Explanatory Memorandum
to the Recommendation Rec. (2002) 2
of the Committee of Ministers to member states
on access to official documents

Background

1. Within the Council of Europe, the principle of public access to official documents began to be developed in Recommendation N° R (81) 19 on access to information held by public authorities. A recent example of European co-operation in this field is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark, on 25 June 1998. Another recent example from the EU is the adoption of the Regulation (EC) N° 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In the course of the last years, there has been growing interest among the member states in making provision in domestic law for measures to ensure open government and public access to official information. Work was accordingly started in the Council of Europe in order to further elaborate basic principles on the right of access to official information held by public authorities.

2. This work was entrusted in the first instance to the Steering Committee on the Mass Media (CDMM). Then, in 1997[1], the Ministers' Deputies approved specific terms of reference given by the Steering Committee for Human Rights (CDDH) to the Group of Specialists on access to official information (DH-S-AC).

3. According to these terms of reference, the DH-S-AC was to examine options for preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by public authorities. In so doing, the DH-S-AC was to have due regard to the aforementioned Recommendation N° R (81) 19 and to legislative developments in the field of access to information both in the member states of the Council of Europe and at European level as well as of relevant work being carried out within the Council of Europe and in other fora.

4. It should be noted that Article 19 of the Universal Declaration on Human Rights and Article 19 of the International Covenant on Civil and Political Rights appear to grant a wider right of access to official information than the European Convention on Human Rights as these provisions also contain a right to seek information.

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[1] At the 613th meeting (18-19 and 23 December 1997) of the Ministers' Deputies.

I
Definitions

Public authorities

5. It should be noted that there is no definition of "public authorities" in other legal instruments of the Council of Europe[2]. For the purposes of this recommendation, the expression "public authorities" shall cover the government and all bodies at national, regional or local administration, the term "government" covering both political bodies and administrative bodies.

6. The term "public authorities" also includes natural or legal persons in so far as they perform public functions or exercise administrative authority as provided for by national law. In some member states this notion also includes natural or legal persons performing services of public interest, or private entities financed by public funds.

Official documents

7. The term "official documents" covers, for the purpose of this recommendation, any information fixed on any physical medium in a retrievable form (written texts, tape-recordings - sound or audio-visual, photographs, e-mails, information stored in electronic data bases, etc.) Both documents produced by a public authority and documents emanating from third parties which have been received by a public authority are covered by the definition.

8. While it is usually easy to define the notion concerning paper documents, it is more difficult to define what is a document when the information is stored electronically in data bases. Member states must have a margin of appreciation in deciding how this notion can be defined. In some member states access will be given to specific information as specified by the applicant if this information is easily retrievable by existing means.

9. In member states, there are different traditions and practices concerning the qualification of documents as "official documents". In principle, unfinished documents are not covered by this notion. Furthermore, in some member states, documents which contribute to the decision-making process (for instance, opinions, memoranda, etc.) are not considered as official until the decision to which they refer is taken. However, in other member states, documents can be made available before the decision for which the document is being prepared is taken, in particular to enable participation in the decision-making process.

10. In addition, it is important to distinguish clearly between documents received by public authorities which relate to their functions and those received by the officials as private individuals and not having any link to their functions, for example letters received in the officials' capacity as politicians, or as holders of external posts. The latter category of documents is not covered in the definition adopted for the present instrument.

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[2] It might be noted that a handbook published in 1997 under the auspices of the Council of Europe states that "*administrative authority*" means "any entity or person in so far as these are entitled to take decisions or measures which constitute an administrative act." (see "*The Administration and you - A handbook", Council of Europe Publishing 1997,* p. 11).

II
Scope

11. The scope of this recommendation is closely linked to the definitions above, and covers official documents held by *public authorities*. The member states should, however, also examine to what extent these principles could be applied to information held by legislative bodies and judicial authorities.

12. Information is also "held" by a public authority when it is physically held by a legal or natural person on behalf of a public authority under arrangements made between the public authority and that person.

