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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**GROUP OF SPECIALISTS
ON ACCESS TO OFFICIAL DOCUMENTS
(DH-S-AC)**

**Comments and proposals
submitted by representatives of the civil society, the OSCE, Information
Commissioners and the Minister of Public Administration of Slovenia,
on the draft European Convention on access to official documents**

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Document 1**Open Letter re future European Convention on Access to Official Documents, sent to the Chair of the DH-S-AC, Ms Helena Jäderblom on 5 October 2007**

5 October 2007

To:

Group of Specialists on Access to Official Documents
Ms. Helena Jäderblom, Chair
c/o Council of Europe
67075 Strasbourg
France

cc:

Steering Committee on Human Rights (CDDH)
Mr. Roeland BÖCKER, Chair

Madame Chair, Sirs:

We the undersigned write to express our serious concern that the current draft of the future European Convention on Access to Official Documents is defining the right of access to information in a way that, in certain important respects, falls below prevailing European and international standards.

We are gravely concerned that if adopted as it stands, the European Convention on Access to Official Documents will legitimise legislation which lacks important safeguards that are currently found in many domestic access to information laws, thereby flying in the face of the enormous progress made in the past several years, notably the adoption since 1992 of access to information laws in all 20 formerly communist Council of Europe member states, as well as new laws in countries such as the UK and Germany, and modifications to constitutions and statutes in a number of other states. The Council of Europe contributed to these significant advances, including through its Recommendation 2002(2) on Access to Official Documents, and we believe that the only appropriate role for the Council of Europe is to continue setting standards by adopting a treaty that enshrines a core right to information as currently established at the national level in Europe and globally.

We note that the right to information has been confirmed as a basic human right in national constitutions and jurisprudence as well as by the specialised mandates on freedom of expression of the United Nations, the Organization for Security and Co-operation in Europe, and the Organization of American States¹. In September 2006 the right to information was affirmed as a fundamental human right by the Inter-American Court of Human Rights.

We recognise and welcome the fact that the draft Convention has a number of positive features, including recognition of a right to request “official documents”, which are broadly defined as all information held by public authorities, in any form. It is also welcome that the draft Convention clearly establishes that the right can be exercised by all persons with no need to demonstrate a

¹ See Declaration of 6 December 2004 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression at <http://www.cidh.org/Relatoria/showarticle.asp?artID=319&IID=1>

particular interest in the information requested, and at no charge for filing requests and viewing documents. These positive elements of the treaty do not, however, allay concerns that significant flaws in the current draft, if left unremedied, will undermine the value of the Convention.

For the undersigned civil society groups and individuals, the three most serious problems in the current draft of the Convention are:

1. Failure to include all official documents held by legislative bodies and judicial authorities within the mandatory scope of the treaty;
2. Failure to include official documents held by natural and legal persons insofar as they perform public functions within the mandatory scope of the treaty;
3. Failure to specify certain basic categories of official documents, such as those containing financial or procurement information, that must be published proactively.

It is our contention that the future Convention should reflect best practices which have gained broad acceptance across the Council of Europe's 47 member states, rather than merely the existing law and practice of the 15 member states represented in the Group of Specialists drafting the Convention. For example, in previous submissions to the Group of Specialists², civil society groups have drawn attention to the fact that in the vast majority of Council of Europe member states, all branches of government, including the judicial and legislative branches, are required to provide access to information, either under a single law or separate legislation for each branch. There is no principled reason for treating legislative bodies or judicial authorities any differently than executive bodies under an access to information regime. Legislative bodies and judicial authorities perform public functions and are financed with public money; the rationales that call for transparency of the executive apply with equal, if not greater, force to the legislature and judiciary. It would be ironic, for example, to exclude from the scope of the treaty documents related to the law-making activities of national parliaments – the most quintessential exercise of representative democracy. Transparency of these institutions enables citizens to form opinions about their functioning, foster efficiency, reduce corruption and ultimately increase public confidence in them. Furthermore, the treaty's exemptions regime is perfectly capable of protecting any legitimate legislative or judicial privileges.

Similar rationales call for the inclusion of private entities that perform public functions within the mandatory scope of the treaty. In an era in which traditional public services – whether it be utilities, healthcare or military operations – are increasingly being outsourced to the private sector, this would be a glaring omission. It would also represent an unjustifiable lowering of the standards established by the Council of Europe's 2002 Recommendation, which covers "natural or legal persons insofar as they perform public functions." For these reasons, we find it unjustifiable that the future Convention proposes to limit the right to legislative and judicial bodies performing "administrative functions" or exercising "administrative authority" rather than including all information held by all branches of government. If the future Convention fails to reach this minimum standard, it will do a great disservice to the right of access to information to the extent that it will run counter to the Council of Europe's mandated role to promote democracy and protect human rights.

² See *Briefing regarding the elaboration of a Council of Europe treaty on access to official documents*, submitted by Article 19, the Open Society Justice Initiative and Access Info Europe to the Group of Specialists in November 2006; see also *Briefing # 2 regarding the elaboration of a Council of Europe treaty on access to official documents*, submitted by Article 19, the Open Society Justice Initiative and Access Info Europe to the Group of Specialists in July 2007. Available at www.access-info.org, www.article19.org and www.justiceinitiative.org.

With respect to proactive publication of information, we note that proactive publication rules are an essential component of any effective freedom of information regime and that many access to information laws contain detailed provisions on the information that must be disclosed without the need for a request, such as by placing it on a public body's website. Most non-experts will never make a request for an official document; in order to ensure the people are nevertheless able to form a view of the authorities and to engage in decision-making, information of general interest should be made available without the need for a request. To guarantee that this happens in practice, the Convention should identify those categories of information which must, at a minimum, be published proactively.

In addition to the three most serious problems highlighted above, other significant concerns with the current draft are:

4. Absence of a guarantee that individuals will have access to an appeals body which has the power to order public authorities to disclose official documents.
5. Absence of a guarantee that individuals will be able to appeal against violations of the right of access other than "denial" of a request (such as unjustified failures to provide access in a timely fashion or in the form preferred by the requester);
6. Lax drafting of exceptions that permit withholding of official documents under the internal deliberations and commercial interests exemptions:
 - a. There are no time limits on the application of the internal deliberations exemption; such documents may be withheld indefinitely, even after a decision on the matter has been taken;
 - b. The treaty should protect only "legitimate commercial interests," not all and any "commercial interests," as in the present draft.
7. Absence of a requirement that states set statutory maximum time-limits within which requests must be processed.

Of particular concern here is the issue of judicial protection of the right of access (point 4). The current draft of the Convention grants applicants whose request for information has been denied "access to a review procedure before a court of law or another independent and impartial body established by law." It fails to specify, however, that the non-judicial body of appeal should have the legal authority to order disclosure of official documents. Given that access to information is now recognised as a human right, as will be confirmed by this treaty, it is essential that the future Convention enshrine the principle of a right of appeal to an independent body (a judicial or equivalent body) that is empowered to protect the rights of individual requestors by ordering, when appropriate, the release of requested information. In the absence of such a guarantee, the applicant's theoretical right of access would be denied effective judicial protection – in violation of one of the basic principles of human rights law.

Last but not least, we note that the monitoring mechanism for the treaty will need to be robust and well-resourced if the Convention is to serve its intended purpose of upholding the right of access to information for the 800 million people in the Council of Europe region.

Since the Convention aims to ensure a minimum level of respect for the right of access to information, its drafters should avoid the pitfall that if one or two member states do not meet a particular standard, the Convention will accommodate those states by lowering the bar—this would defeat the very purpose of this standard-setting effort. Rather, the core provisions of the Convention should be mandatory, and states whose legislation does not, at time of ratification, meet those minimum standards may, as a last resort, make declarations or reservations and notify the monitoring body when they have brought their legislation into line with the treaty.

We, the undersigned, call on the Group of Specialists to address the seven concerns identified above by making the following modifications to the draft Convention:

1. Include all official documents held by legislative bodies and judicial authorities, irrespective of their nature, within the mandatory scope of the treaty;
2. Include all documents held by natural and legal persons insofar as they perform public functions within the mandatory scope of the treaty, if necessary further defining the meaning of “public functions”;
3. Introduce a provision that requires regular, proactive publication of certain basic, specifically defined categories of official documents including information about the structure of each government body, personnel, activities, rules, guidance, decisions, and public procurement;
4. Introduce a guarantee that individuals will have access, in all cases, to an appeals body with the power to order government agencies to disclose official documents and ensure compliance with the right of access;
5. Introduce language to the effect that in addition to a right to appeal against “a denial of a request”, individuals shall have the right to appeal all administrative actions or omissions that violate their right to information;
6. Redraft the exemptions relating to internal deliberations and commercial interests to ensure:
 - a. that there is a time limit on the applicability of the internal deliberations exemption (i.e. following the conclusion of internal deliberations on a matter or within a reasonable period thereafter);
 - b. that the treaty refers to legitimate commercial interests only;
7. Introduce a requirement that states set statutory maximum time-limits within which requests must be processed.

We believe that only if these concerns are addressed, will the future European Convention on Access to Official Documents enshrine the essential principles of the right of access to information.

Signing Organizations, *with name of person signing on their behalf*:

International organizations:

1. Helen Darbishire Access Info Europe (Madrid)
2. Dr Agnès Callamard Article 19 (London)
3. Sandra Coliver Open Society Justice Initiative (New York)
4. Issa Luna Pla CETA (Centre for Study of Transparency and Access), Mexico
5. Eduardo Bertoni Due Process of Law Foundation (Washington)
6. Gwen Hinze Electronic Frontier Foundation (Brussels, Toronto, San Francisco and Washington D.C)
7. Renate Schroeder European Federation of Journalists (Brussels)
8. Jack Thurston Farmsubsidy.org
9. Gavin Hayman Global Witness (London)
10. Rohan Jayasekera Index on Censorship (London)
11. Hernán Bonomo International Debate Education Association (IDEA, New York)
12. Claire Tixeire International Federation for Human Rights (FIDH, Paris)
13. Dr Aaron Rhodes International Helsinki Federation for Human Rights (IHF)
14. John West Internews Europe (Paris)
15. Milica Pesic Media Diversity Institute

16. Edwin Rekosh, Public Interest Law Institute (PILI) (USA, Hungary, Russia)
17. Karina Banfi Regional Alliance for the Freedom of Expression and Information (United States, Mexico, Honduras, Dominican Republic, Panama, Nicaragua, Peru, El Salvador, Costa Rica, Chile, Argentina)
18. Tony Bunyan Statewatch (London)
19. Robert Hårdh Swedish Helsinki Committee for Human Rights (Stockholm)
20. Cecelia Burgman The Commonwealth Human Rights Initiative (New Dheli, London)
21. Miklos Marschall Transparency International - EU Advocacy Working Group
22. Mark Bench World Press Freedom Committee (Washington)

