ISSN: 1888-0525 D.L./L.G.: BI-1677-03

Transparent Europe? The Council of Europe Convention on Access to Official Documents

Adrienne Komanovics
LLM, PhD. Pécs University

Fecha de recepción / Sarrera-data: 2010/04/14
Fecha de admisión / Onartze-data: 2010/05/17

Abstract: The Council of Europe Convention on Access to Official Documents (2009) is the first binding international legal instrument to recognise a general right of access to documents. While there are several positive aspects, such as the broad definition of the material scope, the generously stipulated group of beneficiaries, as well as the list of exemptions, the Convention nevertheless displays several shortcomings. The Convention fails to include a clear guarantee of the right of access to documents and the presumption of openness. The narrow definition of "public authorities", the failure to set clear time frames, as well the absence of limits on State reservations seriously undermine the effectiveness of the right to information. The argument of this paper is that much more progressive provisions could have been adopted, arguably without the risk of limited participation in the Convention.

Key words: Access to official documents, Council of Europe, transparency, harm test, overriding public interest test.

Resumen: El Convenio del Consejo de Europa sobre el Acceso a los Documentos Oficiales (2009) es el primer instrumento legal internacional vinculante que reconoce un derecho general de acceso a documentos. Aunque hay algunos aspectos positivos, tales como la amplia definición del alcance material, el grupo de beneficiarios generosamente estipulado, así como la lista de exenciones, el Convenio muestra, sin embargo, varios defectos. El Convenio no incluye una clara garantía del derecho de acceso a documentos y la presunción de franqueza. La escueta definición de "autori-

ISSN: 1888-0525 D.L./L.G.: BI-1677-03

dades públicas", la omisión del establecimiento de unos marcos temporales claros, así como la ausencia de límites sobre las reservas del Estado, socavan gravemente la eficacia del derecho a la información. Este artículo sostiene que se podrían haber adoptado unas disposiciones mucho más progresivas, razonablemente sin el riesgo de una participación limitada en el Convenio.

Palabras clave: Acceso a documentos oficiales, Consejo de Europa, transparencia, prueba del perjuicio, prueba del interés público dominante.

Laburpena: Europako Kontseiluak Agiri Ofizialak Eskuratzeari buruzko Hitzarmena onetsi du (2009). Nazioarteko lege-agerkaien artean horixe da aurrenekoa, agiriak eskuratzeko eskubide orokorra aitortzen duena; eta loteslea ere bada. Hitzarmenak alde onak ditu, besteak beste, esparru materialari buruzko definizio zabala, onuradunen taldea zehazteko eskuzabaltasuna edota salbuespenen zerrenda. Nolanahi ere, hitzarmenak baditu zenbait akats. Alde batetik, hitzarmenak ez ditu argi bermatzen, dela agiriak eskuratzeko eskubidea bera, dela gardentasunari buruzko presuntzioa. Eta, beste alde batetik, "agintari publikoak" nor diren definitzean urri eta motz geratzen da, ez du argi ezartzen denbora-tarterik, eta, gainera, estatuak egindako erreserbei ez die mugarik jartzen. Horiek guztiek nabariro murrizten dute informazio-eskubidearen eragingarritasuna. Azterlan honen egileak adierazten du xedapenak aurrerakoiagoak izan zitezkeela, eta horrek, ziur asko, ez lukeela mugatuko hitzarmenean parte hartzea.

Gako-hitzak: Agiri ofizialak eskuratzea, Europako Kontseilua, gardentasuna, kaltea frogatzea, interes publiko nabaria frogatzea.

SUMMARY:

> *"… it must be borne in mind that there is little value in having a perfect system which is so demanding that states are either unable or unwilling to sign up to the convention, either at all or only after a long time period needed to put all the necessary measures into place. But at the same time, there is no point in introducing a system that falls short in significant ways so that the right of access available to the public is unsatisfactory."*[1]

1. INTRODUCTION

Twelve European countries, including Hungary, signed the Convention on Access to Official Documents in Tromso, Norway on 18 June 2009.[2] Unfortunately, the first binding international treaty to lay down such a general right of access has significant flaws. The Convention fails to lay down a general statement on the right to information, the treaty applies only to a narrow range of public bodies, there are no mandatory time limits for answering requests, review bodies are not

[1] Explanatory Memorandum by Mr Klaas de Vries, rapporteur. In: Parliamentary Assembly: Draft Council of Europe Convention on Access to Official Documents. Report. Doc. 11698, 12 September 2008 (hereinafter PACE Explanatory Memorandum), para. 5.

[2] Council of Europe Convention on Access to Official Documents (CETS No.: 205), Tromsø, 18 June 2009. See: http://conventions.coe.int/Treaty/Commun/QueVoulez.asp?NT=205&CM=8&DF=05/01/2010&CL=ENG.
Explanatory Report: http://conventions.coe.int/Treaty/EN/Reports/Html/205.htm (15.03.2010).

ISSN: 1888-0525 *Boletín JADO.* Bilbao. Año VIII. Nº 19. Mayo 2010, pp. 141-170
D.L./L.G.: BI-1677-03 *JADO Aldizkaria.* Bilbo. VIII. urtea. 19 zk. 2010eko maiatza, 141-170 or.

given the power to order disclosure of a requested official document; contracting parties are allowed to enter wide-ranging reservations when ratifying the Convention, thereby undermining the right of access.[3] The world's first treaty on access to information is unimpressive; it provides weaker guarantees than many other EU or national instruments.

