Council of Europe recommends criteria for access to information

By David Goldberg

ON FEBRUARY 21ST, the Council of Europe's Committee of Ministers adopted a Recommendation to member states "on access to official documents". It builds on the earlier Recommendation, No. R(81)19, "on the access to information held by public authorities".

Constituting merely "a minimum standard", the eleven principles set out the contemporary governmental consensus regarding the elements for a freedom of information regime.

THE RECOMMENDATION

The key objective is contained in Principles III and V:

• Guarantee of a non-discriminatory right of everyone to have access, on request, to official documents held by public authorities (i.e. not just citizens)

• No obligation to give reasons for requesting access and

• Minimum formalities for requesting official documents.

NOTEWORTHY POINTS FROM OTHER PRINCIPLES ARE:

1. Coverage of all information recorded in any form – but excludes "documents under preparation" (Principle 1);

2. Holders of information cover governmental and administrative authorities – not legislative or judicial authorities – and also persons performing public functions (important in an era of increasing privatization) (Principle 1);

3. Provision of an "exhaustive" list of limitations regarding access. Each must be prescribed by law; necessary in a democratic society; and proportionate to the aim sought. Limitations should operate on the harm-test principle; may be subject to a public interest override; and may be time-sensitive (Principle IV);

4. Requests should be dealt with on an equal basis within a set time-limit (not, however, specified by the Recommendation); refusals must be justified; advice and assistance should be offered; "manifestly unreasonable" requests may be refused (a catch-all phrase, this); and the form of access should meet the applicant's preference (Principle VI);

5. Charges should be reasonable and not exceed costs (Principle VIII);

6. A review procedure before courts or other independent and impartial body should be accessible, and there should be access to an inexpensive and speedy procedure for internal reconsideration by the authority or courts or other body (Principle IX);

7. Information about these rights and training for officials should be provided; authorities should manage their documents efficiently and maintain registers of documents held (Principle X);

8. An "active" freedom of information policy should be encouraged (Principle XI).

PRIVACY

With regard to privacy, "documents containing personal data are within the scope of the recommendation" (Explanatory memorandum (EM) para. 14). However, access (or limitations on access) should be consistent with the rules provided for in European Treaty Series (ETS) No 108. More specifically, Principle IV(iv) allows member states to limit access to protect "privacy and other legitimate private interests" (i.e. interests covered by ETS No 108, and otherwise covered, EM para. 23).

CONCLUSION

Recommendation (2002)2 is another useful brick in the evolving global edifice establishing the normalcy of, and criteria for, a freedom of information regime.

However, the mandate of the Group of Specialists on access to official information (DH-S-AC) permitted it to propose a binding legal instrument. In the event, it chose to propose the soft-law measure of a Recommendation.

Although the Council of Europe's political bodies have

been promoting freedom of information since 1970, its legal and judicial bodies have not been nearly so inclined to do so. As the Explanatory Memorandum (para. 4) states:

> "It should be noted that Article 19 of the Universal Declaration on Human Rights (ECHR) 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…"

This point has been confirmed very recently in the English case of Persey v Secretary of State for Environment, Food and Rural Affairs (QBD Administrative Court, 15/3/2002). The Court said:

> "In Leander v Sweden (1987) 9 EHRR 433 the European Court of Human Rights had made the point that freedom of expression – whether the right to receive or the right to impart information – was one thing, access to information quite another, and that Art.10 of the Convention, whilst naturally conferring the former, did not accord the latter."

Arguably then, Article 10, of the European Convention on Human Rights requires amending to provide explicitly for a right to seek information. And until the Court unambiguously declares a general right to freedom of information *in abstracto*, disappointed applicants will have to rely on the circumstances of the case justifying access to information to protect private and family life under Article 8 of the ECHR. The Explanatory Memorandum (para. 17) points in that regard to the judgments of the European Court of Human Rights of 7 July 1989, Gaskin v. the United Kingdom; of 26 March 1987, Leander v. Sweden; and of 19 February 1998, Guerra and others v. Italy).

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