National/Regional Organizations - Europe³

23. Edik Hovhannisyán "Achilles" Center of Protection Drivers' Rights, Armenia
24. Boris Pustyntsev, "Citizens' Watch" Human Rights NGO, St. Petersburg, Russia
25. Vaga Amirkhanyán "Hakastver" (Against Shadow), Armenia
26. Vasile Spinei Acces-info Centre (Moldova)
27. Gergana Jouleva Access to Information Programme (Bulgaria)
28. Maria Morozova AEGEE-Kyiv, Ukraine
29. Remzi Lani Albanian Media Institute
30. Zuzana Wienk Aliancia Fair-play / Fair-Play Alliance, Slovakia
31. Mary Alice Baish American Association of Law Libraries
32. Diana-Olivia Hatenescu APADOR-CH (the Romanian Helsinki Committee)
33. Miguel A. Gallardo APEDANICA, Spain
34. Antonio González Quintana Archiveros Españoles En La Función Pública (AEFP)
35. Levon Nersisyan Center of Human Rights Protection after A.D. Sakharov, Armenia
36. Dr. Jindrich Petrik Arnika, Czech Republic
37. Janos Erdos Ars Longa Foundation, Hungary
38. Ana-Maria Mosneagu Asociatia Pro Democratia (Pro Democracy Association) Romania
39. Levon Barseghyan Asparez Journalism Club, Armenia
40. dr Juhászné Halász Judit Association for Ragweed-free Hungary
41. Boris Darmanovic Association of Young Journalists (Montenegro)
42. Nazeli Margaryan Bagaran, Armenia
43. Aurel Stratan BasaMediaNet (Moldova)
44. Yaman Akdeniz BilgiEdinmeHakki.Org (Turkey)
45. Dana Kašparová Brečtan o. z. (Ivy civic association), Slovakia
46. Krassimir Kanev Bulgarian Helsinki Committee, Bulgaria
47. Maurice Frankel Campaign for Freedom of Information, UK
48. Isabel Ávila Fernández-Monge CEACCU (Spanish Confederacion of Housewives, Consumers and Users) Spain
49. Ioana Avadani Center for Independent Journalism, Bucharest, Romania
50. Drew Sullivan Center for Investigative Reporting - Bosnia-Herzegovina
51. Gavin MacFadyen Centre for Investigative Journalism, UK
52. Gerogiana Iorgulescu Centre for Legal Resources, Romania
53. Linda Austere Centre for Public Politics PROVIDUS (Latvia)
54. Ilir Aliaj Centre for Public Politics PROVIDUS (Latvia)
55. Norbert Brazda Changenet, Slovakia
56. Peter Wilfling Citizen and Democracy Association (Slovakia)
57. Yuri Ivanov Civil Association "Public Barometer" - town of Sliven, Bulgaria
58. Mate Varga Civil College Foundation, Hungary
59. Artak Kirakosyan Civil Society Institute, Armenia
60. Srdjan Dvornik Croatian Helsinki Committee for Human Rights, Croatia
61. Winnie Vitzansky Danish Library Association
62. Anne Louise Schelin Danish Union of Journalists
63. Miroslav Patrik Deti Zeme (Children of the Earth), Czech Republic
64. Dr. Sven Berger Deutsche Gesellschaft für Informationsfreiheit, Germany
65. T.J. McIntyre Digital Rights Ireland
66. Pavlina Petrova Economic Policy Research Institute (Macedonia)

³ In addition to the organisations listed here, the Secretariat received directly signatures from Anne Schwöbel & Anton N. Fritschi for Transparency International Switzerland and from GEA2 – Grupo de Estudios y Alternativas.

67. M^a Eugenia Callejón de la Sal Economistas sin Fronteras, Spain
68. Viktor Tarasenko, Ekologia I Mir, Crimea, Ukraine
69. Sarka Nekudova Ekologicky pravni servis (Environmental Law Service), Czech Republic
70. Volodimir Berezin Environmental & Cultural Center Bakhmat, Ukraine
71. Oleksandr Stepanenko Environmental Humanitarian Association "Green World", Ukraine
72. László Majtényi Eötvös Károly Public Policy Institute (Budapest)
73. Fernando Martínez Randulfe EsCULcA. Observatório para a Defesa dos Direitos e Liberdades, Galiza, Spain
74. Julia Amirkhanyan Femida, Armenia
75. Mr. Jan-Ewout van der Putten FOBID Netherlands Library Forum, Netherlands
76. Marry Alexanyan Forum of Armenian Youth, Armenia
77. Vladimir Milcin Foundation Open Society Institute – Macedonia
78. Shushan Doydoyan Freedom of Information Center of Armenia
79. Miroslav PROKES Friends of Nature, Czech Republic
80. Phil Michaels Friends of the Earth England, Wales and Northern Ireland
81. Tony Lowes Friends of the Irish Environment, Allihies, Co. Cork (Ireland)
82. Jose Raul Vaquero Pulido Fundación Ciencias de la Documentación, Spain
83. Maria Auxiliadora Martín Gallardo Fundación Ciencias de la Documentación, Spain
84. Tamar Gurchani Georgian Young Lawyers' Association
85. Prof. Dr. Rosemarie Will German Civil Liberties Union (Humanistische Union)
86. Alexey Simonov Glasnost Defence Foundation, Russia
87. Panayote Dimitras Greek Helsinki Monitor
88. Magdalena Klimovicova Greenpeace, Czech Republic
89. Arthur Sakunts Helsinki Citizens' Assembly Vanadzor, Armenia
90. Marek Antoni Nowicki Helsinki Foundation for Human Rights, Poland
91. Várady Tibor Humanista, Hungary
92. Ilona Vercseg Hungarian Association for Community Development
93. Adam Földes Hungarian Civil Liberties Union
94. Veronika Mora Hungarian Environmental Partnership Foundation
95. Judit Bayer Hungarian Press Freedom Centre
96. Corina Cepoi Independent Journalism Center, Moldova
97. Tomáš Gremlica Institute for Environmental Policy, Czech Republic
98. Arcadie Barbarosie Institute for Public Policy, Moldova
99. Violeta Alexandru Institute for Public Policy, Romania
100. Ion Georgescu IRT – Romanian Training Institute
101. Yevgeniy Zakharov Kharkiv Human Rights Protection Group, Ukraine
102. Ilze Brands Kehris Latvian Centre for Human Rights
103. Dejan Milenkovic Lawyers' Committee for Human Rights YUCOM, Serbia
104. Lidiya Topolevs'ka Legal and Political Research Center «SIM», Ukraine
105. Claire Tixiere for Ligue des Droits de l'Homme – Belgium
106. Iso Rusi Macedonian Helsinki Committee
107. Danilo Mandic Macedonian Young Lawyers Association
108. Natalie Zubar Maidan Alliance, Ukraine
109. Peter Molnar Center Media and Communication Studies (CMCS), Central European University, Hungary
110. Ognian Zlatev Media Development Center, Bulgaria
111. Karen Andreyan Media Law Institute, Armenia
112. Taras Shevchenko Media Law Institute, Ukraine
113. Rashid Hajili Media Rights Institute, Azerbaijan
114. Katarína Šimončíčová Mestský výbor Slovenského zväzu ochrancov prírody a krajiny (Slovak Union of the Nature and Landscape Protectors, City Committee), Slovakia
115. Nafsika Papanikolatos Minority Rights Group-Greece
116. Slobodan Franovic Montenegrin Helsinki Committee for Human Rights
117. Slobodan Franovic Montenegrin Helsinki Committee for Human Rights
118. Peter Medved Nadacia Ekopolis / Environmental Partnership for Sustainable Development Association, Slovakia
119. Janko Nikolovski National commission for protection of the right to free access to public information of the Republic of Macedonia
120. Séamus Dooley National Union of Journalists (Ireland)
121. Jeremy Dear National Union of Journalists, UK

122. Michal Tulek Natura Rusovce, Slovak Republic
123. Michal Tulek Natura Rusovce, Slovakia
124. Vanja Calovic Network for Affirmation of NGO Sector – MANS, Montenegro
125. Dr. Thomas Leif Netzwerk Recherche e.V., Germany
126. Phil Booth for NO2ID, UK
127. Norwegian Association of Editors
128. Norwegian Bar Association (Human Rights Committee)
129. Norwegian Helsinki Committee
130. Viktoria Mlynarcikova Open Society Foundation Slovakia
131. Viktoria Mlynarcikova Open Society Foundation, Slovakia
132. Monika Ladmanová Otevrena spolecnost, o.p.s. Czech Republic
133. Munir Podumljak Partnership for Social Development, Croatia
134. Pen Society Norway
135. Sergei Bereznuik Phoenix Fund, Russia
136. Jens Sejer Andersen Play The Game, Denmark
137. Alexei Marciuc Informational Policy Institute, Moldova
138. Eugen Urusciuc Press Monitoring Agency "Monitor Media", Moldova
139. Mircea Toma Press Monitoring Agency, Romania
140. Klime Babunski Pro Media, Macedonia
141. Andrea Pal Regina Regina Foundation, Hungary
142. Suzana Dobre Romanian Academic Society
143. Henrik Kaufholz 'Scoop' - Support Structure for Investigative Reporting East- and South Eastern Europe
144. Ing. Lesanka Blažencová Slatinka Association (Združenie Slatinka), Slovak republic
145. Gabriel Petrescu Soros Foundation Romania
146. Renate Weber Soros Foundation-Romania
147. Sør-Trøndelag College, Norway
148. Stefan Szabó SOSNA association, Slovak Republic
149. Carlos Cordero Sanz Sustentia (Spain)
150. Prof. Claes Sandgren Swedish Chapter of Transparency International
151. Matti Stenrosen Swedish organisation for investigative journalism, Föreningen Grävande Journalister
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155. Marie Kopecka The Open Society Fund - Prague
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157. Jesús Lizcano Alvarez Transparencia Internacional España (Spain)
158. Pavel Nechala Transparency International Slovakia
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160. Zorislav Antun Petrovic Transparency International Croatia
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166. Alicja Szablowska Transparency International Poland.
167. Tamuna Karosanidze Transparency International Georgia
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169. Vladimir Goati Transparency-Serbia
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171. Nils Mulvad Updates netværk for aktindsigt, Denmark
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173. Margo Smit Vereniging van Onderzoeksjournalisten VVOJ (Netherlands/Belgium)
174. Vladymyr Peslyak WETI, Ukraine
175. Volker Grassmuck Wizards of OS (Germany)
176. Georgi Milkov Youth Forum 2001 Razgrad
177. & for NGOs Center Razgrad
178. & for Woman Support Center in the Village of Strazhet
179. Sarah Maliqi Youth Initiative for Human Rights (Kosovo)