The objective of this paper is to give a detailed analysis of the provisions of the Convention. At the time of writing (May 2010) only three States, Norway, Hungary and Sweden expressed its consent to be bound by the Convention[4] thus it has not yet entered into force. Consequently, at the moment it is not possible to elaborate on its application in practice.

Even though the Council of Europe Convention is the first binding international legal instrument which recognises the right to information, it is not unprecedented. The most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations Economic Commission for Europe has culminated in the adoption of the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[5] When compared to the Council of Europe Convention, it is evident that the Aarhus Convention is partly broader, partly more restricted in scope. More restricted in the sense that it covers only environmental information, but broader in that it deals with other aspects of participatory rights and not limited to access to information. The so-called first pillar of the Aarhus Convention regulates access of

[3] Draft Opinion of the Parliamentary Assembly. In: Parliamentary Assembly: Draft Council of Europe Convention on Access to Official Documents. Report. Doc. 11698, 12 September 2008 (hereinafter: PACE Draft Opinion), paras. 3-8.

[4] See. http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=205&CM=8&DF= 29/10/2009&CL=ENG (15.05.2010).

[5] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, 25 June 1998. See: http://www.unece.org/env/pp/welcome.html (15.05.2010).

information, the second pillar sets out minimum requirements for public participation in various categories of environmental decision-making, while the third pillar aims to provide access to justice in environmental matters.[6]

Work has been undertaken in the European Union as well. The most important instruments are Directive 2003/4 on public access to environmental information[7] imposing obligations on Member States regarding environmental information held by national public authorities, Regulation 1049/2001 guaranteeing the transparency of documents of three institutions of the Union (Council, Parliament, Commission);[8] and Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[9] Finally, the right of access was also expressed in several political instruments elaborated under the auspices of the Council of Europe.[10]

---

[6] See further (15.05.2010).

[7] Directive 2003/4 of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. *Official Journal 2003 L 41/26.*

[8] Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. *Official Journal 2006 L 145/43.*

[9] Regulation of the European Parliament and of the Council 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. *Official Journal 2006 L 264/13.*

[10] Declaration of the Committee of Ministers of the Council of Europe on the freedom of expression and information adopted on 29 April 1982; Recommendation No. R (81) 19 on the access to information held by public authorities; Recommendation No. R (91) 10 on the communication to third parties of personal data held by public bodies; Recommendation No. R (97) 18 concerning the protection of personal data collected and processed for statistical purposes; Recommendation No. R (2000) 13 on a European policy on access to archives; Rec (2002) 2 on access to official documents.

The key element of any access regime is effectiveness. To give maximum effect to the right of access, the exemptions must be carefully circumscribed and narrowly applied, requests should be promptly responded, States should not be allowed to invoke exemptions too readily, guarantees must be introduced against making access too expensive or burdensome.[11]

In the following chapters, analysis of the substantive (Chapter 2) and procedural provisions (Chapter 3) of the Convention is followed by the review of the monitoring mechanism (Chapter 4) and the final provisions (Chapter 5) of the Convention. By way of conclusion (Chapter 6) the argument of this paper is that drafters made too much concession for the sake of wide participation in the Convention.

2. SUBSTANTIVE PROVISIONS

There is no actual *statement of the right of access* in either the Preamble or the text of the articles. The Convention begins with the stipulation that the Convention is without prejudice to stricter domestic laws and international treaties,[12] followed by definitions.[13] The presumption of openness appears only in the Preamble, according to which all official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests. It would be more convincing and would show more commitment to the objectives of the Convention to begin with a statement of the right of access in the very first article of the binding provisions, followed by the presumption of transparency.[14]

[11] PACE Explanatory Memorandum, para. 4.

[12] Article 1 para. (1).

[13] Article 1 para. (2).

[14] PACE Explanatory Memorandum, para. 18.

In the actual text, this right is established in Article 2 para. (1) which provides that each contracting party shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by public authorities. This formulation reflects the specific characteristic of the implementation, i.e. that the Convention does not provide for a complaint procedure for those whose rights have been violated.

Briefly returning to Article 1 para. (1): the wording of this article, as explained in the Explanatory Report, makes it clear that the Convention identifies a minimum core of basic provisions. The Convention serves as a starting point for an effective right of access, and encourages Parties to maintain or introduce domestic provisions that allow a more extensive right of access. It is argued that this compromise solution was chosen to attract the greatest number possible of Council of Europe member States. The implementation of more extensive rights, argues the Explanatory Report, would present difficulties to many countries and thus would hinder the accession of many Council of Europe member States.[15] The result, however, is rather unsatisfactory. The final text of the Convention imposes no further obligation on States with progressive access regime but regrettably the same holds truth with regard to less transparent countries. Hopefully, amendments to the Convention provide a means to strengthen the Convention rules and thereby guaranteeing effective access rights.

