oral access to information which, while not common, is a valuable additional provision to include in a law. In Finland the requester can have information explained to him or her orally, and in Armenia there can be rapid oral responses when the information relates to threats such as some kind of public emergency.

In the digital era, with the exception of older documents in archives, providing a copy will simply mean providing a digital copy, delivered electronically. The obligation is to maintain the full machine-readability of the digital original.

Only five (5) countries (Albania, Lithuania, Estonia, Montenegro and Ukraine) expressly provide for referral to other sources, indicating that the preference is to provide copies directly to requesters, something that is, again, seen as a good practice. The Albanian law is overall well drafted with respect to these provisions.

1.3 Partial Access & Signalling of Omissions

The Tromsø Convention at establishes (Article 6.2) that when exceptions are applied to requested documents, access should be granted to the remainder, unless the unredacted part is misleading or meaningless.

When it comes to partial access, almost all (12 out of 13) specifically mention partial access in the text of the access to information law, and all are known to apply this in practice.

By contrast, only two countries (Bosnia and Herzegovina and Norway) find it necessary to refuse access should a redacted document be meaningless, indicating that good practice is to provide even heavily-redacted documents, recognising that they may indeed have some value to the recipient.

Importantly, the Tromsø Convention stipulates that any omissions should be clearly indicated. There are emerging good practices on the marking of omissions. These include that if more than one exception applies to the redacted document, then for each part that is blacked out, there should be a marking which makes clear which exception has applied to that section.

A good model to follow for this is the Albanian Law which, in quite clear and short language, provides for the possibility of partial access without any conditions and also establishes the obligation of the authorities to specify to which part(s) the limit(s) have been applied and which limits have been applied.

The Moldovan law similarly requires that there be specificity about which omissions have been applied to which sections of a document actually naming the relevant grounds.

It is important to make clear that after redactions have been made, any documents which were originally digital should remain in a digital, machine-readable, format.

1.4 Limitations: The harm and public interest tests

The right of access to information, like almost all rights, is not absolute and its exercise may be subject to certain limitations. Thus, a particularly important provision in the Tromsø Convention is that it sets out a limited list of the only grounds that can be used to deny access to information (Article 3). There are eleven (11) such limitations to the right of access to information. There is an additional possible limitation for Royal Families and Heads of State.

> *Article 3.2 Each 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:*
>
> *a. national security, defence and international relations;*
> *b. public safety;*
> *c. the prevention, investigation and prosecution of criminal activities;*
> *d. disciplinary investigations;*
> *e. inspection, control and supervision by public authorities;*
> *f. privacy and other legitimate private interests;*
> *g. commercial and other economic interests;*
> *h. the economic, monetary and exchange rate policies of the State;*
> *i. the equality of parties in court proceedings and the effective administration of justice;*
> *j. environment; or*
> *k. the deliberations within or between public authorities concerning the examination of a matter*

These exceptions can only be applied, however, if the release of the information would harm the protected interest, and also on the condition that there is no overriding public interest in disclosure. Various examples of how this works in practice are given in this report.

When drafting an access to information law, it is important to aim for the greatest possible clarity in phrasing and in structure so as to ensure that the law will be correctly interpreted and implemented by public officials. Examples of well-drafted provisions are cited in this report.

Given the requirement to carry out these tests on a case-by-case basis, in many countries even classified information can be requested and, upon receipt of a request, the classification will be reviewed using the harm and public interest tests.

The Tromsø Convention does permit the legislator to do an advance, prima facie, balancing either requiring that information not be disclosed or mandating transparency, but this is not encouraged for limiting access, as the Explanatory Memorandum makes clear. The reason is that it is almost impossible for the legislator to know in advance all the conditions and considerations that will prevail at the time that a request is made.

By contrast, having the legislator stipulate in advance which information shall be made public, in increasingly widespread, both in the proactive provisions of access to information and also in many other laws and EU directives and regulations. This is because the right of access to information, as confirmed by the UN Human Rights Committee in its General Comment No. 34, is a right which imposes the obligation on states to ensure easy availability of information of public interest absent the need for requests.

In this review of countries which have ratified the Tromsø Convention, it is clear that older laws have a more complex system for limiting access, such as Sweden, which has a relatively limited list of exceptions in the main access to information law, but then has other legislation which classifies documents, although such classification is always then subject to harm and public interest tests.

More recent laws, such as those of Albania and Montenegro, as well as Spain which has signed but is still to ratify the Convention, are more complete in their listing of the exceptions. The Spanish law, which is the youngest of those countries which have signed or ratified Tromsø, having been adopted on 9 December 2013, is directly modelled on the Convention, including having the harm and public interest tests for every exception.

1.5 Mandatory Public Interest Test

A number of laws go even further than the general language of a public interest test and identify specific cases when the public interest shall be deemed to exist. For instance, if the information in a document is necessary for the protection of public health, or if it would reveal abuses of power such as corruption or violations of human rights.

Such "mandatory" or "hard" public interest overrides are very valuable as they help public officials to evaluate the public interest test and provide a certain clarity. Good examples include the laws of Armenia, Bosnia and Herzegovina, and Montenegro, which list grounds

concerns such as corruption, fraud, criminal offences, and threats to public security, life or health, as well as threats to the environment, as grounds which will always prevail over possible harms to a protected interest. These provisions are cited in this report.

1.6 Privacy, Commercial Confidentiality and Consent

There will be multiple instances in which the information that might be released in response to a request includes data affecting third parties which are natural or legal persons, such private individuals, or businesses. Ultimately it is for each public body to decide on whether or not to release the information many laws or their implementing regulations and other guidance specify the procedures for a consultation prior to taking a decision in such cases.

When it comes to data about private persons, in the European region, then the provisions of the EU's General Data Protection Regulation or similar national regulations will apply, along with requirements that data is only released compliance with legal obligations and where the person concerned has provided his or her consent to the specific data processing to be carried out. The legislator may, furthermore, decide that certain personal data can and should be released on a regular basis when this is in the public interest. For instance, if there is to be publicity of assets declarations of senior public officials, or of the names of lobbyists entered in the lobby register. Examples of specific legal provisions are cited in the report.

1.7 Classified Information

Every country will have systems for classifying information, and members of NATO have to comply with its standards, noting that NATO recommends not overclassifying so as to ensure that genuinely sensitive information is well protected. Most countries also have historical labelling systems for documents such as "limited circulation".

Given the range of types of classification, it is important that access to information laws make clear the procedures for when a request comes in that might include such documents in its scope. There are a number of ways this can be done, and the Tromsø Convention adopts an approach that has developed over time in the Nordic countries, which have the oldest access to information laws, namely that, whatever the actual classification of a document, upon receiving a request, the possibility of releasing that information must be considered, and the harm and public interest tests must be applied.

The way this is reflected in Tromsø is through the definition of information, which makes clear that all information held by a public body must fall within the scope of the right of access to information (Article 1.2.b). When there is a request for information which is considered to be an official secret, it should always be subject to a harm and public interest test. Examples of relevant legal provisions are cited in the report.

1.8 Time Limits beyond which exception no longer applies

The Tromsø Convention encourages States Parties to ensure that when there is a refusal to provide information based on a limitation, this in itself is limited in time, and encourages setting time limits beyond which the limitations no longer apply.

This can be done either by general language stating that the limitation shall only apply for as long as can be justified (EU access to documents rules), sometimes with a requirement to notify the requester of such a circumstance, and/or setting a hard maximum time limit, such as the 30 years absolute maximum in the Icelandic access to information law.

1.9 Review Procedure and Oversight Bodies

An inherent part of any right, including the right of access to information, is person who is exercising that right has access to an appeal procedure, to review of an administrative decision, and to access to justice in the case of an alleged violation of the right.

To this end, the Tromsø Convention establishes (Article 8) a review procedure, either before the court or before an impartial and independent body must be established. Furthermore, this procedure should be expeditious and inexpensive.

Among the countries which have ratified the Tromsø Convention to date, and across Europe more broadly, there are different models for the appeals procedures for access to information requests. These are internal appeals and/or independent oversight bodies and/or the courts.

Fewer than half of Council of Europe countries (21 out of 46) offer internal appeals, with the preferred solution in most countries being that a requester goes straight to an external oversight body or to the administrative court.

The courts will always be an option for an appeal to challenge a refusal, but given the need for lawyers and other court costs, and the slowness of many administrative courts, they do not sufficiently meet the Tromsø Convention requirement to ensure an "expeditious" (rapid) and "inexpensive" route for requesters.

To ensure that member of the public can defend their right of access to information easily, speedily, and at low cost, countries are increasingly setting up an independent oversight body, sometimes but by no means always combined with the role of overseeing personal data protection. Older laws permit appeals to the Ombudsman (seen as a gender neutral term as per its Swedish etymology), but the emerging preferred model in Europe and globally is that of an Information Commissioner (one person) or Commission (multiple persons) which has a mandate that specifically relates to the access to information law.

Hence a best practice recommendations, in line with the current trends which have emerged since the drafting of the Tromsø Convention (2006 to 2008), is for there to be an independent oversight body with a specific mandate for the access to information law.

The report therefore identifies key elements of the mandates, powers, and functioning of an independent oversight body as per the best practices and emerging standards in the European region.

These include that the independent oversight body:

- Issues binding decisions and can impose sanctions;
- Has oversight of all aspects of the access to information law, not just the request process;
- Can mediate, and issue recommendations;
- Has powers of inspection and can review the contested information;
- Is able to review the classification of information or recommend a reclassification to the appropriate body;
- Can initiate ex-officio investigations with out the need to receive complaints or to investigate systemic breaches identified through complaints;
- Is able to issue guidance to public bodies and training to public officials;
- Is mandated to raise public awareness about the right of access to information;
- Can issue guidance and criteria for interpreting the access to information law and other relevant legislation;
- Is able to make recommendations on existing and new legislation;
- Regularly collects data from public bodies on the implementation of the access to information law;
- Conducts additional data collection, including surveys and public opinion polls;
- Issues reports to Parliament at least annually and reports regularly to the public on its activity, decisions, and on the data gathered from public authorities.

The report provides examples of countries which have relevant provisions and have established good practices for the mandate, structure, and functioning of independent oversight bodies such as information commissioners.

It is also noted that empirical data gathered by UNESCO indicates that the implementation of access to information laws is better in countries which have an independent oversight body.[1]

[1] See UNESCO 2022 Survey on Public Access to Information, https://www.unesco.org/en/articles/unesco-launches-2022-survey-public-access-information?hub=751

2

INTRODUCTION

This report has been developed as part of the Council of Europe cooperation project on "Strengthening Freedom of Media, Internet Governance and Personal Data Protection in Georgia". This project aims to strengthen freedom of media through a series of actions which include, specifically, raising awareness of international standards in the field of access to public information.

The right of access to information, while being a right of everyone, is particularly important for media professionals. The European Court of Human Rights has repeatedly placed emphasis on the importance of the right of access to information for journalists and social watchdogs, specifically stating the importance of this right for those gathering information as "a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate".[2] This does not, however, mean that it is a right exclusively for the media and civil society organisation, but rather that this is particularly important and so a State's obligation to ensure media freedom should include an obligation to ensure a strong legal framework for the right of access to information.

The current Georgian access to information law forms part of the General Administrative Code of Georgia, in Chapter 3, the first version of which was adopted in 1999. The aim of this analysis of comparative law and practice is to contribute to discussions on how to ensure that Georgia's legal framework permits ratification of the Council of Europe Convention on Access to Official Documents, CETS 205, known as the Tromsø Convention, which came into force on 1 December 2022.

The analysis and recommendation on highest standards and best practices will also help Georgia bring its legal framework for protecting the right of access to information into line with the highest European and international standards.

The preamble to the Tromsø Convention states that it regulates the right of access to official documents as part of promotion of transparency, which is essential to a pluralistic and democratic society. The Preamble to the Tromsø Convention states that the benefits of transparency are that it:

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.*

Recognising the value of these benefits as well as taking the specific current needs in Georgia into account, this report examines the comparative law and practice on four selected elements of the Tromsø Convention, namely timelines for responding to request, forms of access, limitations, and oversight bodies.

[2] Case of *Magyar Helsinki Bizottság v. Hungary*, 8 November 2016, §158 https://hudoc.echr.coe.int/fre?i=001--167828

The research was done largely with reference to the countries which have ratified the Tromsø Convention. These are Armenia, Albania, Bosnia and Herzegovina, Estonia, Finland, Hungary, Iceland, Lithuania, Montenegro, Norway, Republic of Moldova, Sweden, and Ukraine. The law of Spain, which has signed but not yet ratified the Convention, was also studied as it is a younger law with some strong provisions. Other laws reviewed include that of Croatia, which is generally highly ranked on evaluations that measure access to information laws against international standards.

The signalling of good practices are included in this report so as to identify the ways in which countries comply with and/or establish higher standards than those of the Tromsø Convention which, as the Explanatory Report makes clear, is only a "minimum core of basic provisions".

3

TIME LIMITS FOR RESPONDING TO REQUESTS

The Tromsø Convention does not establish a specific deadline for responding to a request for access to information. It does, however, recommend in Article 5.4 that:

> *A request for access to an official document shall be dealt with promptly. The decision shall be reached, communicated and executed as soon as possible or within a reasonable time limit which has been specified beforehand.*

The Explanatory Report for the Convention adds some more detail, underscoring that a prompt response is central to the right of access to information, and identifying three essential elements for legislators to consider:

- A prompt response, establishing a maximum time limit.
- A requirement to inform the requester of any delays
- Public bodies should not wait until the time limit to respond.