180. Pavol Siroky Za Matku Zem (For Mother Earth Slovakia), Slovakia
 181. Pavel Petráš Združenie ochranárov severovýchodného Slovenska – Pčola, Slovakia
 182. Miloslava Stejskalova Zeleny kruh, Czech Republic
 183. Biljana Kovacevic Vuco Lawyers' Committee for Human Rights YUCOM, Belgrade, Republic of Serbia
 184. Victor Tarasenko Crimean Republican Association EKOLOGIA i MIR, Ukraine
 185. Gabriella Nemeskéri Hungarian Association of Women's Advocacy
 186. Elshad Eyvazli Impartial Journalist Organization, Azerbaijan
 187. Intigam Mamedov Deutschland (enrenamtlicher Mitarbeiter von Pro Asyl im Landkreis vom Verein Niedersächsischer Bildungsinitiativen (VNB) – und Sprecher des Arbeitskreis Kaukasische Flüchtlinge in Niedersachsen)
 188. Erkin Gadirli Caucasus Caspian Commission
 189. Ferah Aliyeva Impartial Journalists Organization, Azerbaijan
 190. Barbro Fischerström The Swedish Newspaper Publishers' Association
 191. Gubad Ibadoglu Economic Research Center, Azerbaijan
 192. Sabit Bagirov Far Centre, Azerbaijan
 193. Per Hultengård Swedish Newspaper Publisher's Association
 194. İlgar İbrahimoglu DEVAMM
 195. İlgar Mammadov Baku Political Research and Advocacy Institute
 196. Fakhrinur Huseynli Azerbaijan Tafakkur (Thinking) Youth Association
 197. Malik Bayramov Azerbaijan, Demokratik Jurnalistler Liqasi, Azerbaijan
 198. Khaled Aqaliyev Media Rights Institute, Azerbaijan
 199. Mehriban Vezir Political and Culture Center of Azerbaijani Women
 200. Osman Gunduz Center Information Systems and Technologies Multimedia, Azerbaijan
 201. Emin Huseynov Institute for Reporter Freedom and Safety, Azerbaijan
 202. Intigam Aliyev Legal Education Society, Azerbaijan
 203. Gabriella Nemeskéri Hungarian Association of Women's Advocacy
 204. Gábor Halmai The Openness Club
 205. György Kalas Reflex Environmentalist Association (Reflex Környezetvédő Egyesület), Hungary
 206. Ida Csapó Association of Hungarian Internet-user Women (Magyar Internetező Nők Egyesülete-MINők)
 207. & Women Companion Foundation (Nőtárs Alapítvány)
 208. Miklós Rosta Association of Liberal Young People (Liberális Fiatalok Egyesülete)
 209. Péter Molnár Óvás! Association (for the protection of the cultural and architectural heritage of Budapest)
 210. József Lajtmann Ecological Studio Foundation (Ökológiai Stúdió Alapítvány), Hungary
 211. Árpád Györffy European Association of Hungarian Journalists and Newspaper Makers
 212. Péter Balázs Green Radio Public Benefit Association (Zöld Rádió Közhasznú Egyesület- Zörke)
 213. Zoltán Ferenczi Greenpower Association of nature protection (Zöldező Környezetvédő és Szépitő Egyesület)
 214. Petra Bárd Hungarian Europe Society
 215. András Kádár Hungarian Helsinki Committee
 216. Nemeskéry Gabriella National Lobby Association of Women (Országos Női Érdekvédelmi Egyesület)
 217. István Farkas National Society of Conservationists (NSC), Hungary
 218. Csaba Bálint Pannon Alliance of Nature Protection (Pannon Természetvédő Szövetség), Hungary
 219. Pál Eötvös The Association of Hungarian Journalists
 220. Asabali Mustafayev Democracy and Human Rights Resource Centre Public Union, Azerbaijan
 221. Tapani Tarvainen Electronic Frontier Finland

National/Regional Organizations – Global

222. Fernando Rodrigues ABRAJI - Brazilian Association of Investigative Journalism
 223. Roberto Saba Association for Civil Rights, Argentina
 224. Devendra Dattatray Inamdar Aurangabad Journalist Union, India
 225. Said Essoulami Centre for Media Freedom in MENA, Morocco
 226. Mukhtar Ahmad Ali Centre for Peace and Development Initiatives, CPDI-Pakistan
 227. Kela Leon Consejo de la Prensa Peruana (Peruvian Press Council)
 228. John Richard Essential Information, USA
 229. Miguel Poulido Fundar, Mexico

- 230. Mary Brumder Government Accountability Project, USA
- 231. Dr. Corinne Packer Human Rights Internet (HRI), Ottawa, Canada
- 232. Temitope Johnson Independent Advocacy Project, Nigeria
- 233. Temitope Johnson Independent Advocacy Project, Nigeria
- 234. Javier Casas IPYS (Press and Society Institute), Peru
- 235. Walid Abboud Maharat foundation, Lebanon
- 236. Edetean Ojo Media Rights Agenda (Lagos)
- 237. Roy Peled Movement for Freedom of Information in Israel
- 238. Alison Tilley Open Democracy Advice Centre, Cape Town, South Africa
- 239. Patrice McDermott OpenTheGovernment.org
- 240. Laura Alonso Poder Ciudadano (Argentina)
- 241. Moises Sanchez Pro Acceso (Chile)
- 242. Jane Kirtley Silha Center for the Study of Media Ethics and Law (Minnesota, USA)
- 243. Emmanuel Saffa Abdulai Society for Democratic Initiatives, Sierra Leone & Freedom of Information Coalition in Sierra Leone
- 244. Jerry Zremski The National Press Club (Washington DC, USA)
- 245. Dario Soto Trust for the Americas (Washington)

Individual signatories - à titre personnel:

- 1. Marc-Aurele Racicot, Lawyer and Editor of the Open Government Journal, Canada
- 2. Walter Keim (Norway, German citizen)
- 3. Eduardo Bertoni, former Special Rapporteur for Freedom of Expression at the Organization of American States (OAS), Washington D.C.
- 4. Professor Maeve McDonagh, Faculty of Law, University College Cork, Ireland
- 5. Jane E. Kirtley, Silha Professor of Media Ethics and Law, University of Minnesota, USA
- 6. Ursula Owen, Project Director, Free Word Centre for Literature and Free Expression
- 7. David Goldberg (Scottish Campaign for Freedom of Information), Scotland, UK
- 8. Dwight E. Hines, Ph.D, Florida, USA
- 9. Arditë Metaj, Kosovo
- 10. Dr Ian Brown, Oxford Internet Institute, University of Oxford
- 11. Volker Grassmuck, Humboldt University Berlin, Germany
- 12. Alexander Kashumov, Head of Legal Team, AIP, Sofia, Bulgaria
- 13. Prof. dr. Dirk Voorhoof, Ghent University and Copenhagen University. Former member of the Federal Commission for Access to Administrative Documents (Belgium)
- 14. Mark Stephens, Partner, Finers Stephens Innocent, UK
- 15. Michael Ewing, Senior Researcher, Centre for Sustainability, Institute of Technology, Sligo, Ireland
- 16. Ylber Mehmedaliu, Film Director, Kosova
- 17. Rosalinda V. Kabatay, School of Communication, University of Asia & the Pacific, Philippines
- 18. Lara Etoum, Media Consultant, Al Nasher, Jordan
- 19. László Majtényi, Chairman, Eötvös Károly Public Policy Institute (Budapest) (former DP&FOI Parliamentary Commissioner of Hungary)
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- 24. Dragos Necula, Romania
- 25. David Picón Álvarez, Spain
- 26. Ulf Öberg, Lawyer, Öberg & Associés AB, Sweden
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- 28. Elvira Souto, Galicia (Spain)
- 29. Susanne Nielsen, Journalist, Aller Press, Denmark
- 30. Michael Holm, Journalist, 24timer, Denmark
- 31. Signe Thomsen, Journalist, 24timer, Denmark
- 32. Julie Lorenzen, Journalist intern 24timer, Denmark
- 33. Lars Lindevall Hansen, Journalist 24timer, Denmark
- 34. Anders Emil Møller, Journalist, 24timer, Denmark
- 35. Heine Richard Jørgensen, Journalist, 24timer / JP/Politikens Hus, Denmark.
- 36. Plamen Penev, Bulgaria

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43. Nevena Ruzic, Human Rights Lawyer, Belgrade, Serbia
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45. Marleen Teugels, Journalist, Belgium
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56. Peter Hartung, freelance journalist, Denmark
57. Kirsten Weiss, Freelance journalist, Denmark
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60. Susanne Falch, journalist, Denmark
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129. Savintseva Marina Transparency International-Russia
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215. Nino Gobronidze Georgian Young Lawyers' Association
216. Beka Kokaia Georgian Young Lawyers' Association
217. Otar Kakhidze Georgian Young Lawyers' Association
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222. Ekaterine Popkhadze Georgian Young Lawyers' Association
223. Khatuna Kviralashvili Georgian Young Lawyers' Association
224. Konstantin Stalinski
225. Ninia Kakabadze
226. Emzar Diasamidze "Batumelebi" Newspaper
227. Giorgi Girkelidze "Guria News"
228. Davit Mchedlidze "Internews"
229. Sopho Vardiashvili "Media.ge"
230. Rusudan Loladze CIDA
231. Marika Vardoshvili "Timer" Newspaper
232. Maia Mamulashvili "Kakhetis Khma" Newspaper
233. Giorgi Siradze "Guriis Moambe" Newspapre
234. Nato Gobeladze "P.S." Newspaper (Kutaisi)
235. Sophiko Kanchaveli "Akhali Gazeti" Newspaper
236. Grigol Giorgadze Public Defender's Office of Georgia
237. Nino Dalakishvili "Khalkhis Gazeti"
238. Magda Memanishvili "Monitori" Studio
239. Armine Minasian "ATV-12"
240. Tamar Kaldani "Open Society - Georgia"
241. Khatuna Gogashvili "Hereti" Radio
242. Gela.Mtivlishvili "Imedi" Newspaper (Kakheti)
243. Nana Biganishvili "Monitori" Studio
244. Nino Zuriashvili "Monitori" Studio
245. Lia Kiladze "Alioni" Newspaper (OzurgeTi)
246. Nino Mumladze "The Messenger"
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259. Katalin Szoke, Trust for Civil Society in Central and Eastern Europe, Hungary
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261. Leila Alieva Azerbaijan
262. Mikko Tähkänen Finland
263. Quran Memmedov Azerbaijan
264. Sabir Mammedov Azerbaijan
265. Sabit Bagirov Azerbaijan
266. Selena Selen Azerbaijan
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Document 2

**Comments sent by the OSCE on 11 September 2007
on the draft European Convention on Access to Official Documents
as prepared by the Group of Specialists on Access to Official Documents***

Vienna, 11 September 2007

The OSCE Office of the Representative on Freedom of the Media (OSCE RFOM) welcomes and supports the preparation of a Draft European Convention on Access to Official Documents by the Council of Europe.

The OSCE RFOM fully shares the underlying analysis, that access to information is a basic human right, a prerequisite for independent media and accountability of governmental action, but equally a key aide in fighting such universally accepted challenges as corruption, human trafficking and misuse of taxpayers' money.

From the media freedom perspective, access to information is one of the modern challenges in a globalizing media environment and is an element befitting democratic media to fulfil their important role in the future. As with any right, some restrictions are legitimate. However, granting access to information should become a rule, and any exception to this rule should be as narrowly defined as possible. Exceptions should be limited to core national security issues, some protection of judicial proceedings, legitimate protection of commercial and personal data, which are often spelled out in separate laws.

Acknowledging the paramount importance of free access to information for societies at large and for media in particular, the RFOM surveyed the 56 OSCE participating States' relevant legislation and practices related to access to information legislation, classification rules, criminal sanctions for disclosing confidential data and protection of confidential sources. The purpose of the survey was to highlight best practices to assist the states embarking on reform of their relevant legislation.