As mentioned above, Article 2 para. (1) provides that Contracting Parties shall guarantee the right of everyone, without discrimination on any ground, to have access, on request, to official documents held by authorities. The right of access applies to both natural and legal persons. Though the major *beneficiaries* in practice are journalists, anyone can

[15] Explanatory Report, (iv) point.

make use of his/her Convention rights.[16] Article 4 para. (1) lays down that *the applicant shall not be obliged to give reasons* for his request. The whole idea behind freedom of information rules is that anyone can have access to documents of public interest. Thus the applicant does not need to show a specific interest, nor is he required to give reasons for the request. Consequently, a person who is denied access by a public authority to a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing him such access. Requestors are free to use the information for any lawful purpose, including disseminating the information or publishing it.[17]

It is not easy to link the prohibition of discrimination with the right to information. By way of example, the Explanatory Report mentions discrimination based on nationality, thus even foreigners living outside the territory of a Party to the Convention (!) can exercise this right.[18]

While the rules relating to beneficiaries are very generous, this cannot be said as regards *the scope of application* of the Convention. First of all, the term ìpublic authoritiesî covers administrative authorities at national, regional and local level (e.g. central government, town councils and other municipal bodies, the police, public health and education authorities), legislative and judicial bodies as well as natural and legal persons.[19] However, the Convention makes a distinction between the functions of these organs and persons, and only documents connected to certain activities come automatically under the scope of the Convention.

Thus it should be welcomed that all functions of the government and other administrative authorities are covered by the Convention.

[16] Explanatory Report, paras. 17-18.

[17] Explanatory Report, para. 19.

[18] Explanatory Report, para. 18.

[19] Article 1 para. (2)a)i).

However, the term ìpublic authoritiesî includes only the administrative functions of legislative and judicial authorities and of natural and legal persons. The problem is the actual scope of the term "administrative" function, whether and how it can be separated from other activities of these bodies. In case of natural and legal persons the limitation set out by the Convention is that their documents is within the *ratione materiae* of the Convention only in so far as they exercise administrative authority.

By means of a separate declaration, Contracting Parties may extend the scope of the Convention to other activities of the above-mentioned bodies (so-called *opt-in* technique). Thus, the Convention potentially covers all other activities of legislative and judicial bodies, and the public functions and public funding aspects of the operation of natural and legal persons.[20] However, there is no common definition of these notions and examples differ from one country to the other.[21] Another difficulty in connection with this ìopt-inî technique is that traditional services, such as utilities, healthcare, the provision of security and even prison services, are being increasingly outsourced to the private sector, and thus being removed from public scrutiny. This solution allows some public bodies to continue operating in the shadows.

The possibility for Parties to make a declaration, opting in to a broader concept of the term "public authorities" is better than not including those bodies or persons at all but it falls short of ensuring their inclusion. Also, it is fair to allow State Parties a definite extra period of time to include these other functions, or do it incrementally. However, the exemptions listed in Article 3 provide sufficient safeguards to Parties even if they subscribe to the expanded definition of the term "public authorities".[22] It is welcomed that the Hungarian government accepted

[20] Article 1 para. (2)a)ii).

[21] Explanatory Report, para. 10.

[22] PACE Explanatory Memorandum paras. 21-22.

the broadest concept of the term at the time of the signature of the Convention.[23] Norway and Sweden, the other two contracting parties, made no such declaration.

The definition of "official document" is very progressive in the Convention: it includes all information recorded in any form, drawn up or received and held by public authorities. An information-based regime requires authorities to provide access to existing documents as well as to search for documents if the applicant can not actually identify the document he wishes to receive or if it is not easily accessible and, if necessary, to extract and compile information from various documents if the requested information has not already been compiled. Regrettably, para. 14 of the Explanatory Report stipulates that the Convention does not oblige Parties to create new documents upon requests for information. This interpretation is, however, clearly inconsistent with the wording of the Convention.

The notion of "official documents" covers any information that is recorded on any sort of physical medium such as written texts, information recorded on a sound or audiovisual tape, photographs, e-mails, information stored in electronic format such as electronic databases, etc.[24] In the case of information stored electronically in databases, Parties

[23] *Declaration handed over by the Minister for Justice and Law Enforcement of Hungary to the Deputy Secretary General of the Council of Europe at the time of signature of the instrument, on 18 June 2009.*
In accordance with Article 1, paragraph 2, subparagraph a.ii, of the Convention, the Republic of Hungary informs the Secretary General of the Council of Europe that, for the Republic of Hungary, the definition of "public authorities" includes the following:
- legislative bodies as regards their other activities;
- judicial authorities as regards their other activities;
- natural or legal persons insofar as they perform public functions or operate with public funds, according to national law.

[24] Explanatory Report, para. 11.

have a margin of discretion in defining this notion.[25] When processing requests for documents containing *personal data*, State authorities must pay due regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[26]

The limitations to access to official documents permitted by the Convention fall into the following three groups.[27]

Exemptions to protect State interests	• national security, defence and international relations • public safety • the economic, monetary and exchange rate policies of the State
Protection aimed at ensuring effective government·	• the deliberations within or between public authorities concerning the examination of a matter • the prevention, investigation and prosecution of criminal activities • disciplinary investigations • inspection, control and supervision by public authorities
Exemptions designed to protect private interests, human rights and other rights	• privacy and other legitimate private interests • commercial and other economic interests • environment • the equality of parties in court proceedings and the effective administration of justice

In some States the Reigning Family and its Household or the Head of State enjoy a special constitutional position. The last limitation, which is not mentioned in the box above, aims at maintaining respect for this unique status. The Contracting parties may declare (another opt-in technique) that communication with the Reigning Family or the Head of State shall also be included among the possible limitations.[28]

[25] Explanatory Report, para. 12.