The relative vagueness of the Tromsø Convention on time limits does not excuse legislators from having vague laws. The European Court of Human Rights has made clear that timeliness of access to information is a core part of the rights to freedom of expression and information, and the court has stated and reiterated that "news is a perishable commodity" – in other words that information delayed is, in effect, information denied because it loses its value.

Furthermore, comparative standards and a review of recognised good practices permit the identification of a more extensive framework, with each access to information law establishing a set of timeframes for specific elements, namely:

- **Acknowledgement**: Provision of an acknowledgement. The acknowledgement should inform the requester of registration of the request and about appeal mechanisms. It should give an official reference number. It should be sent immediately and at most within 5 working days.
- **Clarification of request**: When there is a need to clarify the request, the timeline for sending a clarification message should be done as possible and at most within 5 working days. The requester should be given a fair time to respond (at least 15 working days) and the clock on his/her request should restart only after the clarification has been sent. So for instance, if the maximum time limit is 15 working days, and after 5 days a request for clarification is sent, and then after 10 working days the requester clarifies, the new maximum time limit will be 25 days from the submission of the request.
- **Transferral or referral of a request**: Where the request has been sent to the wrong public body, the time limit for either an internal transfer of a request or the referral to another body which holds the information should be no more than 5 working days. The legislator has the option of including this in the original timeframe or extending that original timeframe by these 5 additional days.
- **Response with information or refusal**: A decision notice with information provided or a clearly motivated and justified denial should be provided as soon as possible and

at most within the absolute maximum timeframe set in the law. The legislator should expressly include the injunction to respond as rapidly as possible.

- **Extension to the response timeframe**: Extensions should only be permitted in exceptional circumstances and where they are duly notified to the requester along with a full justification. It should only be possible to issue one extension, and it should be no more than the length of the original timeframe so, for instance, 15 working days as the original maximum and an extension of a further 10 or 15 working days.
- **Time limit to appeal:** Whether there are internal appeals or an appeal to an independent oversight body, there should be a clearly stated timeframe within which the requester may submit an appeal. It is recommended that this period be sufficiently long for the requester to obtain legal advice, so, for instance, 40 working days (2 months).
- **Time limit for responding to an internal appeal**: The law should establish a clear maximum limit for responding to appeals. This should be similar to that for responding to original requests (15 working days maximum) with only one extension allowed when duly justified. [For response times for oversight bodies, see the relevant section].

3.1 As soon as possible

In all the countries which have ratified the Tromsø Convention, with the one exception of Armenia, it is expressly stated that the information must be provided as soon as possible, which means that one should not wait until the last moment of the deadline for the disclosure of the requested information.

For countries with very short timeframes, this is not such an important consideration. For those with longer timeframes, it is essential to ensure that public officials do not wait until the last possible day to respond.

An example of such language is that in Article 15 of the 2014 Albanian Law on the Right to Information, which states:

> *The public authority handles the information request by giving the required information as soon as possible, but no later than 10 working days from the day of submission, unless otherwise provided for by the particular Law.*

A good practice is to include such language and to make clear that prompt responses are the norm. An independent oversight body such as an Information Commissioner should be charged with monitoring timeframes and taking remedial measures, such as additional training or even sanctions, for bodies which constantly push to the limits (or go over) the timeframes established by law.

3.2 Maximum time limit

In line with the Tromsø Convention, most countries establish a maximum timeline for responding. The following table shows the timelines per country for responses and extensions:

Table A: Timeframes for Responses

COUNTRY	TIME TO RESPOND	EXTENSIONS
Armenia	5	30
Albania	10	5
Bosnia and Herzegovina	15	15
Estonia	5	15
Finland	14	30
Hungary	15	15
Iceland	7	Case-by-case
Lithuania	20	20
Montenegro	15	8
Norway	5	8
Republic of Moldova	15	5
Sweden	ASAP	Not mentioned
Ukraine	5	20
AVERAGES :	11	16

The exceptions to this are Sweden which does not set a timeframe but rather states that if access is to be granted the document "shall be made available on request forthwith, or as soon as possible." It is important to note here that the law states immediately or as soon as possible, setting a very high standard for rapidity of access.

Most of the laws of the countries ratifying the Convention are under fifteen working days, with an average time of 11 working days for responding to initial requests.

The maximum for countries which have ratified is 20 working days (one month) in Lithuania. The countries with the shortest timeframes are Armenia, Estonia, Norway and Ukraine with just 5 working days.

The average across Europe more broadly is some 15 working days, which is precisely the timeframe that EU bodies have for responding to requests from EU institutions. The Aarhus Convention on access to environmental information, an older treaty from 1998, sets a timeframe of 20 working days (1 month), something now seen as a rather long timeframe in the internet age.

A good practice to follow could be that of Albania, whose 2014 law is overall one of the strongest ones in the European region. Albania sets a 10 working day timeframe for initial responses, in line with the average of 11 working days in this study.

3.3 Extensions

When it comes to extensions to the timeframe before providing a response to a request, there is some variation around Europe as to the number of days allowed, ranging from 5 to 30 days. In all cases, however, any delay must be justified with the grounds for the extension being those permitted in the law, and the requester must be notified of the extension.

Table B: Extension Timeframes and Notification requirements

COUNTRIES	EXTENSIONS (DAYS)	NOTIFICATION REQUIRED	GROUNDS SET IN LAW
Albania	5	Yes	Yes
Armenia	30	Yes	Yes
Bosnia and Herzegovina	15	Yes	Yes
Estonia	15	Yes	Yes
Finland	30	Not mentioned	Yes
Hungary	15	Yes	Yes
Iceland	Not mentioned	Yes	Not mentioned
Lithuania	20	Not mentioned	Not mentioned
Montenegro	8	Yes	Yes
Norway	8	Yes	Yes
Republic of Moldova	5	Yes	Yes
Sweden	Not mentioned	Not mentioned	Not mentioned
Ukraine	20	Yes	Yes

The typical grounds for extensions include having to search in a large amount of documents or a large data set, the need to consult, or the need to apply many exceptions with redaction taking time.

The Albanian law sets this out clearly in Article 20.4:

> *Deadlines … may be extended by no more than 5 working days for one of the following reasons:*
>
> *(a) the need to look for and consider numerous voluminous documents;*
>
> *(b) the need to expand the search in offices and facilities that are physically separated from the headquarters of the authority;*

(c) the need to consult with other public authorities before making a decision whether or not to meet the request.

The decision to extend the deadline shall be immediately notified to the applicant.

It will be seen in Table A above that there are different models for the relationship between initial timeframes for responses and the extensions. These include:

- Similar timeframes for both initial response and for the extension, such as in Bosnia and Herzegovina or Lithuania, and also the European Union which has 15 days plus a 15 day extension;
- An initial timeframe followed by a shorter extension, as in Albania, Montenegro or Moldova;
- A shorter initial timeframe followed by a longer extension, which is the most common model with examples being: Armenia (5 days + 30 day extension), Finland (14 days + 30 days) or Ukraine (5 days + 20 days extension).

When the legislator is determining what is the best timeframe, consideration should be given to what is a reasonable initial timeframe given the particular circumstances of the country and the quality of its information management, followed by a reasonable timeframe for an extension when genuinely merited and justified.

The solution from Albania for a 10 working day initial timeframe is in line with the average in this study and seems appropriate for many countries in the Council of Europe region. An extension of 15 working days (Bosnia and Herzegovina, Estonia, Hungary) or 20 working days (Ukraine) seems to be reasonable, provided that it is duly justified.

3.4 Appeals Timeframes

For appeals against initial refusals or other issues with the handling of a request, there are multiple options in countries which that have signed or ratified the Tromsø Convention.

Some countries, offer internal review, such as by a more senior figure in the same body or by a superior administrative body (See Section 6 on Appeals and Oversight Bodies below). Many others provide only for a direct appeal to an entity external to the public body to which the request was submitted, by that to a court, an general Ombudsman, or a specialised oversight body such as an Information Commissioner.

In some cases the first level of appeal is mandatory before turning to the courts, in others the requester can go directly to the courts.

Given the variety of appeals, the timeframes also vary. Furthermore, they are not always specific timeframes for the right of access to information but rather more general timeframes established by the administrative procedure code.

An overview of the timeframes is given in Table C below, and it shows that appeals must be launched in timeframes that range from 8 working days for an internal appeal in Bosnia and Herzegovina to up to 5 years for going to the Ombudsman in Finland. The shortest mandatory response time is 8 working days in Moldova, whereas in a number of countries there is no specified limit for resolving an appeal, particularly not for court proceedings.

In terms of good practice, the general trend, particularly of more recent and more specific laws is to give a reasonable timeframe to requesters to appeal and a relatively short timeframe to the superior administrative body or the independent oversight body to respond to the appeal.

Table C: Appeals Timeframes

COUNTRY	OVERSIGHT	TIME TO APPEAL	TIME TO RESPOND
Albania	Commissioner for the Freedom of Information and Personal Data Protection	30 working days	15 working days
Armenia	Human Rights Defender	1 year	30 days
Bosnia and Herzegovina	Internal appeal Followed by appeal to the Ombudsman for Bosnia and Herzegovina.	8 working days 12 months	15 working days Not stated
Estonia	Data Protection Inspectorate	30 natural days	30 natural days which can be extended to 60 natural days if needed.
Finland	Court appeal and/or Parliamentary Ombudsman	30 days Up to 5 years	Not stated Not stated
Hungary	Court Appeal National Authority for Data Protection and Freedom of Information.	30 days 30 days	Not stated Not stated
Iceland	Information Committee	30 days	Not stated
Lithuania	Seimas Ombudsman Or Administrative Court	1 Year 20 days	Not stated Not stated
Montenegro	Agency for Personal Data Protection and Free Access to Information	15 working days	15 working days
Norway	Internal appeal Then Ombudsman	3 weeks 1 year	"without undue delay" Not stated
Republic of Moldova	Internal appeal	30 working days	8 working days
Sweden	Administrative Court Ombudsman	3 weeks 1 Year	"An appeal must always be tried quickly." Not stated
Ukraine	Internal appeal (administrator's superior official or higher authority) or the courts Appeals to Human Rights Commissioner	30 calendar days 1 Year	30 calendar days with one possible extension of 15 calendar days. As soon as possible, and at most between 15 to 45 days depending on nature of appeal.
Spain	Transparency Council	1 month	3 months
UK	Internal appeal Then Information Commissioner	40 working days 3 months	20 working days Not specified

European Union	Internal appeal (known as "confirmatory application")	15 working days	15 working days
	Then appeal to the European Ombudsman	2 years for appeal to the European Ombudsman	Not specified but Ombudsman aims to respond in 3 months

3.5 Best Practice on Timeframes

The comparative analysis of timeframes in countries which have to date ratified the Tromsø Convention, along with the best practice from across Europe, suggests that good practice would be to set the following timeframes:

Table D: Recommendations On Timeframes

STAGE OF REQUEST	RECOMMENDED TIMEFRAME	COMMENTS
Acknowledgement	Immediately / 24 hours / max 5 working days	Requester should be provided with registration number and information about timeframes and about appeals
Clarification of request	Max 5 working days	Requester has 15 or 20 working days to respond; timeframe is stopped pending response.
Transferral or referral of a request	5 working days.	In cases of an internal transfer, it is acceptable to extend the original timeframe for responding by the time taken to effect the transfer which should be no more than 5 additional working days.
Initial response	As soon as possible at most 10 to 15 working days	Public bodies should be encouraged to respond as soon as possible and this data should be captured and monitored
Extension	10 to 15 working days	Only in exceptional circumstances which must specified in the law and then justified in writing. If requester objects to the extension, they should be able to appeal it immediately.
Time limit to appeal	20 to 40 working days	It is recommended to provide the requester with time to seek support from an expert / civil society organisation / legal advice
Responses to appeals	15 working days for internal appeals 30 working days for independent oversight bodies Extension in rare cases of 15 -20 working days.	The importance of information means that appeals should be handled as swiftly as possible.

The legislator should set these timeframes clearly in law and all public officials should be trained on compliance. Internal and records management systems should be designed to permit the speediest possible response.

4

FORMS OF ACCESS

Article 6 of the Tromsø Convention sets out the forms of access in which the requester may obtain the information once access is granted. These are:

1. When access to an official document is granted, the requester has the right to choose whether to inspect the original or a copy, or to receive a copy of it in any available form or format of his or her choice unless the preference expressed is unreasonable.
2. If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. However, if the partial version of the document is misleading or meaningless, or if it poses a manifestly unreasonable burden for the authority to release the remainder of the document, such access may be refused.
3. The public authority may give access to an official document by referring the requester to easily accessible alternative sources.

Based on the key elements of Article 6, as Table E below identifies which laws contain relevant provisions.

Table E: Forms of Access to Documents

COUNTRIES	INSPECT ORIGINAL	RECEIVE A COPY IN ANY AVAILABLE FORMAT	PARTIAL ACCESS	REFUSE IF REDACTIONS RENDER MEANINGLESS?	REFERRAL TO ACCESSIBLE ALTERNATIVE SOURCES
Albania	Yes	Yes	Yes	No	Yes
Armenia	Yes	Yes	Yes	No	Not mentioned
Bosnia and Herzegovina	Yes	Yes	Yes	Yes	Not mentioned
Estonia	Yes	Yes	Yes	No	Yes
Finland	Yes	Yes	Yes	No	Not mentioned
Hungary	Not mentioned	Yes	Yes	No	Not mentioned
Iceland	Not mentioned	Yes	Yes	No	Not mentioned
Lithuania	Yes	Yes	Yes	No	Yes
Montenegro	Yes	Yes	Yes	No	Yes
Norway	Not mentioned	Yes	Yes	Yes	Not mentioned
Republic of Moldova	Yes	Yes	Yes	No	Not mentioned
Sweden	Yes	Yes	Yes	No	Not mentioned
Ukraine	Yes	Yes	Not mentioned	No	Yes

4.1 Inspection of originals

The possibility that a requester who has been granted access can inspect copies of original documents on-site is something that is well established in access to information standards, as reflected by the Tromsø Convention.