The survey was presented to the public on the eve of the World Press Freedom Day, 2 May 2007. The summary of its findings is attached to this document. The underlying country reports can be accessed at <http://osce.org/item/24251.html>.

Based on these findings, the OSCE RFOM would like to make the following remarks regarding the latest Draft of the European Convention on Access to Official Documents:

The OSCE RFOM recognises the value of the draft Convention and appreciates its positive features, such as the recognition of a right to request "official documents", which encompass all information held by public authorities, in any form.

The draft Convention provides for access to information for all persons with no need to demonstrate their particular interest in the requested data, without any charge for filing requests or viewing documents.

* These comments are based on the Draft European Convention on Access to Official Documents which reflects the state of discussions at the end of the 15th meeting of the DH-S-AC (3-6 July 2007).

However, the OSCE RFOM believes there are some substantial deficiencies in the draft Convention and recommends that the Group of Specialists on Access to Official Documents include the following amendments to the draft before approval.

Recommendations:

- The scope of the treaty should include all official information held by all kinds of legislative bodies and judicial authorities.
- The Convention should require states parties to set a maximum period within which requests must be processed.
- The treaty should provide for free access to all information held by natural and legal persons performing public functions.
- Adequate access of individuals to an appeals body should be guaranteed in all cases. This independent body should be authorised to order releases of information by public bodies in cases of unjustified denial of access.
- Individuals should be guaranteed by the treaty to have the right to appeal, apart from actual denials of access, all administrative violations or omissions that infringe their right to information.
- The Convention should require all public bodies to affirmatively publish information about their structures, personnel, activities, rules, guidance, decisions, procurement, and other information of public interest on a regular basis in formats including the use of information and communication technologies and in public reading rooms or libraries to ensure easy and widespread access.
- Exemptions relating to internal deliberations and commercial interests should be redrafted to ensure that there is a time limit on the applicability of the internal deliberations exemption (i.e. following the conclusion of internal deliberations on a matter or within a reasonable period thereafter); and that the treaty refers to legitimate commercial interests only.

Conclusion

The Council of Europe is the most important standard setting organisations for the OSCE area. It is therefore imperative that a European Convention on Access to Official Document is farsighted, responsive to the needs of the 21st century, mindful of the globalisation trend of media and information technologies. The Convention should be a beacon of progress for improving access to information where it is still needed, since a mere continuation of existing practices on a lowest common denominator basis is not sufficient for that challenge. The OSCE RFOM hopes that the above recommendations will help to achieve this goal.

The Office of the OSCE Representative on Freedom of the media would like to extend its gratitude to the CDDH (DH-S-AC) for its invitation to offer remarks on the draft treaty in a capacity as an observer.

Document 3**Access to information by the media in the OSCE region: trends and recommendations – Summary of preliminary results of the survey**

**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media
Miklós Haraszti**

**Access to information by the media in the OSCE region:
trends and recommendations****Summary of preliminary results of the survey¹**

Vienna, 30 April 2007

With the support of the 2006 Belgian OSCE Chairmanship, the Office of RFOM started a survey in May 2006 on access to information by the media in the OSCE participating States. RFOM sent a Questionnaire to all Governments of the OSCE participating States on the state of relevant legislation and practice in their nations.

This summary presents the preliminary results of the survey to the Permanent Council of the OSCE. The underlying 450-page database, compiled from the answers, remains an open document which will be updated as more Governments reply and laws change. Both this report and the database will be uploaded on the www.osce.org/fom website².

Although data for some countries are not yet complete, the survey enables us to draw up the **major trends in deficiencies**, and offer **best practices** for consideration.

The four surveyed areas

The survey covered four basic issues that inform the level of journalists' access to governmental data.

Freedom of information laws (FOI)

Modern FOI principles constitute a Copernican revolution for the development of the free press. By passing them either as Constitutional amendments or basic laws, the states give up their absolute right to withhold information, and introduce the primacy of their citizens' right to know about the government, making it an exception defined in law when the government still has the right to classify information.

Classification rules ("What is a secret?")

¹ Based on the analysis of the responses by David Banisar, Director of the FOI Project of Privacy International, London. See the analysis at www.privacyinternational.org/foi.

² So far, 41 Governments of the OSCE participating States (over 70 per cent) have filled out the Questionnaire. With the responses from OSCE field operations, local NGOs and experts, the responses cover 48 out of 56 participating States.

They define the scope and the oversight mechanism of classification, and determine the amount of governmental information available for the media by default or by request. These rules should be adjusted to FOI principles, defining state secrets as narrowly as appropriate for the sake of openness.

Punitive laws and practices (“Breach of secrecy”)

As the media often recur to unauthorised disclosure of classified information, opportunities for investigative journalism to access information will also be defined by the ‘breach of secrecy’ provisions of the penal code. Is ‘breach of secrecy’ only applied to the officials who fail to protect the secrets, or also to civilians who pass them on, journalists among them? Penal sanctions also should be consistent with FOI principles, and should enable courts to look into the public-interest value of questionable publications.

Protection of journalists’ confidential sources

For the sake of freedom of investigative reporting, in a modern FOI regime media workers should not be forced to reveal their confidential sources to law enforcement agencies or to testify about them in court. This privilege also includes the protection of journalists’ records, exemption from searches of their homes and offices, and from interception of journalists’ communications, if these are done in order to identify their sources.

I. FREEDOM OF INFORMATION LAWS

The FOI trend in the OSCE participating States is positive. Out of 56 OSCE participating States, 45 started their “Copernican revolution” in favour of the public’s right to know, by adopting national laws on access to information. This happened in equally high numbers in all regions of the OSCE area.

- In the past 10 years, dozens of OSCE states have adopted FOI laws. These include older democracies such as the **UK** (2000), **Switzerland** (2004), and **Germany** (2005), and new democracies such as **Armenia** (2003), **Kyrgyzstan** and **Azerbaijan** (both 2006).
- Of the remaining states, a number, including **Luxembourg**, **the Russian Federation** and **Malta**, are currently developing or considering proposals for FOI laws.

However, behind the composite good news hides the fact that FOI principles in many participating States remain only on paper.

Deficiencies despite successes

The mere existence of FOI laws does not ensure their appropriate implementation and functioning.

Adopting freedom of information laws is part of a **culture shift that can take time**. In some countries, the problem is often related to inherited difficulties with freedom of expression.

- In **Tajikistan**, a monitoring project found that basic information, including the number of persons sick from typhoid fever, anthrax, brucellosis and flu, statistics of divorce cases, the number of suicides, funds spent for events on the Day of Youth, the total amount of drugs seized by the police, bathing deaths and natural disasters, was being denied.³
- In **Uzbekistan**, since the incident in Andijan, access about what happened there has been limited.

In other places, the laws themselves are **not adequate**.

- In **Italy**, the 1990 law on Administrative Procedure limits access to “stakeholders” who have a “direct, practical, and actual interest based on a legally regulated case in relation to the document for which access is required.”⁴
- In **Austria**, the broadly defined exemptions in the law have led commentators to describe the right of access as “often illusory”.⁵
- The **Spanish** law on administrative procedures gives citizens a right to access files and records held by authorities but the Spanish government does not recognize it as a freedom of information act and a study found that requests are not answered.⁶

Finally, there has been some **withdrawing of openness** even in countries with advanced FOI regimes. Those happened either due to heightened security needs, or by introducing more restrictive fees for FOI requests:

- In the **United States**, there has been considerable controversy over reductions on access to data on internal decision-making, based on the claim of ‘Executive Privilege’⁷. However, the Congress is in the process of amending legislation to resolve these problems.⁸
- In **Ireland**, amendments to the Freedom of Information Act imposing high fees on applications and appeals have reduced the use of the act significantly. The changes have had an especially strong effect on the media, whose requests declined by 83 per cent between 2003 and 2004.⁹
- In the **United Kingdom**, the Government expects a pending proposal to impose fees significantly to reduce media use of the FOI Act.¹⁰ The Lord Chancellor said: “Freedom of information was never considered to be, and for our part will never be considered to be, a research arm for the media”.¹¹

³ NANSMIT, Monitoring 2005. http://old.cafspeech.kz/tj/monitoring_en.htm

⁴ Law No. 241 of 7 August 1990, §22(1).

⁵ ARTICLE 19, Advance Summary of Concerns on Respect for Freedom of Expression in Austria, Submission to the United Nations Human Rights Committee, March 2007.

⁶ “Transparencia y Silencio” Estudio Sobre el Acceso a la Información en España, Octubre de 2005.

http://www.sustentia.com/transparencia_y_silencio_espana.pdf

⁷ See OpenTheGovernment Coalition, Secrecy Report Card 2006. <http://www.openthegovernment.org/>

⁸ House Passes Open-Government Bills, Washington Post, 15 March 2007.

⁹ Office of the Information Commissioner, Review of the Operation of the Freedom of Information (Amendment) Act 2003, June 2004.

¹⁰ See CFOI, The Government’s proposals to restrict the Freedom of Information Act.

<http://www.cfoi.org.uk/feesproposals.html#otherresponses>

¹¹ Speech by Lord Chancellor and Secretary of State for Constitutional Affairs Lord Falconer of Thoroton, Lord Williams of Mostyn Memorial Lecture, 21 March 2007. <http://www.dca.gov.uk/speeches/2007/sp070321.htm>

- In **Bulgaria**, the Government has proposed amendments to require that some requestors show that they are “interested persons” and would extend timeframes and increase fees.¹²

Recommendations on FOI laws

For the sake of free flow of information in society in general, and for freedom of the media in particular:

All participating States should adopt freedom of information legislation that gives a legal right to all persons and organizations to demand and obtain information from public bodies and those who are performing public functions. Individuals should also have a right to access and correct all personal information held about themselves.

Public bodies should be required in law to respond promptly to all requests for information. Requests for information that are time-sensitive or relate to an imminent threat to health or safety should be responded to immediately. The process for requesting information should be simple and free or low-cost.

Some information of a sensitive nature may be subject to withholding for a limited, specified time for the period it is sensitive. The exemptions should be limited in scope. The official who wishes to withhold the information must identify the harm that would occur for each case of withholding. The public interest in disclosure should be considered in each case. In cases where information may be deemed sensitive by any other law, the FOI law must have precedence.

There should be an adequate mechanism for appealing each refusal to disclose. This should include having an independent oversight body such as an Ombudsman or Commission which can investigate and order releases. The body should also promote and educate on freedom of information.

Government bodies should be required by law affirmatively to publish information about their structures, personnel, activities, rules, guidance, decisions, procurement, and other information of public interest on a regular basis in formats including the use of ICTs and in public reading rooms or libraries to ensure easy and widespread access.

There should be sanctions available in cases where it is shown that an official or body is deliberately withholding information in violation of the law.

II. CLASSIFICATION RULES

Unfortunately, many countries retained the right to classify a too wide array of information as ‘state secrets’. In fact, the majority of the OSCE participating States have not yet adjusted their rules of classification to the FOI principles, that is, they disregard the primacy of the public’s right to know.

¹² See OSCE Representative urges Bulgaria to prosecute attackers of journalists, warns against changes to law on information, 23 March 2007.