[26] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 1981 (CETS No. 108).

[27] Article 3, para. (1). See also: (15.05.2010).

[28] See the declaration of Norway. Declaration contained in the instrument of approval deposited on 11 September 2009.

The list of limitations in Article 3, para. (1) is exhaustive, but it does not prevent national legislation from reducing the number of reasons for limitation or formulating the limitations more narrowly, thus granting wider access to official documents.[29]

The Explanatory Report emphasizes that the notion of *national security* should be used with restraint, and should not be misused in order to protect information relating to human rights violation, corruption within public authorities, administrative errors, or information which is simply embarrassing for public officials or public authorities. Disclosure of documents concerning security systems of building and communications might be restricted for *public safety* reasons. The *inspection and supervision* exemption includes tax inspections, school and university examinations, labour inspections, or inspections by social services and environmental authorities. Limitations set up to protect *private life* cover criminal records or medical files. Examples of information that may be covered by *commercial and other economic interests* include trade secrets, production procedures, trade strategies or lists of clients. The possible limitation under the *environment* exemption includes the location of threatened animals or plant species. The *court proceedings* exemption applies before domestic as well as international courts of law. Documents that are not created in contemplation of court proceedings as such cannot be refused under this limitation. The Explanatory Report emphasizes that "even if the aim of the Convention is to encourage public participation in decision-making, the purpose of this limitation is to preserve the quality of the decision-making process by allowing a certain free 'space to think".[30]

As regards *the scope of limitations*, any limitation of access to official documents must be specifically prescribed by law, be necessary in a democratic society and be proportionate to the aim of protecting other legiti-

[29] Explanatory Report, para. 22.

[30] Explanatory Report, paras. 23-34.

mate rights and interests. This follows the formulation and the three-limb test laid down in several provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[31]

Furthermore, the exemptions are subject to the following tests: firstly, access can only be denied if disclosure of the information might harm any of the interests mentioned above (the so-called harm test) and, secondly, the authority has to balance the harm caused by granting access against the public interest justifying disclosure.[32]

As to *the harm test*, the mere fact that a document concerns an interest protected by an exemption cannot justify application of that exemption. Thus the applicability of limitations must be assessed on the basis of the actual information contained in the document. The public authority has to show that disclosure of the information would harm any of the public or private interests.[33] Unfortunately the threshold is low: access can be denied not only if it *would* undermine the stated interests, i.e. the risk of a protected interest being undermined must be reasonably foreseeable, but also if it *would be likely* to harm these interests, thus when the risk is purely hypothetical.

The time dimension is crucial: it can easily occur that after a certain period of time disclosure of information no longer harms any interests. Thus the exceptions laid down in paras. 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. This again highlights the importance of the requirement that decisions be based on the content of the document, and not on the label of the file.[34]

---

[31] See e.g. Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950 (CETS No.:005) Articles 8, 9, 10 and 11.

[32] Article (3) para. (2).

[33] Explanatory Report, para. 37.

[34] Article 3 para. (3).

Even if disclosure was found to be harmful to certain interests, access must be granted if there is an *overriding public interest* in disclosure. Public authorities have to balance the general interest of transparency against the interest protected by the exception. This interest must be "public", i.e. general in character (e.g. to disclose corruption or abuse of power) and must be something more severe than the "normal" public interest in disclosure of information. Access must be granted if transparency is necessary for the realization of the objectives listed in the Preamble to the Convention. Unfortunately, neither the Convention nor the Explanatory Report gives any guidance as to the meaning and scope of the notion of "overriding public interest".

The harm test and the overriding public interest test may be carried out for each individual case or by the legislature by e.g. providing in legislation for requirements for carrying out the tests. According to the Explanatory Report, these rules can take a form of a presumption for or against the release of the document, or an unconditional exemption for extremely sensitive information, even though such absolute exceptions should be kept to a minimum.[35] Here the text of the Report is at variance with the provisions of the Convention which makes the application of the harm and overriding public interest tests obligatory in the case of each and every application. Absolute restrictions are not permitted under the Convention. In any case, total ban on the release of sensitive information is unnecessary since such documents are generally caught by one of the interests listed in Article 3, e.g. national security, defence, international relations or crime fighting activities.

As far as *the timeframe of the exemptions* is concerned, the Convention contains only a "soft" formula: the Parties shall *consider* setting time limits beyond which the limitations would no longer apply.[36] Thus the

[31] [35] Explanatory Report, para. 38.

[36] Article 3 para. (3).

Contracting Parties are not obliged to determine the lifetime of the exceptions but they are obliged to consider this possibility. This provision is a double-edge sword: it has the potential to limit the right of access inasmuch as it starts from the premise that the document is not accessible before a specific period of time has passed. However, this interpretation cannot be accepted since the decision on disclosure must exclusively be based on the content of the document, tested against the harm and overriding public interest requirement. The Contracting Parties cannot set by legislation a time period during which documents cannot be released.