Granting on-site access dates from a time when the only way of providing copies was as photocopies, and it gave requesters a chance to decide which documents they wanted copies of in countries where more than a few photocopies would be charged for.

In the digital era, there is less necessity to have this as large numbers of documents can be provided digitally with great ease.

It is, nevertheless, recommended that such on-site access be defined in law as a right, particularly for more historical documents which only exist on paper such as documents in the archives. For this reason almost all (10 out of 13) of the laws reviewed have such provisions, while in practice in at least two others (Iceland and Norway) this option is offered in practice.

The laws of Bosnia and Herzegovina or Finland are examples of slightly older laws which specifically talk about on-site consultations:

In Bosnia and Herzegovina the notification of access comes with an option of consulting information in person:

> *Article 14.2. If access to the information is granted, either in whole or in part, the competent authority shall notify the requester in writing thereof. This notice shall (a) inform the requester that the information is available for access in person at the premises of the competent authority.*

Regular users of the access to information law in Bosnia and Herzegovina report that, in practice, documents are provided attached to an email with no invitation to consult in person. This does not, of course, obviate the right established in the law.

In Finland the law makes clear that not only reviewing the original but listening to an audio recording is possible:

> *Section 16 (1) Access to an official document shall be by explaining its contents orally to the requester, by giving the document to be studied, copied or listened to in the offices of the authority, or by issuing a copy or a printout of the document.*

Whilst the right to access copies of a document in an original format should be given as a general right, there will be exceptions when this is not possible. These are set out in the Explanatory Report, which states:

> *An authority may be justified in refusing to provide a copy of the document if, for example, the technical facilities are not available (for audio, video or electronic copies), or if this would entail unreasonable additional costs, or if, according to national legislation, intellectual property rights might be infringed.*
>
> *It may also be justified in refusing direct access to the original version document if it is physically fragile or in poor condition. In such cases, the authorities shall provide a copy of the document.*

With respect to the fragility of documents, the majority of access to information requests refer to more current information and so the issue of the fragility of historical documents is not one that arise with particular frequency. It is, however, pertinent to any historical research, especially in countries which have not yet undertaken an extensive digitalisation of their archives. It is therefore important to ensure – in law and in practice – that there is a system for providing digital copies whenever the preservation of a document is a concern.

As to technical facilities for copying, even since the Tromsø Convention was drafted in the years 2006 to 2008, technologies have advanced significantly, and the costs of any digital reproduction, even of audio or video, is close to zero, and should not pose a problem. A modern access to information should, rather, make clear that all formats, including audio-visual, are under the scope of the broad definition of information set out in the Tromsø Convention and so that copies should be provided.

The biggest challenge then is with respect to inspecting originals of documents when part of the document should be redacted, for reasons of the application of one or more exceptions. In such cases the refusal of onsite consultation is justified, at least for the pages of the document affected.

The Swedish law anticipates this circumstance by stating in Art. 12 that whenever "a document cannot be made available without disclosure of such part of it as constitutes classified material, the rest of the document shall be made available to the applicant in the form of a transcript or copy" rather than inspection of the original. This is something that is worth stating explicitly in the law, also adding that a scanned, or digital, copy could be provided in case of paper originals that have to be redacted, especially since redactions are more efficiently done in a digital format.

In the case that the "original" is in fact a digital document, this is moot, as sending a digital copy (with or without redactions) is equivalent to sending the original.

Where cost can become an issue is when a very large number of documents is to be released and/or they are large file sizes (such as for audio-visual material and databases) and the public authority's email or that of the requester cannot handle such a large file size.

There are various options here, including splitting the digital delivery into a series of emails with attachments, compressing the files, or using a service such as WeTransfer (which is the option of the Council of the EU for instance). What is important is that this is done in a way that does not incur costs for the requester.

4.2 Right to receive a copy in any available format

The Tromsø Convention establishes the right of a requester to receive copies of information in any available form or format, at least whenever the requester has expressed a preference.

Although not clearly and explicitly stated, this inevitably in the digital age, must mean receiving copies in a digital format whenever the document exists in that format.

In most of the countries that have ratified the Tromsø Convention, this right is defined in terms similar to those in the Convention. In Sweden it is not, and requesters in Sweden sometimes complain that their pre-digital-age law does not give them an explicit right to digital documents.

Finland does provide digital access but also, rather quaintly, reflects its age, by stating that "information in a computerised register of the decisions of an authority shall be provided by issuing a copy in magnetic media or in some other electronic form".

More clearly, in Armenian, the law establishes both that there is a right to opt for the format, or that, if no preference is stated, the answer shall be given in the most "suitable" format for the public body:

> *Article 9.8 The answer to written inquiry is given on the material carrier mentioned in that application. If the material carrier is not mentioned and it is impossible to clarify that within the time limits foreseen by the following law, then the answer to the written inquiry is given by the material carrier that is the most suitable for the information holder.*

The Albanian law is one of the most detailed and has a series of references which serve as a good model:

> *Article 3.3.*
> *Any person shall be entitled to access the public information, either through the original document or receiving copies in the form or format enabling full access to the document contents.*
>
> *Article 11.5*
> *As long as the application does not determine the format where the information has been applied for, it shall be provided in the most effective and lost cost fashion for the public sector body.*
>
> *Article 14.2*
>
> *The applications pertaining to written documents shall be processed by making available to the applicant:*
>
> *a) a full copy in the same format as the one used by the public sector body, except in specific cases;*
>
> *b) a full copy of the information via e-mail, as long as the information exists or is convertible to such a format.*
>
> *Art. 14.3.*
> *With regard to the applications referring to other formats, the information shall be provided in the most efficient way and at the lowest cost for the public sector body.*

This law is a good model of more precise legal drafting, drawing on international comparative law and best practices.

4.3 Oral Access

In a relatively unusual consideration, which can be seen as a good practice to aim for, Finland specifically allows for oral answers to requests. Section 16.1 on *Modes of access* states:

> *Access to an official document shall be by explaining its contents orally to the requester, by giving the document to be studied, copied or listened to in the offices of the authority, or by issuing a copy or a printout of the document.*

Similarly, Section 19 on the obligation to provide information about the state of on-going decision-making processes includes that this can be one "orally or by other suitable means".

The law further states at Section 34.1 on *Charges* that no charge is levied when the provision of information is provided orally.

Armenia also has provisions on oral requests and answers. A request can be made orally, with the only condition that the requester provide his or her name and surname. In case of an oral inquiry, the applicant must provide in advance a name and surname. An oral inquiry is given an answer if necessary for preventing threats, such as to public security, public order, public health and morals, other's rights and freedoms, environment and person's property. In such cases "the answer to the oral inquiry is given immediately after listening to the inquiry or within the shortest possible timeframe."

While not all access to information laws make explicit provision for oral enquiries, these are recommended and can be particularly useful in countries where the traditional bureaucratic culture has historically involved a certain reticence to answer oral requests from members of the public. The Finnish provision of informing a member of the public on the state of ongoing processes such as administrative or legislative processes is especially recommended, as is the Armenian provision on providing oral answers in context when the information is needed immediately.

4.4 Partial Access & Signalling of Omissions

The Tromsø Convention at Article 6.2 establishes that when exceptions are applied to requested documents, access should be granted to the remainder:

> *If a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains. Any omissions should be clearly indicated. ...*

It is increasingly frequent across Europe for requesters to receive documents where some information has been blacked out or "redacted", in particular because almost every document contains names and, due to data protection rules, such redactions are common.

This is also because public authorities are getting better at applying exceptions very precisely, just as is required by the Tromsø Convention and other international standards, and so only

withholding the information that would cause genuine harm to a protected interest, and only after a public interest test has been applied.

The Tromsø Convention anticipates this by both requiring that partial access should be provided to the remainder of the document and that any omissions should be clearly indicated.

There are also emerging good practices on the marking of omissions. These include that if more than one exception applies to the redacted document, then for each part that is blacked out, there should be a marking which makes clear which exception has applied to that section.

The Albanian Law, in quite clear and short language, provides for the possibility of partial access without any conditions and also establishes the obligation of the authorities to specify to which part(s) the limit(s) have been applied and which limits have been applied:

> *Article 17.6. Where the restriction affects the information only partially, the remaining part shall not be rejected to the applicant. The public sector body shall clearly indicate the parts of the respective documentation having been rejected, as well as based on which point of this Article the rejection was ruled.*

The Moldovan law similarly requires that there be specificity about which omissions have been applied to which sections of a document:

> *Art.7.(3) If the access to the information, the requested documents is partially limited, the information providers are obliged to present to the applicants the parts of the document, the access to which is not restricted according to the legislation, indicating in the places of the omitted parts one of the following phrases: "trade secret", "confidential information about the person ". …*

In addition to the requirement of specificity about which exceptions have been applied, it is highly recommended that there be a requirement that after redactions have been made, the document remains in a digital, machine-readable, format.

It is further recommended that, to the extent that the law contains provisions on training, there be a requirement that public officials be trained on how to carry out redactions well, both so that they only remove the necessary information, and also to ensure that they do so correctly and fully. If certain information really would damage international relations or commercial confidentially or harm the privacy of an individual, then it is not desirable that this be exposed simply because an official as used a non-Pro version of Adobe to put black over the text in a way that is easily reversible by any recipient of a copy of the document!

4.5 Meaningless … or not?!

The Tromsø Convention states in Article 6.2 "However, if the partial version of the document is misleading or meaningless, or if it poses a manifestly unreasonable burden for the authority to release the remainder of the document, such access may be refused".

In our review of legislation, amongst countries that have ratified the Tromsø Convention as well as those that have not, there are few examples of such a provision.

Indeed, only Bosnia and Herzegovina and Norway have some variation on them, with the Bosnian article stating that the partial access shall be provided "unless the severance has rendered it incomprehensible" and in Norway the concern being that the redacted version might "give a clearly misleading picture of the content" or the "exempted information constitutes the most essential part of the document."

The accumulated experience of users of the right of access to information is that even minimal information can be valuable. Investigative journalists often receive documents with just a date or a reference number and find it useful, either to cross-reference with other documents received or as the basis for subsequent request.

Indeed, documents received from EU institutions which are partially blacked out, often provide the basis for appeals, using the non-redacted parts, so as to obtain fuller access. For these reasons, and given that the majority of laws do not have such ground for refusing access to the partially redacted document, it is recommended not to include this in access to information legislation.

4.6 Machine-Readable Formats

One of the biggest practical problems that requesters across Europe currently encounter is that when documents are either redacted or in other cases where a public official wishes to, for instance sign a document, then the "digital" copy is provided in a non-machine-readable format, such PDF which contains a scanned image.

This is, in fact, a breach of the Tromsø Convention because any available format must necessarily include digital machine-readable formats to the extent that these exist. Most laws are not yet explicit enough to anticipate and prohibit this bad practice. It is recommended that clarity about the machine-readability of documents be included in future access to information laws.

What can be found in a handful of laws, is language that encourages the use of digital formats more broadly. An example is the Estonian Law, which establishes that:

> *Article 17.1 A holder of information shall comply with a request for information in the manner requested by the person making the request for information and shall release the information:*
>
> 1) *digitally to a transferable data medium or to an electronic mail address set out in the request for information.*

And the Spanish law, a more recent text, actively encourages the provision of information in digital formats.

> *Article 22. Formalization of access. 1. Access to information shall preferably be given by electronic means, unless this is not possible or the applicant has expressly indicated other means.*

Requirements about the machine-readability of data can be found in other legal instruments, such as the EU's Directive 2019/1024 on open data and the re-use of public sector information, more commonly known as the Open Data Directive. It is recommended that legislators also review this to ensure that any future access to information law meets the highest EU standards with respect to digitalisation.

4.7 Providing access via alternative sources

Article 6.3 of the Tromsø Convention permits that public authorities provide access by referring requesters to other sources which are "easily accessible".

The Explanatory Report provides an detailed explanation of this in Paragraph 60:

> *60. Paragraph 3 states that access may also be granted by referring the applicant to easily accessible alternative sources. For example, if a document is published on the internet and is easily accessible to a specific applicant, the public authorities may refer him or her to this alternative source. In any event, whether a document is "easily accessible" must be assessed on a case-by-case basis: for example, not everyone may have access to internet. "Accessible" also encompasses affordability; it may not be in accordance with this paragraph, for example, to refer somebody to purchase an expensive publication.*

Of the countries which have ratified the Tromsø Convention, only Albania, Estonia and Ukraine have relevant language. Out of other countries, this is something which it is possible for UK public authorities to do.

The Albanian law does permit referral to other sources, but only when the information is both sought in electronic format and is available on the internet. In such cases access must be provided immediately:

> *Article 16.2. If the information is sought in electronic format and it is available in internet, the public sector body shall immediately indicate to the applicant the accurate address of the internet site where the information can be found. If the information is not sought in an electronic format, the public sector body cannot respond to the application by indicating to the applicant the accurate address of the internet site where the information is available electronically.*

To the extent that a law establishes such a provision, then either it or its implementing regulation should make clear that a very precise URL should be provided. It is never sufficient to state "the meeting report you requested can be found on our municipality website". Rather the precise link should be given.