13. This recommendation also covers official documents stored in Archives, without prejudice to the application of more specific rules set down in Recommendation 2000 (13) of the Committee of Ministers to member states on a European policy on access to archives.

14. Documents containing personal data are also within the scope of the recommendation. In this context, it should be noted that the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 (ETS N° 108)[3] does not preclude granting third party access to official documents containing personal data. However, when giving access to such documents, this must be done in accordance with the rules laid down in Convention N° 108.

III
General principle on access to official documents

15. The right of access to official documents guaranteed in this instrument is limited to existing documents. A public authority is not under the obligation to produce new documents in order to reply to the request.

16. This right of access should apply to any person, i.e. natural persons and legal entities, without any discrimination on any ground including national origin. No limitations in this respect are set out in Recommendation N° R (81) 19 on access to information held by public authorities.

17. This recommendation applies to a general right of access to official documents which may be exercised by anyone. A person might also have a specific right to access official documents deriving from other legal instruments. For example, a person has the right of access to personal data relating to him/her, in accordance with the aforementioned Convention N°108. In the same vein, some member states provide a wider right to access to official documents to parties in administrative proceedings. In this context it should also be mentioned that Article 8 of the European Convention on Human Rights enshrines a right to access to information that relates to a person's private or family life in certain circumstances (see, in particular, the judgments of the European Court of Human Rights of 7 July 1989 in the *case of Gaskin v. the United Kingdom*, of 26 March 1987 in the *case of Leander v. Sweden*, and of 19 February 1998 in the *case of Guerra and others v. Italy*).

18. This recommendation, whilst allowing disclosure to any person, does not affect any intellectual property right attached to the information disclosed.

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[3] ETS: European Treaty Series

IV
Possible limitations to access to official documents

19. Access to documents should be the rule and confidentiality the exception, in cases where other legitimate interests take precedence. Limitations should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecting the other legitimate interest(s).

20. It follows from the general right in Principle III above that individuals will need to be told whether the public authority holds a particular document. Where the protection of other legitimate interests takes precedence over disclosure, in limited circumstances it may be necessary to keep secret the fact that information exists. This would apply in circumstances where to admit or deny that the information existed in itself would amount to disclosure of the information.

21. Limitations to the right of access to official documents should be possible only for the reasons listed exhaustively in Principle IV, paragraph 1. A specific limitation foreseen by national law may fall under several limitations contained in this Principle. The criteria for the application of limitations have been drawn up keeping in mind Articles 6, 8 and 10 of the European Convention on Human Rights, as well as the relevant provisions which appear in the instruments relating to data protection, in particular in the aforementioned Convention for the protection of individuals with regard to automatic processing of personal data of 28 January 1981 (ETS N° 108), and in Recommendation N° R (81) 19 on access to information held by public authorities.

22. Paragraph 1.i foresees that member states could limit access to official documents in order to protect national security, defence and international relations. In some member states, limitations related to these fields have a constitutional dimension. For example, some states having regions with a large degree of autonomy, may also have interest in protecting correspondence between such regional authorities, or in federal states, between the federal government and regional authorities. Some member states also limit access to documents concerning the Head of state; this is the case in particular in some constitutional monarchies.

23. Paragraph 1. iv. foresees that member states could limit access to protect privacy and other legitimate private interests. Information relating to such interests may be covered by the aforementioned Convention N° 108, but the limitation foreseen by paragraph 1. iv. may also be applied to information not covered by that Convention.

24. The concept of “commercial and other economic interests”, as used in paragraph 1.v, may cover for example business matters which need to be kept secret for competition reasons, such as the confidential nature of business negotiations. This paragraph may also be extended to those documents which public authorities use to prepare collective bargaining, in which they take part.

25. In order to develop good statistical data, most states have confidentiality clauses protecting information gathered from private persons or entities for statistical purposes. Such data will usually either be personal data or data concerning economic or commercial interests. The access to documents containing such information, may therefore be limited in accordance with paragraph 1, items iv. and v. Similar considerations may apply to data collected in the course of taxation of private persons and entities.