On the other hand, the rule can be interpreted in a different manner: indicating an event after which exceptions would not apply prevents abuse by the public authorities: they cannot deny access even many years after the adoption of the requested document. Undoubtedly, disclosure cannot harm any protected interest after so many years have passed. It is acceptable to provide for a time period after which documents must be released, as long as this is without prejudice to the possibility to apply for documents before that date.[37]

3. PROCEDURAL PROVISIONS

3.1. Access on request

The procedural requirements relating to the form and content of the request are kept to a minimum. Applicants may remain anonymous except when disclosure of identity is essential in order to process the request. Applicants shall not be obliged to give reasons for having access to the official document.[38]

[37] See a similar reasoning at (15.05.2010), p. 3.

[38] Article 4.

The request can be addressed to *any public authority holding the document*. As it is clear from the definition of the document, the authority is obliged to deal with requests for *third-party documents* held by public authorities as well.[39] If the public authority does not hold the requested official document or if it is not authorised to process that request, it shall, wherever possible, refer the application or the applicant to the competent public authority.[40] The latter formulation is, however, contrary to Article 1 para. (2)b) providing that the term ìofficial documentî includes all information drawn up or *received and held* by public authorities. Nowhere does Article 1 require preliminary authorization of the author of the document in order to process a request for access. In our view, the correct interpretation is that no preliminary permission is necessary.

The Convention requires the public authorities to *help* the applicant, as far as reasonably possible. Although the applicant is not obliged to have actually identified the requested document, the request should be formulated with sufficient clarity to enable a trained public officer to identify the requested document.[41] Proactive dissemination of information contributes to the accurate formulation of requests as well as reduces the number of applications. In an open society, public authorities are expected to make available to the public generally information on how they operate, to set up public registers of documents, to provide manuals or on-line guides to the systems they employ and to facilitate direct and easy access to official documents. It is desirable that public authorities appoint freedom of information officers to assist members of the public. Training of both public authorities and of civil society is crucial to the successful implementation and use of any freedom of infor-

[39] Article 1 para. (2)b).

[40] Article 5 para. (2).

[41] Article 5 para. (1), and Explanatory Report, paras. 44-46.

mation scheme. Against this background, it is rather unfortunate that the Convention does not provide for the public registers of documents.

The general obligation to assist includes that the public authority shall, wherever possible, refer the application or the applicant to the competent public authority.[42]

The Convention does not set out exact *time limits*, it only provides that requests shall be dealt with promptly, and the decision shall be reached as soon as possible. Clearly, Contracting Parties must be guaranteed a certain leeway to set time limits because a short timeframe might be too onerous for some States or some public authorities that receive a high number of requests. Access rights would be rendered ineffective if public authorities were not able to process them within the set time, thus leading to backlogs. Nonetheless, it would have been a better solution to set a relatively long time limit, e.g. 30 days, unless special circumstances justify extension.[43]

The apparent lack of time limits is all the more interesting when compared with the relevant provisions of the Aarhus Convention, drawn up under the *aegis* of the United Nations Economic Commission for Europe. When drafting the Aarhus Convention, States were prepared to accept a relatively strict time limit. Article 4 para. (7) provides that *"[t]he refusal shall be made as soon as possible and at the latest within one month, unless the complexity of the information justifies an extension of this period up to two months after the request."* Having this in mind, it is incomprehensible that the present Convention does not contain more exact time limits which are flexible enough, but limits the discretion of the public authority.

[42] Article 5 para. (2), second phrase.

[43] Article 5 para. (4); PACE Explanatory Memorandum, paras. 34-35.

The course of action the public authority may take is set out partly in Article 6 specifying the forms of access to official documents, partly in Article 8 on review procedure. There are *four options*, which are the following.

The public authority provides access to the document. This is the most optimal outcome of any request.

The public authority denies access to the document. Three grounds are specified by the Convention and the Explanatory Report.[44]

The public authority may deny access if the request is too *vague*, or if the request is *manifestly unreasonable*. The formulation of the latter ground for refusal is similar to one of the admissibility criteria stipulated by the European Convention on Human Rights, which provides that the Court shall declare inadmissible any individual application which is manifestly ill-founded.[45] Under this rule the Convention organ investigates whether there is a *prima facie* evidence of a violation of the Convention, thus the determination of the question whether the application is admissible depends upon an examination on the merits. To put it differently, the rule inevitably involves transgressions of the borderline between the formal and material law of the Convention.

Turning back to the 2009 Convention, the Explanatory Report lists practical, formal difficulties, e.g. the request requires a disproportionate amount of searching or examination.[46] In our view, the introduction of this possibility grants too wide discretion to public authorities. Furthermore, providing more direct access to a greater scope of infor-

[44] On the *substantive* grounds for refusal see Chapter 2 (exemptions).

[45] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1950 (CETS No.:005), Article 35. para. (3).

[46] Explanatory Report, para. 52.

mation would significantly reduce the burden on the administration to deal with individual requests. Similarly, the setting up of public registers containing up-to-date, easily accessible and transparent information, the development of user-friendly search engines, and more information published on a proactive basis would limit the workload of public authorities. Undoubtedly, these measures have considerable financial implications but they seem indispensable to the realization of transparency. The interest of good administration does not prevail over the public interest in openness.