The survey offers a large spectrum of best practices from the point of view of media freedom.

Best classification practices (and some not so good ones)

Types of Information to be Protected. A FOI-friendly state secrets act protects only information the disclosure of which would seriously undermine national security or the territorial integrity of a nation.

- In **Lithuania**, a state secret is limited to information that would “violate the sovereignty of the Republic of Lithuania, defence or economic power, pose harm to the constitutional system and political interests of the Republic of Lithuania, pose danger to the life, health and constitutional rights of individuals”.¹³
- In the former **Yugoslav Republic of Macedonia**, the information must be related to the “county’s security and defense, its territorial integrity and sovereignty, constitutional order, public interest, human and citizen freedom and rights.”¹⁴
- The **U.S.** Executive Order on Classification sets out eight areas that are eligible for classification:
 - military plans, weapons systems, or operations;
 - foreign government information;
 - intelligence activities (including special activities), intelligence sources or methods, or cryptology;
 - foreign relations or foreign activities of the US, including confidential sources;
 - scientific, technological or economic matters relating to national security, which include defence against trans-national terrorism;
 - U.S. government programs for safeguarding nuclear materials or facilities;
 - vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to national security, which includes defence against trans-national terrorism;
 - weapons of mass destruction.¹⁵

Duration. For the media, it is very important that classified information had a short “life cycle”¹⁶. Modern state secrets acts classify information for only as long as it is necessary for the protection of the interests involved.

¹³ Law on State Secrets and Official Secrets, §2(2).

¹⁴ Law on Classified Information, §5(2).

¹⁵ Executive Order 13,292, Further Amendment to Executive Order 12958 Classified National Security Information, March 28, 2003. Also See Ireland Freedom of Information Act, Section 24; Canadian Access to Information Act, Section 15; Bulgarian Law for the Protection of Classified Information, Appendix No. 1 of Article 25.

¹⁶ See Background on the Principles and Process of “Life Cycle Risk Assessment”, <http://www.opsec.org/opsnews/Sep97/protected/Secrecy.html>

- The Law on Classified Information of **the former Yugoslav Republic of Macedonia** limits State Secrets to 10 years, Highly Confidential information to five years, Confidential information to three years and Internal information to two years.
- In **Albania**, secrets are limited to ten years under the Law on Classified Information. The U.S. Executive Order sets a default of ten years unless it can be shown that it needs a longer duration.

A few laws impose long or no limits. This results in information being kept secret for far longer than its sensitivity requires.

- In **Hungary**, information can be classified for 90 years (a reform is pending).
- Most of the laws in **Central Asia** do not provide for set limits.
- The current and proposed laws on secrets in **Croatia** do not set any firm time limits.

Reviews. FOI principles require that there are periodic reviews of classification.

- The **Georgian** and **Estonian** State Secrets Act require that each possessor of secrets review the classification yearly and note when it has been declassified.
- In **Sweden**, the classification is re-evaluated each time the document is accessed.
- In **Moldova**, the reviews must happen "regularly".
- **Uzbekistan** and **Turkmenistan** require that information is reviewed every five years.

Prohibitions on the Classification of Information. FOI-capable secrets acts typically ban certain categories of information from being classified.

- The **US** Executive Order states that information cannot be classified to "conceal violations of law, inefficiency, or administrative error, prevent embarrassment to a person, organization or agency, retain competition, or prevent or delay the release of information that does not require protection in the interest of national security information". It also prohibits basic scientific information not clearly related to national security from being classified.
- The **Moldovan** Law on State Secrets prohibits classification of the "true situation in the sphere of education, health protection, ecology, agriculture, trade, and justice".
- The **Georgian** Law on State Secrets prohibits classification of information on "natural disasters, catastrophes and other extraordinary events which have already occurred or may occur and which threaten the safety of the citizens".

Oversight. In good state secrets laws, a specialized body is created to make decisions on the categories of information to be classified, and provide vetting of those who are authorized to access classified information. It can also review decisions on classification.

- In **Bulgaria**, the Law for the Protection of Classified Information created the State Commission for the Security of Information (SCSI).¹⁷ The SCSI controls the handling of classified information and even provides training.

¹⁷ Law for the Protection of the Classified Information. Prom. SG. 45/30 Apr 2002, corr. SG. 5/17 Jan 2003.

- In **France**, the 1998 law on classification of national security information¹⁸ created the *Commission consultative du secret de la défense nationale* (CCSDN). This gives advice on the declassification and release of national security information in court cases. The advice is published in the Official Journal.¹⁹
- In **Hungary**, under the Secrecy Act of 1995, the Parliamentary Commissioner for Data Protection and Freedom of Information is entitled to change the classification of state and official secrets.²⁰
- In **Slovenia**, the Information Commissioner can check the accuracy of the classification.

Recommendations on classification rules

The definition of state secrets should be limited only to data that directly relate to the national security of the state and where their unauthorized release would have identifiable and serious consequences. Information designated as “Official” or “work secrets” should not be considered for classification as state secrets. Limits on their disclosure should be found in the access to information law.

Information relating to violations of the law or human rights, maladministration or administrative errors, threats to public health or the environment, the health of senior elected officials, statistical, social-economic or cultural information, basic scientific information, or that which is merely embarrassing to individuals or organisations should not be classified as a state or official secret.

Information should only be classified as a state secret for a limited period of time where the release of the information would cause a serious harm to the interests of the nation. Information that is classified should be regularly reviewed and have a date after which it will be declassified and released. It should be presumed that no information should be classified for more than 15 years unless compelling reasons can be shown for withholding it.

Governments should institute a review of all secret information over 15 years old and automatically declassify and release it. All information that was designated as secret by a previous non-democratic government should be declassified and presumptively released unless it is shown that its release would endanger the national security or be an unwarranted invasion of privacy.

An independent body that is not part of the intelligence, military or security services should have oversight over classified information and ensure that the system is operating properly, receive complaints about improperly classified information and review and order the declassification of information.

¹⁸ Loi no 98-567 du 8 juillet 1998 instituant une Commission consultative du secret de la défense nationale, <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=DEFX9700140L>. See Rapport 2001 de la Commission consultative du secret de la défense nationale, <http://www.ladocumentationfrancaise.fr/brp/notices/014000754.shtml>

¹⁹ For a copy of decisions, see <http://www.reseautoltaire.net/rubrique387.html>

²⁰ Hungary, Act LXV of 1995 on State Secrets and Official Secrets.

There should be sanctions for those who deliberately and improperly designate information as secret or maintain excessive secrecy.

III. CRIMINAL SANCTIONS

The lack of adjustment of criminal law and practice to FOI principles is one of the greatest dangers for the free flow of information and fearless journalism. Many journalists in the OSCE participating States are prosecuted for unearthing information that the public should know about even if it is classified.

In at least 29 OSCE participating States, the criminalisation of “breach of secrecy” is not limited to those who have a duty to protect the secrets but mechanically extends to each and every citizen who played a role in passing on or publishing classified data.

The courts in these countries are not allowed to acquit any citizen caught with governmental secrets, not even in case of obvious public interest in the disseminated information. In most cases, the only way for journalists to avoid conviction – which may come with imprisonment – is to prove that the data was insufficiently classified.

Let us add to the list of dangers that criminalisation of ‘breach of secrecy’ punishes not professionally weak journalism but precisely demanding investigative reporting that is essential for the role of the press.

Best practices

- In the **United States**, there are no provisions on disclosure of state secrets. The closest law is the Espionage Act adopted in 1917, which includes limited prohibitions on the disclosure of defence information with the intent to harm the US.²¹ It is generally accepted that this does not apply to the publication of state secrets by newspapers, and there has never been a prosecution of a journalist or newspaper in the history of the law.

The necessary differentiation can be done in the punitive law or in the press law:

- In **Norway**, the duty of secrecy, defined in the Security Act and the Penal Code, does not apply to members of the public in general.
- In **Georgia**, the Law on Freedom of Speech and Expression says that the prohibition on publishing secrets only applies to officials and government employees.
- In contrast, the **Belarusian** Press Law bans the mass media from publishing state or other protected secrets.

The future belongs to the so-called ‘public-interest scrutiny’: ensuring that information of importance to the public is not suppressed because it is classified as secret. The protections can apply to both insiders (*whistleblowers*) and to the media.

²¹ 18 USC 793 et seq.

- In **Austria**, the criminal code provides that state secrets are not violated when there is a justified public or private interest.²²
- In **Moldova**, Article 7(5) of the Law on Access to Information states that no one can be punished if the public interest in knowing the information is larger than the damage that can result from its dissemination.
- In **Georgia**, the Law on Freedom of Speech and Expression says that those who disclose state secrets are not liable “if the purpose of disclosure of a secret was protection of the lawful interests of the society, and if the protected good exceed the caused damage”.

Recent cases in OSCE participating States

In the past few years, thanks to prosecutors with no taste for the FOI principles, there has been an increase in the number of cases against the media. Fortunately, in many of these cases, the courts have found that the actions of the police or even the laws were damaging freedom of the press. As in the following:

- **Canada** - In January 2004, *Ottawa Citizen* reporter Juliet O’Neil was threatened with prosecution under the Security of Information Act and her home and office were searched after the *Citizen* published an article in November 2003 on the controversial arrest and transfer to Syria of Martian Arar on allegations of terrorism. The Ontario Court of Justice ruled in October 2006 that the Act violated the Canadian Charter of Rights and Freedoms.²³
- **Denmark** - Two journalists and the editor of *Berlingske Tidende* were prosecuted under the Criminal Code in November 2006 after publishing material leaked from the Defense Ministry. The court found they had acted in the public interest in publishing the information and acquitted them.
- **Germany** - The *Cicero* editor-in-chief was charged and paid a €1,000 fine, but refutes any liability implied by having paid the fine. The Constitutional Court found in February 2007 that the police search and seizure of the offices of *Cicero* because of the publication of the state secret was unconstitutional.²⁴
- **Hungary** - In November 2004, Rita Csik, a journalist with the *Nepszava* newspaper was charged under the Hungarian Penal Code for writing an article that quoted a police memorandum on an investigation of an MP. She was acquitted in November 2005 by the Budapest municipal court, which said that the document was not legally classified. The decision was affirmed by the Court of Appeals in May 2006.
In December 2005, *HVG* magazine reporter Antónia Rádi was charged with disclosing classified information after writing an article on a police investigation of the mafia. The case is still pending.
- **Lithuania** - State Security officials raided the offices of *Laisvas Laikrastis* newspaper and arrested the editor for possession of a state secret in September 2006 after the newspaper wrote a story about a corruption investigation.

²² StGB §122(4).

²³ Canada (Attorney General) v. O’Neill, 2004 CanLII 41197 (ON S.C.), (2004), 192 C.C.C. (3d) 255.

²⁴ 1 BvR 538/06; 1 BvR 2045/06, 27 February 2007.

15,000 copies of the newspaper, computers and other equipment were seized.²⁵ The raid was strongly criticized by the President.