26. Some states protect information given in confidence. This recommendation does not preclude this as long as the protected information is covered by one of the limitations in Principle IV, for example paragraph 1, items iv. or v.

27. The limitation concerning the protection of "equality of parties concerning court proceedings", as set out in paragraph 1.vi, derives from Article 6 of the European Convention on Human Rights on the right to a fair trial. It aims, *inter alia*, at allowing a public authority to refuse access to its own documents with the view not to weakening its position during proceedings to which it is a party.

28. Limitations for the protection of "nature", which are mentioned at paragraph 1.vii, are designed for example to prevent disclosure of the whereabouts of endangered fauna or flora in order to protect them. This limitation is in line with article 4, paragraph 4 (h) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters[4].

29. Paragraph 1. viii may, for example, protect the ability of a public authority to effectively regulate, investigate and audit, possibly through formal proceedings, other organisations or individuals, as well as their own internal rules and procedures. A possible example is an on-going tax investigation or audit.

30. Paragraph 1. x. indicates the possibility to limit access in order to protect deliberations within or between public authorities during the internal preparation of a matter. This limitation would e.g. allow for documents from deliberations in the Cabinet to be exempted. The term "matter" is broad enough to cover all types of cases which are handled by the public authority, i.e. both individual cases and policy-making procedures.

31. Paragraph 2 expresses two important principles, the "harm-test" principle and the principle of balancing the interest of public access to documents against the interest protected by the limitation. If public access to an official document does not cause any harm to one of the interests listed in paragraph 1, there should be no limitations on access to that document. If public access to a document might cause harm to one of these interests, the document should still be released if the public interest in having access to the document overrides the protected interest.

32. The "harm test" and the "balancing of interests" may be carried out for each individual case, or by the legislator through the way in which the limitations are formulated. Legislation could for example set down varying requirements for carrying out harm tests. These requirements could take the form of a presumption for or against secrecy or unconditional secrecy for extremely sensitive information. When such requirements are set down in legislation, the public authority should make sure whether the requirements in the secrecy clause are fulfilled when they receive a request for access to such an official document. The level of sensitivity may vary with time and it should be avoided that the classification of a document would automatically prevent access to the same document in the future.

33. In some member states, documents will be released unless the protected interest overrides the public interest attached to disclosure. This approach is not incompatible with this recommendation.

34. Paragraph 3 evokes that member states should lay down maximum time limits for limitations on access. Accordingly, the documents should be made accessible after a certain period of time. In addition, time limits should be proportionate to what it is hoped to achieve, i.e. the protection of other rights and legitimate interests.

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[4] Adopted in Aarhus, Denmark, on 25 June 1998. Article 4 paragraph 4 reads: "A request for environmental information may be refused if the disclosure would adversely affect: … (h) The environment to which the information relates, such as the breeding site of rare species".

35. As regards documents classified as confidential, secret or top secret, the authorities should ensure that they are made accessible as soon as circumstances permit, or, if the law sets a time limit on confidentiality, as soon as that limit is reached. In some countries, the law provides for regular review of the confidential nature of an item of information. In others, review is carried out as necessary when a request is made for access.

V
Requests for access to official documents

36. An applicant for an official document should not be obliged to specify any reason for having access to the official document. This idea was already included in Recommendation N° R (81) 19 on access to information held by public authorities.

37. In paragraph 2, member states are encouraged to keep formalities to a minimum. In some member states, requests must be in written form. In others, they may be made orally. The right for an applicant to present an anonymous request exists in some member states. However, this recommendation does not oblige member states to grant applicants such a right.

VI
Processing of requests for access to official documents

38. Paragraph 1 recommends that any authority holding an official document should deal, as soon as possible, with the request for access to that document. Before the decision is taken, the public authority may contact the source of the requested document. The public authority holding the official document should not oblige the applicant to present a new request to the public authority which is the source of the requested document.