Quite disturbingly, the Explanatory Report mentions a third ground for refusal in addition to those listed in the Convention, namely that *clearly vexatious requests*, such as repeated requests for the same document within a very short space of time by the same applicant may be rejected.[47]

Failure to reply within the time limit. Thirdly, if the public authority does not response within the time frame determined by national law, this constitutes implicit denial. It should be emphasized, that the Convention does not explicitly mention administrative silence, but it is covered by Article 8 para. (1) which guarantees the right to appeal in case of "implied" denial of access to a document.[48]

Providing partial access. Finally, if a limitation applies to some of the information in an official document, the public authority should nevertheless grant access to the remainder of the information it contains.[49] Nevertheless, access may be denied if the partial version of the document is *misleading* or *meaningless*; or if the release of the remainder of the document poses a manifestly unreasonable burden for the authority.

[47] Explanatory Report, para. 52.

[48] Article 8 para. (1): "An applicant whose request for an official document has been denied, expressly or impliedly, ... shall have access to a review procedure ..."

[49] Article 6 para. (2).

Unfortunately, the notion of ìmeaninglessî is very subjective. The public authority is clearly not in a position to deem the information meaningless. It is ignorant of the motivations of the applicant or the purpose for which the information is sought. Even though the Explanatory Report points out that the possibility of refusing information on this ground must be interpreted in a restrictive way and having regard to the applicant, in our opinion the right to access to official documents can not be made dependent upon its presumed usefulness to the applicant.[50]

As far as the "manifestly unreasonable burden" limitation is concerned, we would like to recall the suggestion made above, namely that the problem of voluminous or excessive requests should be dealt with through communication between the public authorities and the applicant, with the strengthening of proactive information and the streamlining of the administrative process, and not by the blanket refusal of more complex applications. Access to documents should not be seen as a battle between applicants and the authorities

In case of partial access, the decision should clearly indicate where and how much information has been deleted. Whenever possible, the limitation justifying each deletion should also be pointed out in the decision.[51] Finally, when a public authority refuses access to a document, it should indicate in the decision the possibilities of appealing.[52]

A public authority refusing access is required to *give reasons for the refusal*. It has to state the legal basis for refusal by reference to the relevant exception as well as an explanation of how this exception apply.[53] The authority has to indicate which limitation applies as well as show

[50] Explanatory Report, para. 59. See also PACE Explanatory Memorandum, para. 39.

[51] Explanatory Report, para. 57.

[52] Explanatory Report, para. 67.

[53] Article 5 para. (6). Explanatory Report, para. 53.

that the limitation is necessary in a democratic society and proportionate to the aim pursued. The decision has to indicate how the harm test as well as the overriding public interest test apply.

In a transparent legal order the obligation to give reasons is not a purely formal requirement. The mere fact that a document concerns an interest protected by an exemption cannot justify application of that limitation. Firstly, the authority has to assess whether access to the document would specifically and actually undermine the protected interest, and that there is no overriding public interest in disclosure. It is required to carry out a concrete, individual assessment of the content of the documents. Secondly, this examination must be apparent from the decision, and the decision must indicate the reasons for refusal in clear, unambiguous wording.

The duty to give reasons for individual decisions has the dual purpose of, first, allowing interested parties to know the reasons justifying the measure so as to enable them to protect their rights and, secondly, to enable the review bodies to exercise their power to review the legality of the decision.

According to the second sentence of Article 5 para. (6), the applicant has the right to receive on request a written decision. Seemingly, the authority as a general rule is not obliged to give a written statement of reasons. It must do so only when the applicant specifically so requests, which obviously constitutes a very low standard. However, keeping in mind that the Convention contains only minimum core rules, hopefully Contracting Parties will lay down, or already have, stricter national rules.

Forms and charges of access to official documents. It is for the applicant to indicate which type of access he prefers, the public authority should accommodate such preferences whenever possible.[54]

[54] Articles 6 and 7; Explanatory Report, paras. 54-63.

– Inspection of official documents on the premises of a public authority shall be free of charge, except for if the documents are in archives or museums, in this case charges for services can be requested. The public authorities should enable as far as possible consultation of a document by providing reasonable opening hours and physical facilities. It may also be justified in refusing direct access to the original version document if it is physically fragile or in poor condition.

– On request, the public authority is obliged to send a copy of the document in the form determined by the applicant (e.g. by post or electronically). A fee may be charged to the applicant for a copy of the official document, which should be reasonable and not exceed the actual costs of reproduction and delivery of the document. For providing transparency tariffs of charges shall be published.

– Access might be granted by referring the applicant to easily accessible alternative sources, e.g. where the document is published on the internet. This again highlights the outstanding significance of proactive information which reduces the workload of public authorities. In any case, the question whether a document is "easily accessible" must be assessed on a case-by-case basis, having regard to e.g. whether the applicant has access to internet. This "easily accessible" condition also encompasses affordability: it may not be in accordance with the Convention for example, to refer somebody to purchase an expensive publication.

The Explanatory Report adds that as a good practice in many countries, where the applicant who received the document is unable of obtaining a basic understanding of its content, the public authorities are invited to help him or her with comprehension.[55]

[55] Explanatory Report, para. 56.