- ***The Netherlands*** - Reporter Peter de Vries was charged in December 2005 under the Criminal Code after he revealed information on his television show from two disks left by an intelligence officer in a leased car two years earlier. In February 2006, the public prosecutor announced that he would not be prosecuted.
- ***Romania*** - In February 2006, six journalists were questioned and two were arrested for receiving classified information on military forces in Iraq and Afghanistan from a former soldier. The journalists did not publish the information and handed over the information to the government. The Supreme Court ordered the release of one journalist after she had been detained for two days.
- ***Switzerland*** -Two *Sonntags Blick* reporters and the editor were prosecuted under the military penal code for publication of Swiss military interception of an Egyptian government fax about press reports on secret prisons run by the US government. On 17 April 2007, they were acquitted by a military tribunal of having inflicted damage to the defence capabilities of the Swiss Army. In 2003, the government opened proceedings against the editor of *Sonntags Blick* for publishing photos of an underground military establishment.
- ***UK*** - Neil Garrett of *ITV News* was arrested in October 2005 under the Official Secrets Act after publishing internal police information on the mistaken shooting of Jean Charles de Menezes. In November 2005, the government threatened to charge several newspapers with violating the Official Secrets Act if they published stories based on a leaked transcript of conversations between PM Tony Blair and President George Bush about bombing *Al Jazeera* television.
- In ***Ireland***, *Sunday Tribune* journalist Mick McCaffrey was arrested in February 2007 under the Commission of Investigations Act for publishing information from a leaked report on how the police had mishandled a murder investigation in 1997. Two journalists from the *Irish Times* are also under investigation after published leaked information about the investigation of the Prime Minister for receiving payments from a businessman.²⁶ The Supreme Court rejected an effort by the Tribunal to prohibit the newspaper from publishing related information in March 2007.²⁷

Recommendations on criminal sanctions for 'breach of secrecy':

Criminal and Civil Code prohibitions should only apply to officials and others who have a specific legal duty to maintain confidentiality.

²⁵ Committee to Protect Journalists, Newspaper issue seized; editor briefly detained; newsroom, editor's home searched and hard drives confiscated, 11 September 2006.

²⁶ Committee for the Protection of Journalists, Journalist arrested in Ireland; two others investigated, March 5, 2007.

²⁷ Mahon -v- Post Publications [2007] IESC 15 (29 March 2007).

'Whistleblowers' who disclose secret information of public interest to the media should not be subject to legal, administrative or employment-related sanctions.

The test of public interest in the publication should become an integral part of jurisprudence on disclosure of information.

IV. PROTECTION OF SOURCES

Prosecutors recently have been attempting not only to put journalists themselves on the bench of the accused for the crime of 'breaching secrecy'. In the wake of heightened security concerns there have been many attempts to force journalists to reveal their confidential sources, using the citizen's duty to testify.

Protection of confidential sources is crucial for the media's ability to gather information. As noted by European Court of Human Rights:

*"Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."*²⁸

Protections should extend to the use of searches and wiretaps to obtain information on sources.

Unfortunately, the trend is the worst of all among the covered dimensions of access to information. Only a minority of the OSCE participating States have 'shields' for journalists from demands to reveal sources.

Best practices

- **Belgium** is one of the few countries that have adopted a free standing law on a comprehensive system of protection of sources. Such laws also exist in more than 30 U.S. States, but, ominously, not on the federal U.S. level.
- Good 'shield' provisions are also at work in **Armenia, Austria, Croatia, Cyprus, Denmark, Finland, France, FYR Macedonia, Georgia, Germany, Liechtenstein, Lithuania, Malta, Norway, Poland, Portugal, Romania, Sweden, and Turkey.**
- They could be given in constitutions, press laws, criminal procedure rules, or, as in **Germany** since the *Cicero* case, in Constitutional Court case law. In the **UK**, the protection is included in the Contempt of Court Act.

In these states journalists cannot be ordered to reveal their confidential sources, or public-interest scrutiny is provided.

Paradoxical trends

²⁸ Goodwin v. The United Kingdom - 17488/90 [1996] ECHR 16 (27 March 1996).

One surprising result of the survey is that prosecutors are out against the journalists' privilege mostly in the countries which provide some 'shield'.

- 67 per cent of all cases when journalists were requested by prosecutors to give up their 'shield' privilege have been registered in the pre-1989 democracies. Most of these countries have some degree of sources protection.

The other paradox lies in the fact that these attempts were quite regularly overturned by the courts, except in federal cases in the **United States**. All recorded cases of journalists actually punished for not revealing sources have resulted from this legislative deficiency at the U.S. federal level.

- In the **U.S.**, at the federal level, there are guidelines for prosecutors issued by the U.S. Department of Justice which apply to subpoenas of the news media.²⁹ The guidelines as such amount to a protection of confidentiality of sources in 'public-interest' publications. Nevertheless, the current and the previous Attorney Generals have consistently attempted to break the journalists' privilege. Several bills are now pending in the US Congress to incorporate the provisions into law.

The final paradox is the insignificant amount of both 'breach of secrecy' and of 'protection of sources' cases in the **CIS region**. Here, prosecutors often apply other criminal provisions against journalists, so the small amount of such cases is probably caused by a relative underdevelopment of investigative journalism in the CIS region.

In **Central European states**, the number of cases is also small. It seems that courts or prosecutors there try to prevent leaks by prosecuting journalists for disclosure of secrets, rather than by demanding disclosure of their sources.

Recent cases

Regardless of the protections, there have been numerous cases in OSCE participating States in the past few years, where journalists have been arrested, newsrooms searched, and equipment seized in an effort to identify sources or force journalists to cooperate in investigations:

- In the **U.S.**, journalists have been incarcerated for 'contempt of court' after refusing to reveal their confidential sources. In 2005, Judith Miller of the *New York Times* spent 85 days in jail for refusing to reveal the identity of her source; in 2001, freelance writer Vanessa Leggett spent 168 days in jail for not providing her notes and tapes; in 2006, blogger Josh Wolf spent 226 days in jail for refusing to produce raw footage.
- In **the Netherlands**, two journalists from the newspaper *De Telegraaf* were detained in November 2006 after refusing to disclose the source of intelligence dossiers on a criminal.
- Police in **Italy** searched the offices of *La Repubblica* and the *Piccolo* newspapers and two journalists' homes for files in 2003. Also in 2003, the police raided *Il Giornale* and seized a reported 7,000 files.

²⁹ 28 C.F.R. § 50.10.

- In **Belgium**, *Stern* reporter Hans-Martin Tillack was detained and his office and home were searched after he wrote an investigative story based on internal documents from the European Union's Anti-Fraud Agency (OLAF). The European Court of Justice rejected a challenge in October 2006 to force the return of the documents. Belgium has since amended its law.
- In **France**, the police searched the offices of *Le Point* and *L'Equipe* and seized computers following the publication of stories about sports doping investigations. The Minister of Justice Pascal Clément promised in June 2006 to strengthen the law protecting journalists. However, in July 2006, police searched the offices of *Midi Libre* following a complaint that it broke professional secrecy.
- In **the Russian Federation**, twenty armed police searched the offices of *Permsky Obozrevatel* in August 2006 and seized computers and other equipment, claiming that the newspaper had obtained classified information.

Recommendations on protection of sources

Each participating State should adopt an explicit law on protection of sources to ensure these rights are recognized and protected.

Journalists should not be required to testify in criminal or civil trials or provide information as a witness unless the need is absolutely essential, the information is not available from any other means and there is no likelihood that doing so would endanger future health or well being of the journalist or restrict their or others ability to obtain information from similar sources in the future.

* * *

Document 4**Letter sent by the Information Commissioner (Slovenia),
Ms Nataša Pirc Musar, on 20 September 2007**

Date: 20th of September, 2007

Reference number: 540/2/2007/2

Information Commissioner

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To the members of the Group of Specialists on Access to Official Documents**Subject: Draft Convention on Access to Official Documents**

Dear members of the Group of specialists,

At the beginning we would like to inform you that the Minister for Public Administration of the Republic of Slovenia, which is in charge for freedom of information, is fully supporting the Information Commissioner of the Republic of Slovenia as a member of the Group of Specialists on Access to Official Documents (DH-S-AC) in its positions. Furthermore we should emphasise that for Slovenia neither the old draft text nor potential new text will represent any difficulty. However in our efforts to ensure that this historical moment of creation of the first legally binding document regulating the field of freedom of information is fully taken advantage of and that the opportunity to preserve standards established by the Recommendation (2002) No. 2 is not missed we invite you to reflect on and support our proposals thus preventing that a step backwards is made in this important area.

We are convinced that Slovenia adopted effective legal model also resulting from standards defined by the Recommendation (2002) No. 2 of the Council of Europe which has in combination with the Explanatory Memorandum importantly contributed to the development of higher standards in access to public information and consequently also to good freedom of the press and detected corruption record of Slovenia. It is in this respect of utmost importance that the Slovene Access to Information of Public Character Act covers three branches of authorities; state authorities as well as bearers of public authority, public services contractors and even all entities of public law. The Act defines numerous obligations of the liable bodies, for example: each liable body is required to publish catalogue of public information it disposes with arranged by content sets; and each liable body is also obliged to make the information of public character accessible through internet: official consolidated texts of regulations, programmes, strategies, positions, opinions and guidelines, proposals of draft regulations, information related to their procedures and public procurements.

Relevant normative platforms are reflected in Slovenia also in form of good practices. Particularly the possibility of appeal on the grounds of inactivity of the body in case of absence of reply by the body has proven essential in ensuring effective access to information. The number of such appeals on the grounds of inactivity of the body has been approximately four times bigger in previous years than the number of appeals against actual decisions rejecting the request for access to information. We have therefore every reason to conclude, that access to public information would not be actively implemented without the stipulated appeal on the grounds of inactivity of the body. Specific stipulation of the time limit for transmission of

information which is related to this showed as extremely productive in particular in ensuring protection to the applicants requesting access to information.

In drafting the convention as the first legally binding document on the level of Council of Europe we are on these grounds appealing to the Group of specialists to take into account these positions which have according to the practices of countries recently establishing the access to information of public character proved as successful even urgently necessary.

Considering the fact that the Group of specialists drafting the draft proposal of the Convention on Access to Official Documents will be meeting shortly and taking into account that this will be the 16th meeting of this group, we are formally contacting you. As is reflected in the Report of the 15th Meeting, the working document reflects the state of the discussion and is in no way binding in relation to the final text to be adopted by the DHS-AC. **Our estimation is that enough time should be left for deciding on the already discussed provisions which remain at issue.** We would like to mention at this point that Information Commissioner has as representative of the Republic of Slovenia, a member of the Council of Europe, already at the previous meeting taking place on 3 – 6 July 2007 raised concerns with regard to deficiencies of several provisions.

To save time and be as constructive as possible we propose the following changes to some of the discussed solutions according to the last version of the text of Draft European Convention on Access to Official Documents:

1. Optional part of the definition of the term public authority should be included in mandatory part of definition in the binding text. Article 1 Paragraph 2 should thus read as follows:

“2. For the purposes of this Convention:

a. “public authorities” means:

- i. government and administration at national, regional and local level;
- ii. legislative bodies and judicial authorities insofar as they perform administrative functions according to national law;
- iii. natural or legal persons insofar as they exercise administrative authority.
- iv. legislative bodies as regards all their activities;
- v. judicial authorities as regards all their activities;
- vi. natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.”