More broadly, the paucity of laws with such provisions reflects that this is generally seen as bad practice, and that the duty of the public official is to provide a copy of the document requested, something that can indeed be done instantaneously – immediately as the Albanian law requires – if the information is already public and online.

5

LIMITATIONS

The right of access to information, like almost all rights, is not absolute and its exercise may be subject to certain limitations.

In line with other rights in the European Convention on Human Rights, and the jurisprudence of the European Court of Human Rights, in particular on Article 10 on freedom of expression, these limitations must meet a test, which is that they must pursue a legitimate interest, be prescribed by law, and be necessary in a democratic society.

When it comes to which are the legitimate interests, the Tromsø Convention contains a list of eleven (11) limitations to the right of access to information. There is an additional possible limitation for Royal Families and Heads of State.

The list was developed after careful consideration and debate between representatives of Council of Europe member states during the drafting of the Convention and there was strong agreement on this closed list. It was agreed that these are all interests which it is legitimate for a democratic society to protect.

> **Article 3 – Possible limitations to access to official documents**
>
> 2. *Each 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:*
>
> *a. national security, defence and international relations;*
>
> *b. public safety;*
>
> *c. the prevention, investigation and prosecution of criminal activities;*
>
> *d. disciplinary investigations;*
>
> *e. inspection, control and supervision by public authorities;*
>
> *f. privacy and other legitimate private interests;*
>
> *g. commercial and other economic interests;*
>
> *h. the economic, monetary and exchange rate policies of the State;*
>
> *i. the equality of parties in court proceedings and the effective administration of justice;*
>
> *j. environment; or*
>
> *k. the deliberations within or between public authorities concerning the examination of a matter*
>
> *Concerned States may, at the time of signature or when depositing their instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that communication with the reigning Family and its Household or the Head of State shall also be included among the possible limitations.*

5.1 The Harm and Public Interest Tests

It is not acceptable, however, for any and every kind of information relating to a particular exception to be withheld from public access. For instance, not all information about the police can be claimed as an exception on the grounds of investigation and prosecution of criminal activities, as it is important that the public knows how the police is operating and how well it is doing its work, ensuring that money spent on the police force is not subject to corruption, and that the rights of citizens are being respected.

Hence there needs to be a test to decide which information to withhold from the public and which can be released for all to know.

The Tromsø Convention establishes this test in Article 3.2, requiring that the application of each and every limitation be subject to both a harm and a public interest test:

> 3. *Access to information contained in an official document may be refused if its disclosure would or would be likely to harm any of the interests mentioned in paragraph 1, unless there is an overriding public interest in disclosure.*

This means that every time a public body is considering refusing access to certain information, it first considers whether to release the information would harm one of the protected interests and then, even if such harm would arise, whether there is a greater public interest in disclosing the information. This tests is mandatory for all the exceptions and the decision on whether to refuse access or to disclose the information can only be made after the application of the test.

In the case of the police example, if the police are actively hunting a suspected criminal, it would be reasonable not to disclose the full information as that could harm their investigation. On the other hand, once the suspect has been apprehended and charged, there is no longer a need for secrecy, as no damage would be caused by publicising the details, and, furthermore, there is a clear public interest in knowing about the case and criminal charges that have been brought.

To give another example, if a restaurant has repeatedly failed hygiene inspections, it could indeed harm the commercial interests of the restaurant if this were to be made public. On the other hand, there is a clear public interest – namely protecting public health – in disclosing the fact that there are concerns about the hygiene standards of the restaurant. In many countries, such as France and the UK, there are government websites with the results of all restaurant inspections and in the UK it is mandatory to display these on the door to the restaurant or other food establishment.[3]

To give another example of information which could be withheld, if the request were for the secret codes used in encrypted military communication, the publication of this data could cause genuine harm, and there is not such an obvious public interest in making this data available to the population as a whole, so it would be legitimate to refuse access.

[3] For results of restaurant inspections, see Alim'Confiance in France https://www.alim-confiance.gouv.fr/ or the Food Ratings website https://ratings.food.gov.uk/ in the UK.

When drafting an access to information law, it is important to aim for the greatest possible clarity in phrasing and in structure because in this way it is more likely that the law will be correctly interpreted and implemented by public officials.

It is therefore recommended that clear language be included regarding the conduct of these both the harm and public interest tests. The Albanian law emphasises in Article 17.2 that the right to information "*may be restricted as long as it is indispensable, proportional and where making the information available would cause an evident and grave harm …".*

Another good example of the harm and public interest tests is the Croatian law, which states:

> ***Article 16. Proportionality and public interest test***
>
> *(1) The public authority responsible for handling the request for access to information referred to in Article 15, paragraph 2, items 2, 3, 4, 5, 6 and 7 and paragraph 3 of this Act shall, before decision-making, conduct a proportionality and public interest test.*
>
> *The owner of the information referred to in Article 15, paragraph 2, item 1 of this Act, according to the previously obtained opinion of the Office of the National Security Council, is obliged to conduct a proportionality and public interest test before making a decision.*
>
> *(2) When conducting the proportionality and public interest test, the public authority shall determine whether access to information may be restricted in order to protect any of the protected interests referred to in Article15, paragraphs 2 and 3 of this Act. in each case, that interest was seriously harmed and whether the need to protect the right to a restriction or the public interest prevailed.*
>
> *If the public interest outweighs the harm to the protected interests, the information will be made available.*

However, it is not necessary for the language to be so detailed to be effective. One of the best examples of the application of these tests is found in Spanish law, which states:

> *Article 14.2. The application of limits shall be justified by and proportional to the level of protection required, and shall take into account the circumstances of each specific case, especially the confluence of a higher public or private interest justifying access.*

The Explanatory Report establishes the need to carry out these tests on a case-by-case basis, in addition to the prevalence of public interest over harm, when it states, *"If public access to a document might cause harm to one of these interests, the document should still be released if the public interest in having access to the document overrides the protected interest"*.

All this reinforces the idea that, although the right of access to information is not absolute, the application of limits cannot be automatic and, in addition, the use of these limitations must in itself be limited.

The Explanatory Report does also note that the balancing can be done by the legislator, but that this option should be used very judiciously and it is not recommended as there might always be a circumstance in which there is an overriding public interest. As the Report states

"Absolute statutory exceptions should be kept to a minimum." An example of this could be a law which states that the encryption code of the military shall always be classified as top secret. This means that there is not need even to consider a request for application for this information as the answer would be clear. That said, in many countries, even classified information must have the classification re-evaluated once a request is received. See Section 5.7 below.

To give an example of a mandatory application of the harm and public interest tests in favour of transparency, one can look at the many laws around Europe which require proactive transparency. For instance, all laws requiring that public procurement contracts be made public, or the asset declarations of senior officials, are balancing questions such as commercial confidentiality or privacy with the public interest in transparency.

5.2 Scope of exceptions

Not all countries have in their laws every exception permitted by the Tromsø Convention, as can be seen in Table F below.

Table F: Tromsø Exceptions To Access To Information

TROMSØ CONVENTION EXCEPTION	COUNTRIES WITH BOTH HARM AND PUBLIC INTEREST TEST	COUNTRIES WITH ONLY HARM TEST	COUNTRIES WITH ONLY PUBLIC INTEREST TEST
a. national security, defence and international relations;	Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Moldova, Montenegro Sweden, Ukraine	Hungary	Iceland, Norway
b. public safety;	Armenia, Bosnia and Herzegovina, Estonia, Finland, Montenegro, Ukraine		Hungary, Moldova, Norway
c. the prevention, investigation and prosecution of criminal activities;	Albania, Armenia, BiH, Estonia, Finland, Montenegro, Moldova, Sweden Ukraine	Iceland	Hungary, Norway
d. disciplinary investigations;	Albania, Armenia, Estonia, Montenegro, Ukraine	Iceland	
e. inspection, control and supervision by public authorities;	Albania, Armenia, Estonia, Finland, Montenegro, Sweden, Ukraine	Iceland	Norway
f. privacy and other legitimate private interests;	Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Montenegro, Moldova, Ukraine	Iceland	Hungary
g. commercial and other economic interests;	Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Hungary, Montenegro, Moldova, Sweden, Ukraine	Iceland	

h. the economic, monetary and exchange rate policies of the State;	Albania, Armenia, Bosnia and Herzegovina, Estonia, Finland, Montenegro, Sweden, Ukraine	Iceland	Hungary, Norway
i. the equality of parties in court proceedings and the effective administration of justice;	Albania, Armenia, BiH, Estonia, Finland, Montenegro, Ukraine		Hungary, Norway
j. environment	Armenia, Estonia, Finland, Montenegro, Sweden, Ukraine	Iceland	Hungary, Norway
k. the deliberations within or between public authorities concerning the examination of a matter	Albania, Armenia, Bosnia and Herzegovina, Finland, Ukraine	Iceland	Estonia, Norway
Note that Armenia allows for classification and then applies the public interest test, but this equates to legislator mandated harm test. ***Note also that Lithuania only lists a few exceptions, with no harm or public interest test, so does not appear in this table.***			

Sweden has a relatively limited list of exceptions in the main access to information law, although it does have other legislation which classifies documents, but all of these are then subject to harm and public interest tests.

Bosnia and Herzegovina, Iceland, Lithuania, and Norway are also older laws with fewer exceptions.

That said, there is nothing inherently bad about having the full list of exceptions permitted by the Tromsø Convention, and more recent laws such as those of Albania and Montenegro, as well as Spain which has signed but is still to ratify the Convention, are more complete in their listing of the exceptions.

The Spanish law, which is the youngest of those countries which have signed or ratified Tromsø, having been adopted on 9 December 2013, is directly modelled on the Convention:

> ***Article 14. Limits to right of access.***
>
> *Right of access may be limited when access to certain information may compromise:*
>
> *a) National security.*
>
> *b) Defence.*
>
> *c) Foreign relations.*
>
> *d) Public safety.*
>
> *e) The prevention or investigation of, or punishment for, illicit criminal, administrative or disciplinary acts.*
>
> *f) The equality of the parties in court proceedings and effective judicial protection.*

g) The administrative responsibilities of oversight, inspection and control.

h) Economic and commercial interests.

i) Economic and monetary policy.

j) Professional secrecy and intellectual and industrial property.

k) Safeguarding confidentiality or secrecy required in decision-making processes.

l) Environmental protection.

2. The application of limits shall be justified by and proportional to the level of protection required, and shall take into account the circumstances of each specific case, especially the confluence of a higher public or private interest justifying access.

The Albanian law is also particularly clear, with the main exceptions to be found in Article 17.2, which states:

2. The right to information may be restricted as long as it is indispensable, proportional and where making the information available would cause an evident and grave harm to the following interests:

a) national security, referring to the definition made by the legislation on classified information;

b) prevention, investigation and prosecution of criminal offences;

c) normal flow of the administrative review in the context of disciplinary proceedings;

ç) normal flow of inspection and auditing procedures for the public sector bodies;

d) working out the monetary and fiscal policies of the state;

dh) parity of parties in judicial proceedings and normal flow of judicial proceedings;

e) preliminary consultation or discussion internally or among the public sector bodies for developing public policies;

ë) maintaining the international and inter-governmental relations

Followed by a clear public interest test which states that "Notwithstanding the provisions of the first paragraph of point 2 of this Article, the sought information shall not be rejected as long as a higher public interests exists in making it available."

5.3 Structure of Exceptions in Countries with Older Laws

The Tromsø Convention provides a very clear structure for the exceptions and the harm and public interest tests. It has to be recognised that many of the countries which were the first to sign Tromsø Convention are countries with some of the world's older access to information laws and when it comes to the way in which exceptions are listed and the way in which the harm and the public interest tests are formulated they are not as clear and it requires a very

careful reading of the law and a consultation with national experts as to how the laws are applied in practice.

In particular, both the Finnish and the Swedish laws start from a presumption that information can be obtained, with only limited exceptions. This reduces the need for a public interest test because this is the starting presumption. They are also much more specific about precisely which documents can be exempted.

For instance the Finnish law clearly states in Section 1.1 that "Official documents shall be in the public domain, unless specifically provided otherwise in this Act or another Act."

This is reinforced by Section 3 which states:

> *The objectives of the right of access and the duties of the authorities provided in this Act are to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.*

The Finnish law then lists in Article some 32 exceptions, nearly all of which have a harm test, with the remainder being linked to personal data protection and protection of sensitive data or the names of persons in specific contexts, for instance an application for a decision on an anonymous witness in a criminal case.

The 32 exceptions are very specific, such as that on international relations, Section 17.2, which states:

> *concerning the relationship of Finland with a foreign state or an international organisation; the documents concerning a matter pending before an international court of law, an international investigative body or some other international institution; as well as the documents concerning the relationship of the Republic of Finland, Finnish citizens, Finnish residents or corporations operating in Finland with the authorities, persons or corporations in a foreign state,* ***if access to such documents could damage or compromise Finland's international relations or its ability to participate in international co-operation****. [emphasis added].*

When taking a decision on granting access, consideration must be given to both Sections 1 and 3 (as cited above) so as to ensure that "access to information on the activities of the authority is not unduly or unlawfully restricted, nor more restricted than is necessary for the protection of the interests of the person protected."