Review procedure. According to Article 8, an applicant whose request has been denied shall have access to a review procedure before a court *or* another independent and impartial body (e.g. ombudsman or conciliation committee) established by law. The use of the term "or" implies that the Convention does not make the judicial remedy obligatory; non-judicial review is sufficient. The fact that the decision of these non-judicial bodies is not binding on the public authorities deprives the system of access of effective and meaningful remedies. Even though most national systems provide for non-judicial dispute settlement, it should be left to the applicant to decide which course of action he takes – whether it be an expeditious and inexpensive procedure with a non-binding outcome or a time-consuming and more costly litigation before the courts, which is, however, binding on all public authorities.

Unfortunately, it is not clear from the text of the Convention whether the court or other body can review the substance as well as the process of reaching the decision, or just the latter. According to para. 64 of the Explanatory Report, the review body must be able, either itself to overturn decisions taken by public authorities or to request the public authority in question to reconsider its position.[56] Thus it might be assumed that the power of review bodies extends to the reconsideration of the merits of the decision, all the more since this is the interpretation which is the most in line with the Convention objectives, including the fostering of accountability of public authorities.

The Convention provides for an expeditious and inexpensive review procedure, which is similar to certain national systems where an internal review procedure is a compulsory intermediary step before a court of appeal or other independent complaints procedure.[57]

[56] PACE Explanatory Memorandum, para. 43.

[57] Explanatory Report, para. 66.

The Convention does not specify whether the powers of the review body include the power to order the disclosure of the document, or it is limited to either uphold or annul the contested decision. The ambiguous formulation of Article 8 falls short of providing for a meaningful and effective domestic remedy for the right of access.

The Explanatory Report envisages the possibility of legal and disciplinary actions against public authorities that have committed serious breach of their obligations under the Convention (e.g. intentionally destroying the document in order to prevent access or review).[58] Regrettably, nowhere does this provision appear in the Convention. Finally, no specific protection is afforded to *whistleblowers*, to those who reveal abuses, against reprisals.

3.2. Complementary measures: proactive information

Article 9 of the Convention lists several *complementary measures*, which stipulate that the Parties shall inform the public about its right of access to official documents and how that right may be exercised. Furthermore, Parties shall also take appropriate measures to guarantee efficient administration. Thus, States must educate public authorities in their duties and obligations, provide information on how they operate, like data on their structures, staff, budget, activities, rules, policies, decisions, etc., manage their documents efficiently so that they are easily accessible, and apply clear and established rules for the preservation and destruction of their documents.

Proactive measures. At their own initiative and where appropriate, the public authorities shall take the necessary measures to make public offi-

[58] Explanatory Report, para. 64. Although the Report contains a rather cautious formulation: "... the possibility of other legal and disciplinary actions against public authorities which have committed a serious breach of their obligations under the present Convention must not be excluded."

cial documents which they hold 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 According to the Explanatory Report, dissemination of information must be done on a regular basis, including the use of new information technologies (e.g. web pages accessible to the public) and public libraries, in order to ensure easy and widespread access.[59] In our opinion, the Convention ought to oblige the Parties to establish public registers.

4. IMPLEMENTATION, MONITORING SYSTEM

As regards *implementation*, Article 2 provides that each Party shall take measures to give effect to the Convention at the latest at the time of entry into force of the Convention in respect of that Party. Implementation presumably involves multilevel regulation: Parties must adopt general legislation or amend existing legislation, if necessary, in order to give effect to the Convention provisions. Often, legislation is complemented by specific implementing rules. Thirdly, internal rules of procedure relating to the processing of requests or providing for proactive information, as well as the training of public officers on access to official documents might also prove indispensable.[60]

The Convention creates two monitoring bodies. The *Group of Specialists on Access to Official Documents* is an expert body, while the *Consultation of the Parties* is a political one. These bodies shall be assisted by the Secretariat of the Council of Europe in carrying out their functions.

[59] Article 9; Explanatory Report, paras. 71-73.

[60] Explanatory Report, para. 20.

Group of Specialists.[61] This body is composed of independent, impartial and highly qualified experts and its main function is the consideration of periodic reports submitted by the Contracting Parties. How this reporting system will actually function is not known at the moment. However, the Council of Europe has gathered enough experience; the mechanism will probably follow *mutatis mutandis* the technique elaborated in respect of other Council of Europe Conventions.[62] Apart from this, the Group of Specialists can express opinions, make proposals, exchange information and report on significant developments. It makes proposals for the amendment of the Convention, and formulates its opinion on any proposal submitted by others.[63]

The Group of Specialists consists of a minimum of 10 and a maximum of 15 members. As regards the appointment of members, each Contracting Party proposes two experts, but a maximum of one member may be elected from the list proposed by each Party. The members are elected by the Consultation of the Parties for a period of four years, renewable once. Candidates do not have to be nationals of the State by which they are nominated.[64] The Group of Specialists shall meet at least once a year. Its members shall not receive and accept any instructions from governments.

Consultation of the Parties.[65] This political body is composed of one representative per Party. It shall be convened within one year after the

[61] Article 11.

[62] See e.g. Articles 15-17 of the European Charter for Regional or Minority Languages, 1992, CETS No.: 148.

[63] According to Article 19, amendments of the Convention may be proposed by any Party, the Committee of Ministers, the Group of Specialists or the Consultation of the Parties.