39. Service and efficiency towards any applicant, without discrimination, which is expected from any public authority, will be reflected, in particular, in speedy treatment of requests and willingness to co-operate with the applicant, where the handling of the request is complicated. From this point of view, the text of the present recommendation goes further than Recommendation N° (81) 19 on access to information held by public authorities, which merely states that any request must be dealt with within a reasonable time.

40. Paragraph 2 refers to non-discriminatory treatment of requests as already provided for in Recommendation N° R (81)19. Discrimination should be avoided, as must the preferential treatment of requests, which should be dealt with on an equal basis and in accordance with objective criteria. The authorities holding the document should bear in mind the requirements of the additional Protocol No. 12 to the European Convention on Human Rights (prohibition of discrimination) open to signature by member states on 4 November 2000. This protocol broadens, in a general fashion, the field of application of Article 14 (non-discrimination) of the Convention. As a rule, requests should be dealt with in order of receipt.

41. All requests should be dealt with as speedily as possible. The authorities should always tell the applicant whether or not they have decided to release a document. Moreover, where the decision is positive, member states should ensure that the document is made available without delay. The requirement to keep formalities to a minimum and the promptness of treatment should be followed by an execution of the decision without unnecessary delay. The authorities should inform the applicant if a delay is inevitable nonetheless.

42. Paragraphs 4 and 5 recommend to co-operate with the applicant and are particularly important if the applicant is disabled, illiterate, homeless, etc. The extent of the willingness to co-operate depends on the situation of the specific case. Therefore, the public authority enjoys a certain margin of appreciation, but should be as helpful as possible. Furthermore, in special cases, (disabled or illiterate people, the elderly or marginalised, foreigners with little or no knowledge of the language, etc), where applicants are unable without help to obtain a basic understanding of the document concerned, the authorities might envisage, as far as is possible and reasonable, helping them to secure such an understanding. Moreover, in some situations such help would correspond to the wishes expressed by the Committee of Ministers in Recommendation N° R (93) 1 on effective access to the law and to justice for the very poor. Help with comprehension of the information does not include an obligation to translate documents. Neither does it entail the giving of complicated technical (eg. legal) advice.

43. Paragraph 6 recommends that member states should deal with all requests for access on the merits unless they are manifestly unreasonable (e.g. where requests are excessively vague, or require a disproportionate amount of searching or cover too broad an area or too great a volume of documents). Where a request is plainly abusive (one of many regular requests designed to hinder a department's normal work, or uncalled-for repetition of an identical request by the same applicant), it may be refused.

44. Paragraph 7 is based on Recommendation N° R (81) 19 on access to information held by public authorities and recommends that the public authority gives reasons for refusing access except in exceptional cases where the reasons would reveal information that may be exempted according to principle IV.

VII
Forms of access to official documents

45. There are different means of access to a document: inspecting the original or receiving a copy of it, or both. It should be up to the applicant to express his/her preference on the form of access. The public authority should take into account, within reasonable limits, such a preference. However, this may be impractical or impossible in some cases. For instance, it may be appropriate to refuse giving a copy of the document if the technical facilities are not available (for example, for audio, video or electronic copies), if it would entail unreasonable costs, if intellectual property rights might be infringed, or if unlawful use of the document might be rendered possible. It may be appropriate to refuse direct access to a document, if the original is physically fragile. Furthermore, there may be obstacles arising from "on-the-spot" consultations such as opening hours, several persons wanting the same document at the same time. Again, also in this context it is important that public authorities have an open attitude in allowing the general public into their offices.

46. If a limitation only applies to some of the information in a document, the rest of the document should normally be released. It should be clearly indicated where and how much information has been deleted. If the document is a paper document, deletions could be made on the copy by blanking out the parts to which the limitation applies. If the document is electronic, there should be a clear indication on the copy of which parts of the documents have been deleted, e.g., by leaving this space blank. Moreover, the release of part of the document should not be done in such a way that it would reveal information covered by the limitation.