2. Sentence 1 in Article 5 Paragraph 4 should be changed as follows:

“A request for access to an official document shall be dealt with promptly. Each party shall set statutory maximum time limits within which requests shall be processed.”

3. Furthermore Article 8 Paragraph 1 should be changed as follows:

“An applicant whose request for an official document has been denied, whether in part or in full and an applicant whose request for an official document has not been dealt within the statutory time limit of each party shall have access to a review procedure before a court of law or another independent and impartial body established by law.”

4. Article 10 should be changed as follows:

“A public authority takes the necessary measures to make public official documents which it holds in the interest of promoting the transparency and efficiency of public

administration and to encourage informed participation by the public in matters of general interest, especially:

- a. Consolidated texts of regulations relating to the field of work of the body, linked to the state register of regulations on the internet;
- b. Programmes, strategies, views, opinions and instructions of general nature important for the interaction of the body with natural and legal persons and for deciding on their rights or obligations respectively, studies, and other similar documents relating to the field of work of the body;
- c. Proposals of regulations, programmes, strategies, and other similar documents relating to the field of work of the body;
- d. All publications and tendering documentation in accordance with regulations governing public procurements;
- e. Information on their activities and administrative, judicial and other services.”

We propose that each of the above mentioned proposals is to be decided by a public vote and the results to be recorded in the relevant minutes of the meeting.

We kindly invite the members of the Group of specialists to consider our proposal and to contact us before the next meeting taking place on 8th October 2007 with regard to their position on the proposed public vote and amendments to the above mentioned articles of the draft text.

Finally we would like to underline the fact that our proposals are aiming solely at ensuring implementation of the already established minimum standards.

Hoping for your expression of support to our common efforts for transparency we are sending our kindest regards.

Yours sincerely,

Nataša Pirc Musar,
Information Commissioner of the Republic of Slovenia

Address of the delegated body in Council of Europe:

Group of Specialists on Access to Official Documents

Ms. Helena Jäderblom, Chair

c/o Council of Europe

67075 Strasbourg, France

cc:

Directorate General of Human Rights and Legal Affairs

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Representatives – members of the group of specialist:

Belgium, Bulgaria, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, Turkey and United Kingdom, other countries may participate in the discussions – Slovenia was one such participant in the July 2007 drafting session.

* * *

Document 5**Letter sent by the Minister of Public Administration (Slovenia),
Dr. Gregor Virant, on 21 September 2007**

Date: 21st September 2007

Reference number: 090-61/2007/1

Ministry of Public Administration
Tržaška 21
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SI – Slovenia

To all Ministries of Foreign Affairs and Permanent representations to the Council of Europe

Group of Specialists on Access to Official Documents

Ms. Helena Jäderblom, Chair (e-mail of the secretariat Michele.COGNARD@coe.int)

c/o Council of Europe

67075 Strasbourg

France

cc:

Steering Committee on Human Rights (CDDH)

Mr. Roeland BÖCKER, Chair (roeland.bocker@minbuza.nl)

Subject: Draft Convention on Access to Official Documents

We are contacting you in light of the preparation of the convention on access to information of public character, which is being drafted by a Group of Specialists on Access to Official Documents (DH-S-AC).

Allow us to present the position and experiences which Slovenia has gained in the area of transparent functioning of the public sector. The Republic of Slovenia adopted the general Act on the Access to Information of Public Character in 2003. The implementation of this Act itself introduced important changes in the interest of transparent functioning of the public sector due to the following reasons:

- It covers all three branches of government;
- State authorities as well as bearers of public authority, public services contractors and even all entities of public law are covered by the Act;
- It specifies the time limit of 20 working days for reaching a decision regarding the request for access to information;
- Different types of complaints against violations of the right of access to public information are provided for, including the appeal on the grounds of inactivity of the body in case of absence of reply by the body and appeal against inadequate transmission of requested information if the information is not transmitted in the requested form;

- An independent and autonomous appellate body for access to information has been in place since September 2003 – The Commissioner for access to information of public character was renamed the Information Commissioner (on 31.12.2005), as the body was merged with the national supervisory authority for the protection of personal data;
- The Information Commissioner, being the appellate instance on the second level, prior to judicial protection of the right of access to information of public character, has strong decision-making powers, including the possibility to amend the decision of the body on the first level and thus order the transmission of information;
- The Act defines numerous obligations of the liable bodies, for example: each liable body is required to publish a catalogue of public information it disposes with, arranged by content sets; and each liable body is also obliged to make the information of public character accessible on the internet: official consolidated texts of regulations, programmes, strategies, positions, opinions and guidelines, proposals of draft regulations, information related to their procedures and public procurements;
- 12 narrowly defined exceptions to freely accessible information were stipulated, using the damage test for most of the exceptions. In 2005 however, the Act was amended, imposing a public interest test for most of the then relevant 11 exceptions to freely accessible information.

We are convinced that Slovenia adopted an effective legal model, also resulting from standards defined by the Recommendation (2002) No. 2 of the Council of Europe, which has - in combination with the Explanatory Memorandum - importantly contributed to the development of higher standards in access to public information and consequently also to good freedom of the press and good detection of corruption in Slovenia.

The relevant normative platforms are also reflected in good practices. Particularly the possibility of appeal on the grounds of inactivity of the body in case of absence of reply by the body has proven essential in ensuring effective access to information. The number of such appeals on the grounds of inactivity of the body has been approximately four times bigger in previous years than the number of appeals against actual decisions rejecting the request for access to information. We have therefore every reason to conclude, that access to public information would not be actively implemented without the stipulated appeal on the grounds of inactivity of the body. This appeal is namely - according to the Slovene law - followed by the Information Commissioner's request for an immediate decision by the relevant body and thus in most cases leads to the information being transmitted. Specific stipulation of the time limit for transmission of information which is related to this, proved as extremely productive in particular for ensuring the protection of the applicants requesting access to information. Furthermore, the implementation of the Act by liable bodies and the applicants could not be ensured if the independent appellate body lacked adequate powers, enabling it to develop a uniform practice since the establishment of the institute of access to information.

In drafting the convention as the first legally binding document on the level of the Council of Europe, we are on these grounds appealing to the Group of specialists to take into account these positions which have - according to the practices of countries recently establishing the access to information of public character - proved as successful, even urgently necessary.

Recently adopted legislative solutions namely act as a model for numerous countries around the world, for example in the Balkan region or South America.

We are convinced that history has showed true value of transparent and open functioning of the public sector and that access to public information as a basic human right therefore needs adequate protection in form of a convention on the level of the Council of Europe. Such a convention, adopted by the main supranational European human rights organisation, surpassing the geographic boundaries of Europe, should reflect the best legislative solutions, best practices and established and effective standards. It should not be created solely on the premises of seeking the widest possible consensus, but should aim to achieve the highest possible level of access to information, which should not be lower than that defined by Recommendation (2002) No. 2 of the Council of Europe. Should the convention aim to ensure this, it would need to integrate at least the following minimal solutions and standards:

- 1. It should ensure the possibility of appeal on the grounds of inactivity of the body which is unavoidably related to stipulating the time limit for transmission of information;**
- 2. It should cover all three branches of government: not only the executive branch, but also the legislative and judiciary branches;**
- 3. It should cover bearers of public authority and public services contractors;**
- 4. It should include provisions on active disclosure of information by liable bodies.**

If the opposite occurs, namely if the convention moves away from good and already established standards and includes minimum solutions, we can expect negative effects, particularly in those countries where access to public information does not yet have a long-standing tradition. We are equally convinced that our initiative would prove effective also for those countries, where transparency is considered a daily practice and would represent an opportunity for them to make a step further in this area and ensure good prospects for future development of this important field of law. Slovenia will not face any difficulties when it comes to implementing the proposed convention, as all internationally established standards are already an integral part of the Slovene general Act on the Access to Information of Public Character, nevertheless we believe that support for our proposal would mean making a step forward in this field.

Should your position be consistent with ours in our efforts to ensure that the established level, set by the above mentioned Recommendation 2 (2002) is maintained, we kindly propose, in order not to make a step backwards, that you consider contacting your representatives at the Council of Europe in order to establish what position they represent in the Group of specialists and if possible, ensure their support for our proposal.

Our appeal goes also to those member countries of the Council of Europe without a representative in the Group of specialists. We kindly ask you to consider sending a letter of support for our proposal, with which we wish to ensure support for transparent, open and citizen friendly functioning of the public sector, to the Steering Committee on Human Rights (CDDH), to Mr. Roeland BÖCKER, and to the Chair of the Group of specialists Ms. Helena Jäderblom.

The next session of the Group of specialists, which will prepare the final draft of the Convention for consideration by the Council of Ministers, will be held from 8th until 12th of October 2007, therefore we kindly recommend any actions by your authority to be taken at least a week before this date.

Europe is and should remain in this field, a role model for future development of this basic human right.

Yours respectfully,



Dr. Gregor Virant

Minister of Public Administration of the Republic of Slovenia

Representatives – members of the Group of specialists:

Belgium, Bulgaria, Denmark, France, Germany, Italy, Netherlands, Norway, Poland, Portugal, Russian Federation, Spain, Sweden, Turkey and United Kingdom, other countries may participate in the discussions – Slovenia was one such participant at the July 2007 drafting session.

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Document 6**Letter sent by the Deputy Information Commissioner (United Kingdom),
Mr Graham Smith, on 28 September 2007**

Our ref: GS/LMD

Ms Helena Jäderblom
Chair of the Group of Specialists
on Access to Official Documents
c/o Council of Europe
67075 Strasbourg
France

28 September 2007

Dear Ms Jäderblom

I am writing on behalf of the Information Commissioner to lend support for the inclusion of minimum standards in the draft Convention on Access to Official Documents to be put forward for consideration by the Group of Specialists during the week commencing 8 October and thereafter by the Steering Committee on Human Rights.

The Information Commissioner is the UK's independent supervisory body for data protection and freedom of information. The Commissioner promotes and enforces the Freedom of Information Act 2000, which makes provision for the disclosure of information held by public authorities. In particular, his functions include the approval of publication schemes, as a vehicle for the proactive disclosure of information to the public, and adjudicating on complaints of non-compliance with the Act. The Commissioner has statutory power to order the disclosure of requested information which is withheld by a public authority. Such decisions are legally enforceable, subject to a right of appeal to the Information Tribunal, within the justice system.

Having been in operation now for nearly 3 years, the UK FOI Act, together with the parallel regime under the Environmental Information Regulations 2004, are working well. The model of promotion and enforcement by an independent Commissioner is respected and valued both by public authorities and by those requesting information. Against that background, and referring to our experience since January 2005, the Information Commissioner welcomes the progress towards the submission of the draft Convention on Access to Official Documents for consideration by the Council of Ministers.

There are however, certain further provisions which the Commissioner respectfully suggests should be considered by the Group of Specialists and the Steering Committee on Human Rights with a view to the enhancement of the proposed instrument.

First, a specified time limit within which the public authority must either comply with the request or give the requester a properly reasoned refusal to disclose the information requested is important to give efficacy to the right in practice. Under the UK FOI Act this is 20 working days.