The Swedish law on Freedom of the Press, dating back originally to 1766, although the latest version is from 2009, similarly makes clear in Chapter 2, Article 1 that:

> *Every Swedish citizen shall be entitled to have free access to official documents, in order to encourage the free exchange of opinion and the availability of comprehensive information."*

This is followed by a closed list of grounds for restrictions, all of which must be subject to a harm test:

> *The right of access to official documents may be restricted only if restriction is necessary with regard to:*
>
> *1. the security of the Realm or its relations with another state or an international organisation;*
>
> *2. the central fiscal, monetary or currency policy of the Realm;*
>
> *3. the inspection, control or other supervisory activities of a public authority;*
>
> *4. the interests of preventing or prosecuting crime;*
>
> *5. the economic interests of the public institutions;*
>
> *6. the protection of the personal or economic circumstances of individuals; or*
>
> *7. the preservation of animal or plant species.*

Once again there is no explicit public interest test, but it is understood that every decision must weigh these exceptions, with their harm test, against the public interest in the transparency of all activities of the public administration.

Furthermore, the Freedom of the Press Act goes on to state, in Chapter 2, Article 2, paragraph three, that within this framework, there shall be specific rules on restrictions:

> *Any restriction of the right of access to official documents shall be scrupulously specified in a provision of a special act of law, or, if deemed more appropriate in a particular case, in another act of law to which the special act refers. With authority in such a provision, the Government may however issue more detailed provisions for its application in an ordinance.*

The current situation in Sweden is that, whenever any information is restricted or classified under any other law, it can be requested, and the harm and public interest tests will be applied on a case-by-case basis.

In countries such as Sweden and Finland where there is a long tradition of open government, with the rules on access to information having been integrated into training programmes, and where there has been time to build up a strong body of best practices, Ombudsman decisions, and court jurisprudence. Hence, the well-developed culture of transparency among public officials makes the complexity of the laws in those countries less of an issue.

Furthermore, in a country in which there is a strong presumption of openness, marking documents as classified or internal, but then subjecting them to a public interest test, is not a problem. In, on the other hand, countries which do not have such a culture of openness, there is a risk that unless the laws are clearly framed, public officials will be reluctant to release information that in fact should be in the public domain because it's been initially marked for restricted circulation.

In Iceland, the law only establishes a harm test, but it is a test based on the public interest in restricting access to the information so it contains elements of the public interest test in the consideration. Furthermore, Article 11 permits public authorities to grant wider access provided that is not explicitly prohibited by another law, given them a margin of flexibility when weighing the public interest in not releasing the information.

The Norwegian law has an extensive and very specific list of documents which can be classified as internal, noting where this is to protect certain interests and stating time limits, such as until a decision has been taking. It balances this with a list of information which cannot be classified, such as documents from or to any municipal or county control committee, audit body or appeals board.

Although this system is a little complex and not recommended, on the positive side, the Norwegian law then has a public interest test which applies to all documents, in Section 11 on enhanced access to information, which states that:

> *The administrative agency should allow access if the interest of public access outweighs the need for exemption.*

5.4 Royal Families and Heads of State

When it comes to the special protections for Royal Families and for Heads of State, only Norway has availed itself of this, with a specific protection for the Royal Family, given that Section 17 of its law establishes exemptions in respect of certain documents relating to the Royal Court, notably relating to upcoming speeches and to travel itineraries. In notifying the Reservation, Norway declared that communication with the reigning Family and its Household shall also be included among the possible limitations. It should be noted that this is only a possible limitation, giving Norway the option to invoke it or not.

Finland, which does not have a Royal Family, but does have a tradition of a slightly different access to information procedure for the President, declared that the review procedure requirements of Article 8 of the Convention do not apply to the President of the Republic, although requests can be submitted.

Aside from this no country has removed the Royal Family of the Head of State from the scope of the Tromsø Convention, not even Sweden, which has a royal family but also a strong tradition of openness, and nor has Spain which intends to ratify during 2022.

5.5 Mandatory Public Interest Test

A number of laws go even further than the general language of a public interest test and identify specific cases when the public interest shall be deemed to exist. For instance, if the

information in a document is necessary for the protection of public health, or if it would reveal abuses of power such as corruption or violations of human rights.

Such "mandatory" or "hard" public interest overrides are very valuable as they help public officials to evaluate the public interest test and provide a certain clarity.

Montenegro has such a test:

> ***Article 17. Prevailing public interest***
>
> *A prevailing public interest in disclosing information or a portion thereof shall exist when the requested information contains data which reasonably indicates to:*
>
> *1) corruption, non-compliance with regulations, unlawful use of public funds or abuse of authority in the exercise of public office;*
>
> *2) suspicion that a criminal offense has been committed or there is a reason for revoking the court decision;*
>
> *3) unlawfully obtaining or spending funds from public revenues;*
>
> *4) threat to public security;*
>
> *5) threat to life;*
>
> *6) threat to public health;*
>
> *7) threat to the environment.*
>
> *A public authority body shall provide access to information or part of the information referred to in Article 14 of this Law when there is a prevailing public interest in its disclosure.*

Armenia also has such a test in Article 8.3 which states that:

> *Information request cannot be declined, if:*
>
> *a. it concerns urgent cases threatening public security and health, as well as natural disasters (including officially forecasted ones) and their aftermaths;*
>
> *b. it presents the overall economic situation of the Republic of Armenia, as well as the real situation in the spheres of nature and environment protection, health, education, agriculture, trade and culture;*
>
> *c. if to decline the information request will have a negative influence on the implementation of state programs of the Republic of Armenia directed to socio-economic, scientific, spiritual and cultural development.*

Bosnia and Herzegovina has language which provides guidance on how to conduct the public interest test:

> *Article 9.2 In determining whether disclosure is justified in the public interest, a competent authority shall have regard to considerations such as but not limited to, any failure to comply with a legal obligation, the existence of any offence, miscarriage of justice, abuse of authority or neglect in the performance of an official duty, unauthorized use of public funds, or danger to the health or safety of an individual, the public or the environment.*

It should be stressed however, that while these criteria – either as guidance or as a firm requirement – are valuable, they should not substitute for a proper case-by-case assessment of a public interest test. For instance, a particular document might be required by a civil society organisation so that it can participate in a particular debate – for instance a report on progress towards the SDGs on education or on equality. This is not the dramatic case of there being a national emergency or serious corruption or grave violations of human rights, but this is, nevertheless, important in a democratic society.

Indeed, various cases at the level of the Court of Justice of the European Union taken by organisations such as Client Earth or Access Info Europe address precisely this kind of circumstance, where information is needed to participate in decision making.[4]

Similarly, the European Court of Human Rights has made clear that the right of access to information is particularly strong when journalists or civil society organisations need it to play there "watchdog role", but this does not mean that wrong has to have occurred, merely that oversight is beneficial, including in preventing problems.

5.6 Privacy, Commercial Confidentiality and Consent

There will be multiple instances in which the information that might be released in response to a request includes data affecting third parties, such as the names, job titles or other information about private individuals. Similarly, the requested documents might contain information about private businesses, including information which could affect their commercial confidentiality.

Ultimately it is for each public body to decide on whether or not to release the information but given that third parties, be they legal or natural persons, might be affected by the decision, many laws or their implementing regulations and other guidance specify the procedures for taking decisions in such cases.

These rules often require consulting with the third party to gather evidence on any specific considerations that might affect the decision about whether or not to release the requested information. For instance, if the documents requested contain information about a company, there will be a time allocated for a consultation with that company to verify whether or not its commercial confidentiality would indeed be affected by the release of the information. The fact that a company claims that there would be a prejudice is not sufficient to veto the release of the documents: the public body also has to carry out the public interest test, and it is for the public body to take the final decision on disclosure of the requested information.

It may well be that there is already a precedent established in the country. For instance, if an independent oversight body or court jurisprudence has already determined that a specific

[4] Access Info Europe v Council of the European Union. C-280/11 P Judgment of 17 October 2013 https://curia.europa.eu/juris/document/document.jsf?text=&docid=143182&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=12284841

kind of information should or should not be released, then a public body will be guided by this in making its decision.

When it comes to data about private persons, in the European region, then the provisions of the EU's General Data Protection Regulation or similar national regulations will apply. These rules make clear that when it comes to sensitive personal data, such as the health status of a person, this data should not be released. On the other hand, data about a person may be released in compliance with legal obligations and where the person concerned has provided his or her consent to the specific data processing to be carried out.

The legislator may, furthermore, decide that certain personal data can and should be released on a regular basis when this is in the public interest. For instance, if there is to be publicity of assets declarations of senior public officials, or of the names of lobbyists entered in the lobby register.

Sometimes the access to information law will help to make this clear. For instance, a good practice is the case of Spain, where the law explicitly requires that access to information shall be granted if it is "mere identification data regarding the organization, operations, or public activities of the body" (Article 15.2) or if consent has been provided by the person concerned, (Article 15.1). This means that if a person interacted with a public body such as by attending a meeting with public officials regarding an upcoming decision, or by being a lobbyist or a representative of a civil society organisation making a submission to a public consultation, or being a member of an expert advisory group, then this is part of the work of the public body and the person's name will become known. In other instances, when the public body holds information which contains the name of the person, consent can either be collected at the moment the name was collected – for instance all those going to an event sign up to the event and agree upon registration that their names can be made public – or by contacting the person later to ask for consent to release his or her name.

An example of how this works in practice is that the names of the civil society members of the working group on transparency under Spain's membership of the Open Government Partnership are public, as this is deemed to be part of participating in public activities. On the other hand, when it comes to public consultations where members of the public can submit their ideas on a particular project, it is usual to ask participants if they consent to the publication of their names along with the submission.

The Albanian law similarly, in Article 17, states that where consent has been provided either by the person(s) whose name is contained in a document or by a company whose , then there may be access to information that pertains to a persons privacy, to commercial secrets, to copyright and patents. Another criterion is if the holder of the rights is a public body, in which case access also may be granted.

The Finnish Law, similarly in Section 26.1 establishes that:

> *An authority may provide access to a secret official document, if:*
>
> *(1) there is a specific provision on such access or on the right of such access in an Act; or*
>
> *(2) the person whose interests are protected by the secrecy provision consents to the access.*

This examination of the laws of the countries which have ratified the Tromsø Convention points to the inclusion of such provisions as a good practice.

5.7 Classified Information

Every country will have systems for classifying information. In Europe, the rules typically range from the NATO standards for "Top Secret" information to which very few people indeed should have access, to looser categories such as "internal document" or "limited circulation" with which a large number of public officials are empowered to label documents.

Given the range of types of classification, it is important that access to information laws make clear the procedures for when a request comes in that might include such documents in its scope. There are a number of ways this can be done, and the Tromsø Convention adopts an approach that has developed over time in the Nordic countries, which have the oldest access to information laws, namely that, whatever the actual classification of a document, upon receiving a request, the possibility of releasing that information must be considered, and the harm and public interest tests must be applied.

The way this is reflected in Tromsø is through the definition of information, which makes clear that all information held by a public body must fall within the scope of the right of access to information:

> *Article 1.2.b: "official documents" means all information recorded in any form, drawn up or received and held by public authorities.*

As already noted above, in countries such as Sweden, where there is a request for information which is considered to be an official secret, it will always be subject to a harm and public interest test.

Another example is that of Armenia, which permits information to be classified but then has a version of the public interest test which can be applied whenever information is requested. The Armenian law does not represent a good model, and indeed it is questionable if it is fully in line with the Tromsø Convention, but it just about fulfils the core criteria. A more detailed analysis of this is likely to be provided by the Group of Experts which oversees the Convention, a group which started in operating in late 2022.

In the Swedish Secrecy Act, it states the possibility of requesting this type of information and, in turn, the possibility of appealing in case.

> *If a person requests access to a document that is marked as secret, the question of disclosing the document must be examined in the normal manner. The fact that a document is marked as secret does not, therefore, release the authority from the obligation to conduct such an examination, but merely serves as a warning signal.*

A particularly strong example is that of the Albanian law, which establishes that the harm and public interest tests shall always apply:

> *Art.17.5. The right to information shall not be rejected automatically as long as the sought information is found at documents classified "state secret". The public sector body having received the application for information shall, under these circumstances, immediately start the procedure revising the classification … The decision on fulfilling the application for information or not shall always be taken and grounded based on the criteria contained in this Article.*

A good practice is for the legislator to prohibit the classification of certain types of information. This type of language allows for greater clarity for officials at the time of receiving a request for information. Such is the case of Estonia, where the law states:

> ***Article 36. Prohibition on classification of information as internal***
>
> *(1) A holder of information who is a state or local government agency or a legal person in public law shall not classify the following as information intended for internal use:*
>
> *1) results of public opinion polls;*
>
> *2) generalised statistical surveys;*
>
> *3) economic and social forecasts;*
>
> *4) notices concerning the state of the environment and emissions;*
>
> *5) reports on the work or the work-related success of the holder of information and information on the quality of the performance of duties and on managerial errors;*
>
> *6) information which damages the reputation of a state or local government official, a legal person in private law performing public duties or a natural person, except special categories of personal data or personal data whose disclosure would breach the inviolability of the private life of the data subject;*
>
> *7) information on the quality of goods and services arising from protection of the interests of consumers;*
>
> *8) results of research or analyses conducted by the state or local governments or ordered thereby, unless disclosure of such information would endanger national defence or national security;*
>
> *9) documents concerning the use of budgetary funds of the state, local governments or legal persons in public law and wages paid to persons employed under employment contracts and other remuneration and compensation paid from the budget;*

10) information concerning the proprietary obligations of the holder of information;

11) information on the property of the holder of information;

12) precepts which have entered into force and legislation which is issued by way of state supervision, administrative supervision or supervisory control or under disciplinary procedure and information relating to punishments in force.