47. Paragraph 3 indicates that access may be given by referring the applicant to easily accessible alternative sources. For example if a document is published on the Internet, the public authorities may refer the applicant to this, if the Internet is easily accessible to the applicant. Whether a document is "easily accessible" should be assessed on a case-by-case

basis; what may be easily accessible for one person will not necessarily be so for another. Important factors may be the individual situation of the applicant (for example where he/she is disabled, illiterate, homeless, or his/her geographical distance from the public authority which holds the requested official document). The situation of the country as far as accessibility of the public to information (for example, via the Internet) is concerned might also be a factor to be considered.

48. Where access to a document is refused, the public authorities may provide a summary of the document.

49. In some cases a person is merely interested in a certain type of information, and prefers this information to be given orally or in a written summary. States are encouraged to give this type of service, but this is not covered by this recommendation.

VIII
Charges for access to official documents

50. In order to facilitate access to public information, access to original documents on the spot should in principle be free of charge. However the public authority might charge the applicant for the cost of finding the actual documents, especially in cases where the request is voluminous or otherwise creates a large amount of work for the public authority. The fee should not exceed the actual costs incurred by the public authority.

51. Concerning copies, according to paragraph 2, costs of access may be charged to the applicant, but the authorities should not make any profit; the fees should be reasonable and kept to a minimum, and should not exceed the actual costs incurred by the public authority. The limitations on the fees that public authorities are allowed to charge relating to legislation on access to official documents, do not preclude public authorities from producing documents for commercial purposes and selling them at competitive rates.

IX
Review procedure

52. This article contains two principles. Firstly, the applicant should have a right to a review procedure before a court or another independent or impartial body established by law. In addition, the applicant should have access to an expeditious and inexpensive review procedure. This might be a review by a public authority or an independent authority. On this issue, it is important to note that in certain national systems an internal review procedure is seen as an obligatory intermediary step before a court of appeal or other independent complaints procedure. In some member states it is also possible to complain about refusals or malpractice in this field to an ombudsman, a mediator or a mediation body.

X
Complementary measures

53. The aforementioned Recommendation N° R (81) 19 on access to information held by public authorities stated that effective and appropriate means should be provided to ensure access to such information. Principle X of the present recommendation is an expression of the idea contained in paragraph vi. of the preamble, whereby public authorities should commit themselves to conducting an active communication policy, and, as a consequence, establish support systems.

54. In order to use their rights of access it is necessary for the applicants to know about their rights. Paragraph 1 in principle X therefore recommends that member states should take the necessary steps to inform the public about its rights. Such information could inter alia be given in folders to the public, information could be published electronically, or documentation centres could be set up.

55. Furthermore, in order to allow easy access to official documents, the public authorities should provide the necessary consultation facilities (appropriate technical equipment, including that making use of new information and communication technology; well-adapted premises). In any event, the public authorities should ensure preservation and secure storage of originals. They could also set up and indicate a contact point within the given department, in order to facilitate access to that department's documents.

56. Paragraph 2. ii, refers to issues related to the preservation and the destruction of official documents. The preservation generally implies the transfer to Archives services. There is a strong need for clear rules on these matters.

57. In order for the public to know what documents the public authority holds, paragraph 2. iii, recommends that the public authority should make available information on the matters or activities for which they are responsible. One way of doing this is setting up lists or registers of the documents they hold, and making these accessible to the public. This will also facilitate the search for the requested documents. The public authority should also take account of the need to protect legitimate interests when deciding which type of information to include in these lists or registers.

XI
Information made public at the initiative of the public authorities

58. The final principle differs from the others in that it concerns an initiative to be taken by the national administration (making information public), whereas the other principles involve individual initiatives (applying for information). It certainly does not seek to prevail on public authorities to make public all the information in their possession, but rather to encourage them to make public such information (e.g. on administrative files concerning public works) as might foster "enlightened" citizen participation in general-interest debates. Such participation is an important factor for democracy and efficient administration. Moreover, the publication of information before it is requested is advantageous for the authorities in that they will not need to handle requests for that information, the information being henceforth available.

59. The public authorities are free to choose the most appropriate means of publishing information (billboards, official publications, websites or any other medium easily accessible to the public).