[64] The procedural rules shall be determined by the Committee of Ministers after consulting with and obtain the unanimous consent of all Parties. Article 11 para. (5).

[65] Article 12.

entry into force of the Convention in order to elect the members of the Group of Specialists. Subsequently, it meets at least once every four years. Besides ordinary sessions, it can be convened by the majority of the Parties, the Committee of Ministers or the Secretary General of the Council of Europe. The functions of the Consultation of the Parties include the consideration of the reports, opinions and proposals of the Group of Specialists. The Consultation of the Parties makes proposals and recommendations to the Parties, makes proposals for the amendment of the Convention or formulates its opinion on any proposal for the amendment of the Convention.

The Convention contains provisions establishing a *reporting system* which aims at ensuring effective implementation. Within a period of one year following the entry into force of the Convention in respect of a Contracting Party, the latter shall transmit to the Group of Specialists a report containing full information on the legislative and other measures taken to give effect to the provisions of this Convention. Thereafter, each Party shall transmit to the Group of Specialists before each meeting of the Consultation of the Parties an update of this information, which implies periodic reports every fourth year. Each Party shall also transmit to the Group of Specialists any information that it requests. Reports are examined by the Group of Specialists and it can make opinions and proposals.[66]

Lack of right to complain. Unfortunately, the Convention does not provide for individual petitions. Thus, those whose freedom of information has been violated have no direct access to the Convention bodies. On the positive side, all documents relating to the monitoring shall be made public and easily accessible through the website of the Council of Europe.[67]

[66] Article 14.

[67] Article 15.

5. FINAL CLAUSES OF THE CONVENTION

The final clauses are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe (1980). The Convention is open for all Member States of the Council of Europe. It enters into force after the tenth ratification, which is quite reasonable. After that, any State which is not member of the Council of Europe or any international organisation may be invited to accede to the Convention. Other provisions relate to the territorial application, amendments, denunciation, authentic languages of the Convention as well as State declarations.[68]

The question of *reservations* is disturbing in as much as the Convention fails to place limits on the reservations that States may make to the Convention's provisions – highly unusual for a Council of Europe human rights treaty. Thus, the general rules of the Vienna Convention on the Law of Treaties apply. According to Article 19 of the Vienna Convention "*[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless Ö the reservation is incompatible with the object and purpose of the treaty.*"

Considering that the Convention sets out minimum standards, allowing entry of reservations is undoubtedly incompatible with the object and purpose of the Convention. Lack of clear-cut rules will allow States to narrow even further the scope of the Convention to "unacceptable and unpredictable levels".[69]

[68] Articles 16-22.

[69] Recommended Drafting Solutions to Seven Key Problems in the Draft European Convention on Access to Official Documents. Briefing Note, 3 March 2008, p. 8. At (15.05.2010).

6. CONCLUSIONS

The present Convention is the first binding international legal instrument to recognise a general right of access to documents. The material scope of the Convention is defined broadly: "official document" means all information recorded in any form, drawn up or received and held by public authorities. The definition of beneficiaries is similarly generous: anyone can make use of his/her Convention rights without the need to show a specific interest or give reasons. As regards the exemptions, the list of protected interests in Article 3 is reasonable and exhaustive; their application is restricted by the harm test and the overriding public interest test. The Convention provides for a review procedure. Last, but not least, charges should be reasonable and kept to a necessary minimum.

However, much more progressive provisions could have been adopted arguably without the risk of limited participation in the Convention. As regards *the drafting process*, civil society organizations keeping abreast of the drafting were deeply concerned that the text of the treaty had been drafted over a period of just 1.5 years and meetings of the drafting group during this period had totalled only 14.5 days. Only a small number of civil society organizations were able to participate in these meetings, their contributions were not fully considered on their merits, and there was no attempt to engage in wider consultation with civil society. This is particularly problematic given that the main purpose of the Convention is to strengthen participatory democracy.[70]

Regarding *the actual provisions*, the Convention fails to include a clear guarantee of the right of access to documents and the presumption of

[70] Access Info Europe, Article 19, Open Society Justice Initiative: Letter urging the Council of Europe to give further time to reconsider the draft Convention on Access to Official Documents in light of heavy criticism from the Parliamentary Assembly of the Council of Europe. 10 November 2008. (15.05.2010).

openness. The exclusion of several functions of the legislature and the judiciary from the scope of the Convention runs counter to the principle of transparency. Likewise, the Convention does not cover official documents held by private bodies that exercise public functions or operate with public funds.

Furthermore, the Convention fails to set clear time frames. Notwithstanding the fact that the useful life of information is very short, States were not prepared to accept clearly defined time limits for the processing of requests. Although the Convention provides for a review procedure, the powers of review bodies are vaguely defined. The Convention is silent on whether the review body can order disclosure of the document.

The monitoring system of the convention is quite soft, the Convention fails to provide for the right to complain to the Convention bodies. Similarly, the Convention fails to place limits on the *reservations* which seriously undermines the effective enjoyment of the right to information.

Despite the positive intentions to introduce the "modern" right of access to information, the efforts resulted in a rather modest outcome. Real guarantees yielded to the objective of wide participation. In fact, much depends on the actual State practice after the entry into force of the Convention.