This approach follows the Nordic model of being very specific about which information can and cannot be classified. There may be some difficulty in including very long lists in an access to information law, depending on the legal drafting tradition in a country. An alternative is to include this in an implementing act. It is, however, an approach worth examining.

5.8 Time Limits beyond which exception no longer applies

The Tromsø Convention encourages States Parties to ensure that when there is a refusal to provide information based on a limitation, this in itself is limited in time:

> *Article 3.3: The Parties shall consider setting time limits beyond which the limitations mentioned in paragraph 1 would no longer apply.*

An example was given above of restaurant inspections. If a request were made before the hygiene inspection took place, then it would be correct – and would contribute to protecting public health – to deny the list of restaurants to be inspected. After the inspection, however, the information should be disclosed.

An example of this kind of provision can be found in the EU's Access to Documents Regulation 1049/2001, in Article 4.7 which establishes that "The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document."

Among the countries which have ratified the Tromsø Convention, there are some which include time limits on the limitations. For instance, the Icelandic law:

> ***Article 12: Cessation of limitations to the right to information***
>
> *If no other limitations apply according to this Act, access shall be granted to the following:*
>
> 1. *material covered by Sub-paragraphs 1-3 and 5 of Article 6, once eight years have passed since this material came into being,*
> 2. *material covered by Sub-paragraph 5 of Article 10, as soon as the arrangements or examinations are completely finished,*
> 3. *material covered by Sub-paragraph 6 of Article 10, when there is no longer any reason to expect that communicating the information might have a damaging effect on the environment.*
>
> *30 years have passed since material came into being, the cessation of other limitations shall be subject to the provisions of the Act on the National Archives of Iceland, cf. the fourth paragraph of Article 4.*

6

REVIEW PROCEDURE AND OVERSIGHT BODIES

An inherent part of any right, including the right of access to information, is person who is exercising that right has access to an appeal procedure, to review of an administrative decision, and access to justice in the case of an alleged violation of the right.

To this end, the Tromsø Convention in Article 8 establishes a review procedure, either before the court or before an impartial and independent body must be established. Furthermore, this procedure should be expeditious and inexpensive.

> *1. An applicant whose request for an official document has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law.*
>
> *2. An applicant shall always have access to an expeditious and inexpensive review procedure, involving either reconsideration by a public authority or review in accordance with paragraph 1.*

Among the countries which have ratified the Tromsø Convention to date, and across Europe more broadly, there are different models for the appeals procedures for access to information requests. These are internal appeals and/or independent oversight bodies and/or the courts.

Fewer than half of Council of Europe countries (21 out of 46) offer internal appeals, with the preferred solution in most countries being that a requester goes straight to an external oversight body or to the administrative court.

A fraction under half of the Council of Europe countries (22 out of 46) offer an appeal to some kind of Information Commissioner (be it a stand-alone Commissioner, a Council, a Commission or a combined body with the Data Protection Agency). A further 12 countries provide recourse to an Ombudsman figure (a parliamentary ombudsman, a mediator with the administration, or a human rights defender of some kind), although it is noted that these bodies usually do not have the power to issue binding decisions. The remaining 12 countries only offer a court appeal.

All countries do offer a court appeal as an option, either as a direct recourse or after another appeal, such as to an Ombudsman or Information Commissioner. It is, of course, a core rule of law principle that the courts are always an appeal to challenge a decision or omission by a public body – in this case a refusal to provide information, administrative silence, a failure to provide full information or to publish it proactively, or other breaches of the access to information law.

Given, however, the need for lawyers and other court costs, and the slowness of many administrative courts, they do not sufficiently meet the Tromsø Convention requirement to ensure an "expeditious" (rapid) and "inexpensive" route for requesters.

It is perhaps for this reason that of the countries which have ratified the Tromsø Convention, all of them have some kind of independent body in addition to court appeals:

INFORMATION COMMISSIONER OR SIMILAR	OMBUDSMAN / PUBLIC DEFENDER OR SIMILAR
Albania, Estonia, Hungary, Island, Montenegro, Slovenia	Armenia, Bosnia and Herzegovina, Finland, Lithuania, Norway, Republic of Moldova, Sweden, Ukraine.

» **Internal Appeals**

Some countries offer and/or require an internal administrative appeal. Usually this will be to a superior department or person in the same public body that denied the request or to another public body which has oversight of the first body. This will be determined by the administrative law of each country.

However, of the countries which have ratified or signed the Tromsø Convention, most do not require an internal appeal, with the preferred solution in many countries is that a requester goes straight to an external oversight body or to the administrative court. Half of the countries which have ratified Tromsø (six out of twelve) require an internal appeal: Bosnia and Herzegovina, Lithuania, Montenegro, Norway, the Republic of Moldova and Ukraine, while in Hungary is it voluntary for the requester to ask for a reconsideration of a response.

Across the Council of Europe under half of countries (21 out of 46) providing for an internal appeal, sometimes optional, and more than half (25) permitting recourse directly to an external appeal.

It is increasingly recognised as good practice that internal appeals are redundant with access to information as the initial decision is often taken relatively high up in the body and so an internal appeal is unlikely to result in a change of position. Given that the right of access to information is one that is time-contingent, being able to turn immediately to an external review is preferable.

» **Oversight Bodies**:

Whether or not there is an internal appeal, an increasingly common next step is the possibility of an appeal to an independent oversight body. The preferred model that has emerged over time is that of an Information Commissioner (one person) or Commission (multiple persons) which has a mandate that specifically relates to the access to information law.

An alternative, still widely used in Europe, particularly in countries with older access to information law, is the possibility of appealing to an Ombudsman, usually one with broad overview of administrative processes and/or human rights.[5]

Globally, the trend is either an information commissioner or the courts, with younger access to information laws tending to have the specialised oversight body. In other regions of the world, such as Latin America, there is a preference for an Information Commission or Commissioner, with leading examples being Argentina, Chile, and Mexico, with it's very strong and well-resourced National Institute for Access to Information (INAI). There is a global network of information commissioners, the Inter-

[5] It should be noted that the term "Ombudsman" comes from Swedish and means "legal representative". The term "man" in Swedish is a suffix that is not not always gender specific. Hence many modern Ombudsman continue to use the term even if the post is filled by a woman. For instance, the European Ombudsman is currently former Irish Ombudsman Emily O'Reilly, who has used the original format in both positions, whereas in French, Spanish and other languages, where a different term is used, it is put in the feminine version for her, such as "Mediatrice" or "Defensora". For the purposes of this report, the term "Ombudsman" or other national terminology will be used.

national Conference of Information Commissioners, which groups all of these bodies worldwide.[6]

In the countries that have ratified Tromsø to date, there is a mix, with a slight leaning to the Ombudsman model given that this is what is preferred in Nordic countries. The drawback of the Ombudsman model is that its decisions are not binding and so cannot be either enforced or challenged in the courts. In countries where the Ombudsman's office is well-established, such as the Nordic countries, and where decisions are generally complied with, it is a reasonable way of meeting the Tromsø Convention standard. In other countries it is not a recommended model, and the example of Bosnia and Herzegovina, where users have found the Ombudsman route to be often ineffective, is an example of this.

Across Europe, of countries which have not yet ratified Tromsø, the larger countries and/or those with more recent laws – including Croatia, France, Germany, Italy, Serbia, Slovenia, Spain, Switzerland, and the UK – all have the Information Commissioner model. This is the recommended model, providing that these independent oversight bodies have a set of clearly defined functions. The primary functions which such bodies have, including in countries which have ratified the Tromsø Convention, are set out in the remainder of this section.

In quite a few countries the offices of the Information Commissioner are combined with that for data protection, including those in Albania, Estonia, and Montenegro, as well as, for instance, in Croatia, Germany, Slovenia and the UK. With the combined model, it is important to ensure that the body has a strong mandate to promote and defend the right of access to information and that this is not secondary to data protection duties. Indeed, all the bodies mentioned with the exception of Estonia have names which make clear their access to information role.

» **Court Appeals**:

Whether or not there is an independent oversight body, every country in Europe and indeed globally which has an access to information law, offers recourse to the courts. This may either be as a direct alternative to the oversight body or it may be mandatory to first turn to the oversight body and then to the courts. This is signalled with "then" or "or" in Table G.

It should be noted that it is not a Tromsø Convention requirement that there be independent oversight body because the courts are given as an option, but the Convention does require that there be an "expeditious" (rapid) and "inexpensive" route for requesters.

In many countries, the courts are neither rapid not low cost: even simple administrative court cases can take months or even years, and often it is mandatory to have a lawyer, which can be a considerable expense for the average person, plus there are sometimes court fees in addition.

[6] The International Conference of Information Commissioners, ICIC, https://www.informationcommissioners.org/

In conclusion, and as a best practice recommendations, in line with the current trends which have emerged since the drafting of the Tromsø Convention (2006 to 2008), it is highly recommended that every country establish an independent oversight body with a specific mandate for the access to information law.

It is also noted that empirical data gathered by UNESCO indicates that the implementation of access to information laws is better in countries which have an independent oversight body.[7]

Table G: Appeal Procedures

COUNTRY	APPEAL PROCEDURE
Albania	Appeal direct to the Commissioner for the Right to Information and Protection of Personal Data.
Armenia	Courts or the Human Rights Defender.
Bosnia and Herzegovina	Internal appeal followed by appeal to The Ombudsman for Bosnia and Herzegovina or the courts
Estonia	Data Protection Inspectorate
Finland	Courts or Parliamentary Ombudsman.
Hungary	Internal appeal followed by appeal to the National Authority for Data Protection and Freedom of information.
Iceland	Information Committee.
Lithuania	Internal appeal followed by appeal to the Administrative Court
Montenegro	Internal appeal followed by appeal to the Agency for Personal Data Protection and Free Access to Information
Norway	Internal appeal followed by appeal to the Ombudsman
Republic of Moldova	Internal appeal followed by appeal to the Administrative Court or to the Ombudsman *
Sweden	Appeal direct to the Administrative Court on a specific challenge or Ombudsman on General handling of the request.
Ukraine	Internal appeal then courts and/or Appeal to the Commissioner for Human Rights *

** It is noted that both Moldova and Ukraine are currently reviewing their laws, as part of projects with the Council of Europe and are considering establishing Information Commissioners.*

6.1 Court Appeals Key elements

As already noted above all of the countries which have ratified the Tromsø Convention provide for access to court appeals, being the administrative courts. In all of these countries after either the initial administrative decision (or administrative silence), and after an internal

[7] See UNESCO 2022 Survey on Public Access to Information, https://www.unesco.org/en/articles/unesco-launches-2022-survey-public-access-information?hub=751

appeal where required, requesters always have the option of an administrative court appeal, and it is never mandatory to go to the information commissioner, ombudsman or similar body, although all the countries which have ratified do offer this option.

This is an important option, in particular in countries where the decisions of the ombudsman, human rights defender, or similar, are not binding.

There are, however, some key considerations with respect to court appeals which should be evaluated in the light of the Tromsø Convention requirement that there be inexpensive and expeditious appeal processes. These are examined below in the section on Court Fees and on Timeframes. Two further considerations examined below are the grounds for appeal, along with the burden of proof, and the nature of the administrative decision.

As a general observation, with one or two rare exceptions, the laws on court appeals in each country are governed by the legal framework for the administrative court proceedings, typically a Code of Administrative Court Procedure. This means that there are no specific considerations for access to information cases. For instance, no reduction of fees and no requirements for expedited decisions in spite of the importance of information obtained from public bodies in debate on matters of public interest.

As can be seen in other sections of this report, and in the chart just above, all countries which have to date ratified the Tromsø Convention offer at least one free-of-charge and expedited appeals process. This is generally not the court process (although there are free and expedited processes in a couple of countries) but rather the information commissioner or ombudsman model, which is an addition to administrative court procedures which tend to be more costly and lengthy.

Good practices identified in this study as they relate to administrative court procedures include ensuring very broad grounds for appeal and requiring that the burden of proof in an appeal that lies with the public authority. The courts should also be empowered to issue binding decisions which include not only delivery of the information requested within a short space of time (should they decide in favour of the requester) but also other remedial measures as necessary, such as improved internal processes, better training for public officials on limited application of the exceptions, and speedier responses with no administrative silence.

6.1.1 Fees

In this survey of the countries which have ratified the Tromsø Convention, a range of charges for administrative court appeals was identified.

Only Hungary and Sweden have no fees for administrative court appeals. In the case of Hungary this is specific to the access to information law, which requires that court proceedings in connection with access to data of public interest are free of any court procedural fees (Section 57 of *Act XCIII of 1990 on fees)* whereas in Sweden this is a general provision.

For other countries, the following court fees were identified:

- **Estonia:** €20 administrative court, €50 Supreme Court
- **Finland:** €270 administrative court, €530 Supreme Court

- **Iceland:** District courts upwards of €100 (15.000 ISK)
- **Lithuania:** €30 (LTL 100)
- **Ukraine:** a court fee €30 and an appeal fee €60

What can be seen here is a diversity in fees, with the difference being accounted for, in part, by the different economic contexts in each country.

Another cost, which can vary hugely among the countries, is that of legal representation. In many countries around the Council of Europe region, there exist both specialist access to information civil society organisations and also pro bono lawyers willing to help with some particularly important cases. Nevertheless, only a significant minority of the cases involving refusals to access to information can benefit from such pro bono legal services. Indeed, in many cases requesters, be they citizens, or even civil society organisations, journalists, and small businesses, do not appeal refusals because they cannot afford the legal representation costs.