Second, linked to the first, is an express provision that a failure to respond within the time limit should be regarded as a refusal of the request for information without adequate reasons. This would then trigger the right of the requester to pursue a complaint through the appropriate channels. Provisions for an extension of time, either by agreement or by satisfying specified criteria (e.g. complexity or volume of the request) could be included, although a absolute time limit is workable.

Without these provisions, there is a risk that public authorities will not be conscientious in fulfilling their obligations in accordance with the instrument and requesters will be uncertain as to the nature of their rights, the actions they can take when their rights are violated and the time when it is appropriate for them to take action towards having their rights enforced.

Finally, one very successful feature of the UK FOI Act is the obligation on public authorities to give advice and assistance to those who make a request for information or are attempting to request information from them. This puts an explicit duty on public authorities to engage with citizens who wish to exercise their right of access to official documents. It also helps to overcome the very real practical difficulty for citizens who do not know exactly what information is held by a public authority or what they would ask for if they knew it existed.

I hope this contribution is of interest and assistance to the Group of Specialists and the Steering Committee on Human Rights. The primary purpose is to lend support for the development and progress of the draft Convention on Access to Official Documents. If I or any of the Commissioner's staff can be of any further assistance, please do not hesitate to get in touch.

Yours sincerely

Graham Smith
Deputy Commissioner

for
Richard Thomas
Information Commissioner

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Document 7**Letter sent by the Parliamentary Commissioner for Data Protection and Freedom of Information (Hungary), Dr. Attila Peterfalvi, on 2 October 2007**

2 October 2007

To:
Group of Specialists on Access to Official Documents
Ms. Helena Jäderblom, Chair
c/o Council of Europe
67075 Strasbourg
France

cc:
Steering Committee on Human Rights (CDDH)
Mr. Roeland Böcker, Chair

Madame Chair, Sirs:

As the Commissioner of Data Protection and Freedom of Information of Hungary, I welcome the Draft European Convention on Access to Official Documents of the Council of Europe considering that transparency of public matters is a pre-requisite and also an indicator of democracy.

Setting minimum standards might facilitate the adoption of Freedom of Information Acts in countries that have not regulated the right of access to official documents yet. The adoption of the Convention, however, has great importance for other reasons as well. Most members of the Council of Europe (hereinafter 'COE') are countries with advanced freedom of information regimes. Regulations at national levels, however, show a number of differences. I believe that harmonization of national laws of COE member states and non-member countries as well has increasing importance in the age of globalization. Therefore, it is essential to share our experiences with each other.

The right to freedom of information as a fundamental right was included in the Constitution of Hungary in 1989, and the Parliament adopted the Act on Public Access to Data of Public Interest in 1992. The right to freedom of information has been safeguarded not only by the courts of law but by an independent parliamentary commissioner as well since 1995. In my experience, access to information laws can not be merely political declarations and the direct translation of a well-tried foreign law is not sufficient either. Freedom of information can not become a real right unless it is clear for the legislator that:

- this is one of the most expensive rights,

- its proper operation requires the extensive preparation of public servants and a change in their general approach, and
- introduction of effective guarantees (appeals bodies, monitoring system) is indispensable.

The COE should take these into consideration not only when finalizing the text of the Convention but also when it examines the practice of the signatory states.

We welcome the fact that the draft prepared by the Group of Specialists on Access to Official Documents sets forth a number of significant provisions (nobody is obliged to demonstrate his/her reasons for the data request, limitations of the right of access must be set down precisely by an Act, it includes the public interest test, processing of requests are almost free of charge, etc.). At the same time it has some shortcomings as well, which might undermine the purpose of the Convention. Therefore, my proposals based on the Hungarian experience can be summarized as follows:

1. It is justified that the right of access should extend to all data related to the public functions of every public authority on national and local level as well.
2. Laying down exceptions is a key point of access to information laws everywhere. If there are too many exceptions or they are too generally drafted, they might turn freedom of information into an "exhibition object". In my opinion, the exceptions listed in the draft should be narrowed down in three areas:
 - Article 3. 1. f. provides for the protection of privacy and other legitimate private interest. The privacy of persons performing public functions, who exercise public authority and operate with public funds, however, can not receive the same level of protection as the privacy of citizens. Therefore, this limitation should be drafted more narrowly. In Hungary, the Act on Data Protection and Freedom of Information provides that personal data relating to the sphere of tasks of a person performing public function shall be regarded as data public on grounds of public interest.
 - Article 3. 1. g. lays down that it is possible to limit the right of access if necessary for the protection of commercial and other economic interests. This limitation should not apply to the right of access to data related to public funds (public procurement, concession, PPP-constructions, subsidies, tax relieves, financing of political parties, etc.).
 - Article 3. 1. j. allows the limitation of the right of access to environmental data. The scope of this limitation should extend to the least amount of data possible. Most COE member states are parties to the Aarhus Convention. The Convention on Access to Official Documents can not grant fewer rights than the Aarhus Convention in relation to access to environmental data.
3. A reasonable maximum time limit should be introduced within which requests must be processed (15-30 days).

4. Only an effective review procedure can ensure the access to information, therefore, the courts of law or the ombudsman should have the authority to review the decision of the data controller and their decisions should be binding on the data controller.
5. A provision should be introduced that requires public authorities to proactively – if possible in electronic format – publish the most important public information.

Finally, I would like to express my recognition for the number of positive aspects of the draft as well. I hope that my remarks will contribute to the improvement of the Convention.

Yours sincerely,



Dr. Attila Peterfalvi
Parliamentary Commissioner for
Data Protection and Freedom of Information
Hungary

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**Letter sent by the Commissioner for Information of Public Importance (Serbia),
Rodoljub Šabić, on 4 October 2007**

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Commissioner for Information of Public Importance
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No. 337-00-1/2007-01

Date: 04/10/2007

Group of Specialists on Access to Official Documents
Ms. Helena Jäderblom, Chair

c/o Council of Europe
67075 Strasbourg
France

Subject: Draft Convention on Access to Official Documents

Dear Mrs. Jäderblom,

We are contacting you on the subject of preparation of the convention on access to information of public character, which is being drafted by a Group of Specialists on Access to Official Documents (DH-S-AC).

Allow us to introduce the position and experiences which Serbia has gained in the area of transparent functioning of the public sector. Serbia has passed the Law on Free Access to Information in November 2004. Some good results have already been achieved on this plan. Our law is based on really democratic, liberal principles and it guarantees wide access to information owned by the bodies of all three branches of power, as well as to those owned by public companies. However, there are problems and resistance in law implementation, and we consider that it is very important for us to have very good and strong support in our further efforts in relevant international documents, like the Convention which is currently drafted.

In drafting the convention as the first legally binding document on the level of Council of Europe we are on these grounds appealing to the Group of specialists to take into account these positions which have according to the practices of countries recently establishing the access to information of public character proved as successful even urgently necessary. Recent legislative solutions namely act as a model for numerous countries around the world for example in the Balkan region or South America.

We are convinced that the history has showed true value of transparent and open functioning of the public sector and that access to public information as a basic human right therefore needs adequate protection in form of convention on the level of Council of Europe. Such convention adopted by the main supranational European human rights organisation surpassing the geographic boundaries of Europe should reflect the best legislative solutions, best practices and established and effective standards and should not be created solely on the premises of seeking the widest possible consensus but should reflect the highest possible level of access to information in particular not lower than that defined by Recommendation (2002) No. 2 of the Council of Europe. Should the convention aim at ensuring this it would need to integrate at least the following minimal solutions and standards:

- 1. It should ensure the appeal on the grounds of inactivity of the body which is unavoidably related to stipulating the time limit for transmission of information;*
- 2. It should cover all three branches of authorities: not only executive but also legislative and judiciary in whole;*
- 3. It should cover bearers of public authority and public services contractors;*
- 4. It should include provisions on active disclosure of some information by liable bodies.*

The minimum standards proposed by Recommendation 2(2002) has helped Republic of Serbia to adopt a modern law on the field of access to public information and it gave our country an important model to start developing this human right so needed for the countries trying to develop modern standards of democracy and transparency within it.

Please be so kind and forward my letter to members of the Group of Specialists on Access to Official Documents and thank you for all the efforts the group you are presiding will put into the final draft of the Convention.

Yours sincerely,

COMMISSIONER

Rodoljub Šabić

* * *

Document 9**Letter sent by the Chair of the Conference of Commissioners for Freedom of Information (Germany), Sven Holst, on 4 October 2007****Landesbeauftragter für
Datenschutz und
Informationsfreiheit**

Landesbeauftragter für Datenschutz und Informationsfreiheit
Postfach 10 03 80 27503 Bremerhaven

Group of Specialists on Access to Official Documents
Ms. Helena Jäderblom, Chair
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PGP-Fingerprint: E9CD D07E C2DF BFE3 6070 A999
2302 CD93 E3BA 887B

Datum und Zeichen Ihres Schreibens:

Unser Zeichen: (bitte bei Antwort angeben)
18-010-10-11.07/1#3

Bremerhaven, 04.10.2007

CoE - Convention on Freedom of Information

Dear Ms. Jäderblom,

I am writing to you in my capacity as Chair of the German Conference of Commissioners for Freedom of Information.

You are presently discussing in your Group of Specialists a Draft Convention on Access to Official Documents which is to be finalized at the forthcoming meeting from 8th to 12th October 2007 before it is sent to the Committee of Ministers. We welcome the fact that the Council of Europe is considering to adopt a legally binding Convention on Access to Official Documents.

However, the present Draft shows serious shortcomings both with respect to the Recommendation (2002) No. 2 and to the law and practice in the Federal Republic of Germany. In particular we would welcome the modification of the Draft in four respects before it is forwarded to the Council of Ministers:

- a) There should be a right to appeal once the agency holding the documents fails to produce them within a specific time limit. If there is no such right to appeal any time limit may be exceeded without consequences.
- b) The Convention should cover all three branches of government, i.e. executive, legislative and judicial authorities. Neither the legislative nor the judicial branch should be exempted *in toto*. There may of course be documents which cannot be disclosed because they contain information which come under material exemptions of the Convention; this has to be decided on a case-by-case basis.
- c) The Convention should cover public authorities as well as their private contractors. Practical experience shows that in this area it is vital that transparency requirements should not end with the contracting out of public services.

- d) A provision on disclosure at the initiative of public agencies should be included in the Convention (along the lines of Recommendation (2002)2 – XI).

The German Conference of Commissioners for Freedom of Information appeal to the Group of Specialists on Access to Official Documents to take into account these proposals before finalizing their work on the Draft Convention. The Council of Europe has done important work on access to official documents in the past, in particular by adopting Recommendation (2002) No. 2. This Recommendation has influenced freedom of information legislation in a number of Member States. Practical experience with this Recommendation and legislation has been positive throughout. Therefore the Council of Europe should now adopt a Convention which maintains the standards of this Recommendation and makes it legally binding.

We are of course willing to answer any further questions the members of your Group might have.

Yours sincerely,

Sven Holst

Commissioner for Data Protection
and for Freedom of Information

cc:

Steering Committee on Human Rights
Mr. Roeland Böcker, Chair

e-mail-Adresse: roeland.boecker@minbuza.nl

* * *