An interesting model for court proceedings on the right of access to information is that of the UK's Information Tribunal. It is the court-like body to which requesters can take appeals against decisions by the Information Commissioner without needing to have legal representation. In the UK this is a dedicated body and there is no route to appeal to the administrative courts.

In other countries, an information commissioner can go to court on behalf of the requester if a public body does not comply with its decisions. This means that the legal expenses are borne by the budget of the information commissioner rather than the individual requester.

6.1.2 Time

The length of time to conclude an administrative court case is another significant issue, and in all countries evaluated this is significantly longer than the time limits generally established for information commissioners or similar.

Only in Hungary does the law require that the courts process access to information cases in 15 days at the second instance level and 60 days (3 months) for the Supreme Court, based on the 2022 reform of the Information Act.

In no other country is there a specific provision in the access to information law governing the administrative court procedure, which means that an appellant is at the mercy of the general timelines.

In Ukraine there is a general requirement in the current legislation that the procedure for considering cases by the courts is 60 days, but in practice, due to the overload of administrative courts, the average time for a first instance case and for an appeal is more like 90 days or over (more than 3 months).

Other average administrative court timeframes are:

- **Estonia**: First instance of administrative court is 122 days, and in the second instance 194 days.
- **Finland**: Helsinki Administrative Court take 5 to 12 months on average.

- **Iceland**: In the district courts the average time is about seven months for civil cases.
- **Lithuania**: In the Regional Courts the average duration of civil proceedings was 231 days in 2019 and 178 days for reviewing the appeals of first instance cases. In the Court of Appeal the average case duration was 254 days in 2019 and in the Supreme Court 135 days respectively.
- **Moldova**: Administrative court first instance 358 days, appeal 146 days, highest instance 51 days.
- **Montenegro**: Administrative court first appeal is 441 days and second instance is 56 days.
- **Sweden**: Administrative courts 7.8 months, Administrative Court of Appeal 5.8, Supreme Administrative Court 5.5 months.

Calculating the first instance data in days, this gives an average of 245 days, which is 8 months. After a decision, supposing it is in the favour of the requester, there might be another period of between a few days and around a month for the information to be released.

It should be noted here that from all the court data and statistics available, it was not possible to identify any country which publishes statistics on the length of court proceedings specifically for access to information cases, so the data available is for all types of administrative court procedures.

It is interesting to note that many access to information laws contain specific deadlines for decisions by information commissioners but not for courts.

6.1.3 Appeal Grounds and Burden of Proof

In most countries the appeal procedure will be against the administrative decision received pursuant to an access to information request as well as in many countries the failure to receive a decision.

The grounds for appeal to court in the countries which have ratified the Tromsø Convention are generally focused on the administrative decision or failure to respond, although some other procedural elements can also be challenged in court. This is not, however, as broad as the possible range of appeals to an Information Commissioner, such as a repeated failure to issue an acknowledgement of a request or to publish proactively information about the right to request or other proactive publication requirements.

Grounds for appealing administrative decision received pursuant to an access to information request are:

- **Lithuania**: A person has the right to appeal any action, inaction, or administrative decision of an institution, as well as any delay by an institution in the performance of activity falling within its competence, to the institution itself, to a higher public administration, to an out-of-court settlement of disputes process or the administrative court (Article 18 of the Law on the Right to Receive Information). This gives the requester a wide range of appeal options, including eventually always the courts.

- **Republic of Moldova**: A person who considers his/her right or legitimate interest affected by the information provider, may challenge its actions both out of court and directly in the competent administrative court (Art. 21 of Law No. 982/2000), in addition to having the right to appeal to the Ombudsman.
- **Montenegro**: A complaint may be lodged against the decision on request for access to information, for the violation of rules of procedure and other misapplications of the law (Article 35 Law on Free Access to Information)
- **Norway**: A person whose request to access to a document has been rejected, or granted subject to reservations can appeal, inter alia, to the courts for judicial review of the decision.
- **Ukraine**: It is possible to appeal to the court against the decision, actions or inaction of all information administrators without exception, including the response of the head of the administrator, the highest authority or the Ombudsperson to a previously filed complaint.

When it comes to the burden of proof, this is rarely stated in the access to information laws, so the default provisions concerning the burden of proof in relevant codes of administrative court procedure and similar laws apply.

In practice, the burden of proof in administrative court procedures is split between appellant and defendant as the requester taking the case, along with his or her lawyer has to argue why the law was breached, why the right of access to information was not properly respected. This is distinct from an appeal to an Ombudsman or Information Commissioner where the burden of proof is within the public authority whose decision or other action or inaction is being challenged. In this case the Ombudsman or Information Commissioner has the role of assisting the requester in his/her interactions with the public authority, and to protect human rights and specifically the right of access to information.

A rare exception to this is the is Hungary where the law specifies that the burden of proof is with the public body at all levels of appeal, including the courts (Section 31.2 of the Information Act). This can be seen as a good practice to follow as it includes the information commissioner as well as the court appeals.

6.1.4 Types of Court Decisions

One of the clear benefits of an administrative court appeal is that should the requester be successful there are a series of binding decisions which the court can take. For instance, in Estonia, the administrative court is able to:

- fully or partially annul the administrative act;
- require an administrative authority to issue an administrative act or take an administrative measure;
- prohibit an administrative authority to issue certain administrative act or take certain administrative measure;

- order a compensation for harm caused in a public law relationship;
- order elimination of unlawful consequences of an administrative act or measure;
- declaration of nullity of an administrative act, a declaration of unlawfulness of an administrative act or measure, or a declaration ascertaining other facts of material importance in a public law relationship.

In the Republic of Moldova, depending on the seriousness of effects of the unlawful refusal to disclose information by a public authority, the court may decide to apply sanctions under the legislation, to remedy the damage caused by the unlawful refusal to provide information or by other actions that affect the right of access to information, as well as to immediately satisfy the applicant's request (Art. 24 of Law No. 982/2000).

In Norway, as in many other countries, the courts can overturn decisions made by administrative bodies.

In Ukraine, the administrative courts consider cases on the merits and can issue a binding decision, which can be enforced through a special service for the execution of court decisions. The court may issue one of the following decisions:

- Determine that the decision of the public authority (or some of its provisions) is unlawful;
- Annul or endorse a decision or some of its provisions;
- Find that the actions or inaction of the public authority were unlawful;
- Oblige the public authority to take certain actions, such as to provide the requested information, to publish certain information on the official website, or to publish the court decision.
- Require the public body to refrain from performing certain actions;
- Recover funds from the public authority, such as costs of legal representation.
- Make a decision on compensation for material and moral damage caused to the requester by unlawful decisions, actions or inaction of the public authorities.

Furthermore, the Ukrainian legislation provides for criminal liability for non-execution of a court decision.

It is clear from these examples that where the powers of the administrative court are well established and broad this can be a powerful mechanism for defending the right of access to information.

6.2 Independent Oversight Bodies

In order to help considerations of the precise configuration of an independent oversight body, there follows a series of elements related to the powers and functioning of such a body as per the best practices and emerging standards in the European region.

6.2.1 Quasi-judicial role, binding decisions and sanctions

For the oversight body to be able to provide genuine defence of the right of access to information, it is essential that it is able to issue binding decisions. In other words the public body has to comply with the decision or go to court to challenge it.

In the event of non-compliance the oversight body should be able to either issue a fine itself or refer the case to a court of law, which can issue a sanction through an expedited procedure.

It is important that the powers of the independent oversight body include not only the power to overturn an initial administrative decision, but also to explicitly order the release of the information being sought. It is important to note here, that this power must be accompanied by right of inspection of the information at issue, in order to ensure that that decision is taken in full possession of knowledge of the content of the information that has been requested.

The legal framework in several countries provides Information Commissioners with the right to order the release of information, if the office found during an appeal that refusing to issue the information constitutes a violation of the law. Independent oversight bodies in Albania, Croatia, Estonia, Serbia, Slovenia and the United Kingdom have such power.

6.2.2 Oversight of the entire application of the law

To ensure full respect for the right of access to information, it is essential that independent oversight bodies have oversight of all aspects of this right as well as the specific of national access to information laws.

Most Information Commissioners in this study and across the Council of Europe region have a clear mandate provided by law to monitor public authorities' compliance with the access to information legislation, including in Albania, Croatia, Estonia, Hungary, Ireland, Macedonia, Montenegro, Portugal, Serbia, Spain, Switzerland (where the Commissioner shall review the execution and effectiveness of the law, in particular the costs incurred in its implementation[8]) and the UK.

The powers generally, of course, include the power to hear and decide upon appeals related to information requests, permitting requesters to challenge negative responses, be they partial or full refusals, as well as other responses with which they are not content, such as incomplete responses or responses which did not provide the information sought. It is generally possible to challenge administrative silence.

Requesters should be able to challenge a whole range of issues relating to the treatment of their requests, including non-respect for timeframes, failure to assist the requester, improper procedures during clarification, failure to respect the request is preferences when it comes to the format image the information is provided, and so on.

[8] Article 19, FOIA, https://www.admin.ch/opc/en/classified-compilation/20022540/index.html#a19

Independent oversight bodies should also monitor compliance with the law when it comes to data collection, record-keeping, and archiving, as well as, importantly, all the proactive publication provisions.

It should be possible for any citizen to take a complaint to the oversight body for a failure on any of these dimensions, with it being particularly important for the public to be able to challenge a lack of proactive publication as per the requirements of the law, be it the access to information law or any other law requiring that information be made public.

6.2.3 Mediation role: negotiations and recommendations

When complaints are received, or when a public body has a doubt about how to respond to a particular request, it is useful for there to be a certain flexibility, whereby the staff of the oversight body are able to undertake mediation and support to reach a rapid and amicable solution to a particular issue without the formalities of a formal proceeding.

It may be that the oversight body wishes to establish a mediation department to complement its legal department, and ought to have all its staff able to undertake an initial mediation approach, within a delimited timeframe, before proceeding to a formal ruling. It is important however that such procedures do not result in undue delays for the requester. Furthermore should the request require that there be a legal interpretation of the issues of law under consideration, this should be provided to the requester.

When the Information Commissioner or similar sees patterns of behaviour, either from a particular public body, or from a series of public bodies, it should be able to make recommendations, to require that training be undertaken, or to recommend or even require such remedies as may be necessary to rectify the problem.

In countries where the Ombudsman has oversight of the law, they will have a mediation role. This is something which the European Ombudsman also has, and she is often able to intervene to resolve a complaint without having to complete a full procedure, provided that both parties are satisfied with the outcome of the mediation.

It is also important that independent oversight bodies can engage in negotiations and in-person hearings with the complainants. This is something which is provided for in Albania, where the Commissioner, prior to making a decision, can "require the complainant and the public sector body, against which the complaint has been filed, to make written submissions and to be informed by any other person or source. Where deemed necessary, the Commissioner holds a public hearing with the involvement of the parties."

6.2.4 Review of contested information / Power of inspection

Almost all Commissioners and Commissions in Europe have the power to review contested information as and when they receive a complaint, including in Albania, Estonia, Hungary, and Montenegro out of those which have ratified the Tromsø Convention.

This is something that is common in other countries, including Croatia, Germany, Greece, Ireland, Portugal, Serbia, Slovenia, Spain, Switzerland and the United Kingdom.

Such access is crucial to ensure that the independent oversight body can get the full picture before issuing a recommendation or decision.

A number of European Information Commissioners, in particular those that are also responsible for supervising personal data protection, have the power to carry out inspections of public bodies on their premises, including in Albania, Croatia, Estonia, Finland, Ireland and Slovenia.

The ability to conduct inspections can be a powerful tool for a Commissioner to promote compliance with access to information legislation and to monitor the implementation of the law by specific authorities.

6.2.5 Review of classification of information

There is a slightly more mixed picture across Europe when it comes to the review of classified information. In several countries, the access to information law oversight body has the power to access and review information that is classified, including in Albania, Hungary, Serbia and Slovenia.

In Serbia and Slovenia, the legal framework allows the Commissioner in an appeal procedure to authorise or order that classified information is reclassified and/or released.[9]

In other instances, the commissioner has the right to review but not to declassify documents. An example is Croatia, as set out in a recent case at the European Court of Human Rights.[10]

In France on the other hand, an appeal for access to classified information has to be submitted to a separate body. While in principle in line with the Tromsø Convention this cannot be seen as a good practice, as it makes appealing more complicated for the requester and does not bring consistency to deciding upon interpretation of the access to information laws.

6.2.6 Ex-officio investigations

When an oversight body sees patterns of problems based on the complaints that arrive with them and their own monitoring of the right to information environment in their country, it is important that they are able to undertake ex officio investigations to understand the root causes and nature of the problems that they are observing.

A good model for this, is that of the European Ombudsman's office, which has taken numerous *ex officio* enquiries into matters such as registration of requests, timeframes, record keeping, and so forth.

This type of provision is also found in Estonian law "The Data Protection Inspectorate may initiate supervision proceedings on the basis of a challenge or on its own initiative".[11]

---

9 Article 25, Data Secrecy Act, https://www.poverenik.rs/en/access-to-information/the-commissioners-authority-di.html

10 Case of Šeks v. Croatia 3 February 2022 https://hudoc.echr.coe.int/fre?i=001-215642

11 Art. 45.2 Public Information Act

6.2.7 Guidance to and training of public authorities/officials

A key role of information commissioners should be to provide guidance and training to public officials. This is something which is explicitly part of the mandate in Albania, Estonia, Hungary, and Montenegro. And outside the scope of the study, we also find Croatia, France, Germany, Macedonia, Portugal, Serbia, Spain, Switzerland and the United Kingdom.

Ireland also has a policy unit inside government with this function, which is quite typical: to have both a government department responsible for this right, along with, often the official training institution, and the oversight body.

- In Croatia, the law allows the Commissioner to "propose measures for professional education and development of information commissioners in the public authority bodies, and familiarize with the duties of the Commissioner with regard to the implementation of this Law".[12]
- In Italy, the Competence Centre's mandate includes to "develop the skills of public administration staff by promoting training activities in synergy with the National School of Administration".[13]
- In Macedonia, the Commission "shall carry out activities regarding the education of information holders to provide information requesters with information disposed of by them". Furthermore, the law states that "in cooperation with the Government of the Republic of Macedonia and the nongovernmental sector, and with the support from international organizations, the Commission shall perform training of persons in charge of the enactment of the present Law."[14]
- In Serbia, the law not only provides a mandate to the Commissioner to "take necessary measures to train employees of government bodies and to advise them on their duties regarding the rights to access information of public importance, with a view to ensuring effective implementation" of the law, it also requires government bodies to train their staff: "For the purpose of effective implementation of this Law, a government body shall train its staff and advise its employees on their duties regarding the rights provided for in this Law. The staff training (…) shall cover in particular: the content, scope and importance of the right to access information of public importance, the procedure for exercising those rights, the procedure for managing, maintaining, and safeguarding information mediums and types of data which the government body is required to publish."[15]

---

12 Article 35 (3), Law on the Right to Access Information, http://www.revizija.hr/en/access-to-information/law-on-the-right-to-access-information

13 http://www.foia.gov.it/chi-siamo/

14 Articles 32, 49, Law on Free Access to Information of Public Character, http://komspi.mk/en/297-2/

15 Articles 35, 42, Law on Free Access to Information of Public Importance, https://www.poverenik.rs/en/laws/881-law-on-free-access-to-information-of-public-importance-qofficial-gazette-of-rsq-no-12004-5407-10409-i-3610.html

- In Spain, the law states that the government will approve a training plan in the field of transparency aimed at officials and staff of the General State Administration.[16]

6.2.8 Raising public awareness

Many independent oversight bodies have a clear mandate to promote public awareness and knowledge of the right to information:

- In Hungary, "The Authority shall be responsible for monitoring and promoting the enforcement of rights to the protection of personal data and access to data of public interest and data accessible on public interest grounds, as well as promoting the free movement of personal data within the European Union".[17]
- In Croatia, the Commissioner "shall inform the public on exercising the beneficiary rights of access to information".[18]
- In Serbia, the Commissioner shall disseminate content of the law and the rights regulated by this law to the public.[19]
- In Spain, the Transparency Council's mandate includes to promote training and awareness activities for a better knowledge of the matters regulated by the law, including through an information campaign aimed at citizens, which has included some very nice work raising awareness of the right among children.[20]
- In Italy, the National Competence Center FOIA works to promote knowledge of the opportunities offered by the right to general civic access to information and has produced a series of videos on FOIA and a section with frequently asked questions.[21]
- In Ireland, raising public awareness appears to be included in the mandate of the Freedom of Information Central Policy Unit in the Department of Public Expenditure & Reform.[22]

6.2.9 Mandate to issue guidance and interpretative criteria

Most information commissioners and commissions surveyed have a clear mandate to provide guidance to public authorities on how to interpret and apply the provisions of the access to

---

16 Article 38 & 7th additional provision, Ley 19/2013, de of 9 December on transparency, access to information, and good governance, https://www.boe.es/buscar/act.php?id=BOE-A-2013-12887

17 Section 38 (2) Act CXII of 2011on the right to informational self-determination and on the freedom of information

18 Article 35 (3), Law on the Right to Access Information, http://www.revizija.hr/en/access-to-information/law-on-the-right-to-access-information

19 Article 35, Law on Free Access to Information of Public Importance, https://www.poverenik.rs/en/laws/881-law-on-free-access-to-information-of-public-importance-qofficial-gazette-of-rsq-no-12004-5407-10409-i-3610.html

20 Article 38 & 7th additional provision, Ley 19/2013, of 9 December on transparency, access to information, and good governance, https://www.boe.es/buscar/act.php?id=BOE-A-2013-12887

21 http://www.foia.gov.it/chi-siamo/, http://www.foia.gov.it/videolezioni-foia-in-pillole/, http://www.foia.gov.it/notizie/

22 https://foi.gov.ie/

information legislation, including in Albania, Croatia, Estonia, France, Germany, Hungary, Macedonia, Montenegro, Portugal, Serbia, Spain, Switzerland, and the United Kingdom.

The guidance on how to interpret and apply the law is sometimes provided by a different body:

- In Ireland, it is the mandate of the Freedom of Information Central Policy Unit to provide guidance to public bodies.[23]
- In Italy, it is the responsibility of the National Anti-Corruption Authority, in agreement with the Data Protection agency, to provide guidelines.[24]
- In Slovenia, it is in the competence of the Ministry of Public Administration to raise awareness, issue guidelines and opinions and provide general trainings in the field of access to public information. However, the Information Commissioner also tries to raise awareness by organizing workshops where its practice is presented, by giving presentations to various authorities and public sector organization on how to apply the access to information legislation and by publishing all its decisions on its website.[25]

More specifically in some countries, including Ireland, Portugal, Spain and the United Kingdom, the oversight body has the mandate to issue interpretive criteria which will help ensure a consistent application of the law. Such criteria are particularly important where the law is unclear, ambiguous, or silent.

6.2.10 Recommendations on existing and new legislation

In several European countries, the independent oversight bodies have the mandate to make recommendations on existing and proposed legislation.

- In Albania, the Commissioner "may also ask the Assembly to hear him about a case that he deems important."[26]
- In Estonia, "The Data Protection Inspectorate may give recommended instructions for the implementation of this Act.[27]
- In Croatia, the Commissioner "shall initiate the issuing or amending of regulations for the purpose of implementation and improvement of the right of access to information".[28]
- In France, "the Commission may propose to the Government any amendment to the laws or regulations relating to the right of access to administrative documents or the

[23] See: https://foi.gov.ie/guidance/cpu-guidance-notices/

[24] See: http://www.anticorruzione.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/anacdocs/Attivita/Atti/determinazioni/2016/1309/del.1309.2016.det.LNfoia.pdf

[25] See: https://www.ip-rs.si/ijz/

[26] Article 20, Law No. 119/2014 on the Right to Information, www.qkr.gov.al/media/1307/119_2014-anglisht.pdf

[27] Art. 45.4 Public Information Act

[28] Article 35 (3), Law on the Right to Access Information, http://www.revizija.hr/en/access-to-information/law-on-the-right-to-access-information

right of re-use of public information and any measure likely to facilitate its exercise (...) When the Commission is consulted on a bill or decree, its opinion is made public."[29]

- In Hungary, the authority "shall have powers to make recommendations for new regulations and for the amendment of legislation pertaining to the processing of personal data, to public information and information of public interest, and shall express its opinion on drafts covering the same subject".[30]
- In Macedonia, the Commission "shall issue opinions on proposed laws regulating free access to information".[31]
- In Serbia, the Commissioner can "make motions to draft or amend regulations for the purpose of implementation and promotion of the right to access information of public importance".[32]
- In Spain, the Commission has the mandate to "promote the drafting of recommendations and guidelines and standards for the development of good practices in matters of transparency, access to public information and good governance".[33]
- In Switzerland, the Commissioner has the competence to comment "on draft legislation and measures of the Federal Government which have a fundamental impact on the principle of freedom of information".[34]
- In the UK, the ICA can report to Parliament on freedom of information issues of concern.[35]

6.2.11 Mandate to collect data from public bodies

In order for the independent oversight body to have a complete picture of how the right of access to information is functioning, and for its reports to the parliament and to the public to be relevant, comprehensive, and meaningful, it is important that it receives data from all bodies under the scope of the access to information law.

To this end, the access to information law should mandate the collection of data by such public bodies in line with a structure and a level of detail that will be defined by the independent

---

29 Article R342-5, https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000031367773&cidTexte=LEGITEXT000031366350&dateTexte=20190504

Article L342-4, https://www.legifrance.gouv.fr/affichCode.do?idSectionTA=LEGISCTA000031367773&cidTexte=LEGITEXT000031366350&dateTexte=20190504

30 Section 38 (4), Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, https://www.naih.hu/files/Act-CXII-of-2011_EN_15.11.2016-003-.pdf

31 Article 32, Law on Free Access to Information of Public Character, http://komspi.mk/en/297-2/

32 Article 35, Law on Free Access to Information of Public Importance, https://www.poverenik.rs/en/laws/881-law-on-free-access-to-information-of-public-importance-qofficial-gazette-of-rsq-no-12004-5407-10409-i-3610.html

33 Article 38, Ley 19/2013, of 9 December on transparency, access to information, and good governance, https://www.boe.es/buscar/act.php?id=BOE-A-2013-12887

34 Article 18, FOIA https://www.admin.ch/opc/en/classified-compilation/20022540/index.html#a19

35 UK Parliament: Appointment of the Information Commissioner, https://publications.parliament.uk/pa/cm201516/cmselect/cmcumeds/990/99003.htm#_idTextAnchor006

oversight body. Such reporting should be ideally on a monthly or quarterly basis, and at the very least on an annual basis in time for the oversight body to complete its report to parliament.

Recent research by the OECD and UNESCO has found that in many countries there is no body with a mandate to collect such data. Research published in 2022 by the Global Data Barometer in 21 countries across Europe (EU countries plus the UK) found that 13 of them had a specific requirement to collect RTI performance data.[36]

The Law of Bosnia and Herzegovina, in Article 20 requires that there shall be reporting on the implementation of the access to information law:

> *"Each public authority shall disseminate: d) a report at least once every year detailing the functions, policies, operations, organizational structure, and financial affairs of the public authority including but not limited to, their proposed budget and annual financial statement detailing actual prior year revenues and expenditures. This report shall be submitted to the Parliamentary Assembly of Bosnia and Herzegovina, and shall be available upon request.*

6.2.12 Conduct additional data collection, including surveys and public opinion polls

It should also be part of the role and powers of the independent oversight body to undertake any other such data collection exercise as it deems necessary in order to be able to obtain a complete picture of respect for the right of access to information.

It should be able to mandate that public bodies provided with additional information on specific aspects of the implementation of the right such as, for example, levels of internal training or internal procedures.

It should be able to conduct and/or to commission surveys of users of the right of access to information, as well as public opinion polls.

It is also important that the independent oversight body has the possibility to participate in international surveys, such as those conducted by UNESCO, the OECD, and the International Conference of Information Commissioners.

6.2.13 Annual reports to Parliament and regular public reporting

The accountability of the independent oversight body is essential, and to this end the law should require that there be both accountability to the parliament and also to the wider public.

It is typical that the oversight body has to report to parliament on an annual basis.

To complement this annual reporting, it is recommended that the law require the publication of a series of documents including the annual strategy and work plan of the independent

[36] Global Data Barometer https://globaldatabarometer.org/

oversight body, and a series of indicators by which it should report to the public on at least a quarterly basis.

There should also be the requirement that decisions, reports, recommendations, and the outcomes of mediation, be published on line the moment they are issued, so in real time.

- In Albania, "The Commissioner for the Right to Information and Protection of Personal Data shall report to the Assembly or to the parliamentarian committees at least once a year or as often as required by them. He may also ask the Assembly to hear him about a case that he deems important. The report shall contain data and explanations on the implementation of the right to information in the Republic of Albania as well as transparency programs". [37]
- In Estonia, "The Data Protection Inspectorate shall submit a report on compliance, during the preceding year, with this Act to the Constitutional Committee of the Riigikoguand to the Legal Chancellor by 1 April each year".[38]
- In Hungary, "Shall publish a report on its activities each year, by 31 March, and shall submit this report to the National Assembly".[39]
- In Montenegro, "The Council of the Agency shall be obliged to annually submit to the Parliament of Montenegro a report on the situation in the field of access to information. In addition to the obligation referred to in Paragraph 1 of this Article, the Council of the Agency shall be obliged to submit a report to the Parliament whenever the Parliament requests".[40]

Data on the case is being handled by the oversight body should be published in as close to real time as possible, and at the very least once per month.

A particularly good practise in this regard, is that of the European Ombudsman who announces the opening of cases, as well as publishing interim correspondence with public bodies during mediation process, and of course the outcomes of any decisions the moment they are issued. These are not only published on the Ombudsman's website, but disseminated extensively in a weekly newsletter.

[37] Article 20.1 Law No 119/2014 On the Right to Information

[38] Article 54 Public Information Act

[39] Section 38.4b) Act CXII of 2011 on the right to informational self-determination and on the freedom of information

[40] Article 43 Law on Free Access to Information

7

CONCLUSION

It is clear from the comparative review of law and practice in this report that for any country which aspires not only to sign and ratify the Tromsø Convention but also to meet the core European standards on the right of access to information, there is a consistent body of comparative law and practice on which to draw.

For a country such as Georgia, with its aspirations to become a member of the European Union, it is strongly recommended to study in depth all aspects of this comparative law and practice, in order to be harmonise its access to information law and other relevant laws with these European standards.

This will not only mean that it has a strong access to information law, but that it will also be ensuring that the right of access to information serves the purposes set out in the Tromsø Convention of building a democratic society, and of fostering the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy.

ENG

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.