Parliamentary Assembly
Assemblée parlementaire
http://assembly.coe.int

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**Doc. 15308**
07 June 2021

# Media freedom, public trust and the people's right to know

**Report**[1]
Committee on Culture, Science, Education and Media
Rapporteur: Mr Roberto RAMPI, Italy, Socialists, Democrats and Greens Group

*Summary*

There is no democracy without a real possibility of making conscious choices. This can only be ensured if the public is duly informed and can freely inform itself; if a real debate of ideas and a wide range of issues can take place on the basis of exact, precise and complete knowledge of factual elements; and if everyone has the necessary capacity and culture to critically analyse the various points of view and can express themselves without fear.

Today, our democratic values and the functioning of our democratic institutions are challenged by disinformation and recurrent attempts to manipulate public opinion. Recent developments have often eroded parliamentary prerogatives and their fundamental mediating role in a democratic society. A growing sense of divide between governing institutions and the general public have increased public distrust.

Therefore, there is a need to establish a wide *right to know*, defined as the citizen's civil and political right to be actively informed of all aspects regarding all stages of the policy-making and administrative or rule-making processes, in order to allow for full democratic participation, and hold public goods administrators to account according to the standards of human rights and the rule of law.

1. Reference to committee: Doc. 15040, Reference 4495 of 6 March 2020.

**Contents** **Page**

## A. Draft resolution[2]

1. Democracy is only a facade without an informed exercise of the right to vote, and citizens' entitlement to a responsible democratic participation in policy- and decision-making processes through substantial public and parliamentary debate, as fundamental means to effective democratic control over the action of governments and legislators.

2. There is no democracy without a real possibility of making conscious choices. This can only be ensured if the public is duly informed and can freely inform itself; if a real debate of ideas on a wide range of issues can take place on the basis of exact, precise and complete knowledge of factual elements; and if everyone has the necessary capacity and culture to critically analyse the various points of view and can express themselves without fear. Furthermore, these conditions are essential for people's elected representatives to exercise their mandate effectively and responsibly.

3. Today, our democratic values and the functioning of our democratic institutions are challenged by post-truth narratives, disinformation, narrow agenda-setting powers and recurrent attempts to manipulate public opinion. Furthermore, recent developments have often eroded parliamentary prerogatives and their fundamental mediating role in a democratic society. A growing sense of divide between governing institutions and the general public have increased public distrust, endangering democratic governance and the efficiency in implementing public policy.

4. Therefore, for the Parliamentary Assembly, there is a need to establish a wide *right to know*, defined as the citizen's civil and political right to be actively informed of all aspects regarding all stages of the policy-making and administrative/rule-making processes, in order to allow for full democratic participation, and hold public goods administrators to account according to the standards of human rights and the rule of law.

5. Limitations to the right to know, intended to protect national security, the right to privacy or of other human rights, must be narrowly defined.

6. The right to know has three active dimensions for implementation: direct obligations that public authorities, and public or private institutions which exercise public functions, have to respect independently of specific requests; the right for citizens to be notified, be informed, have access to relevant information and contribute to the development and appraisal of laws, regulations, and other policy instruments; and an educational and cultural environment prone to enhancing and stimulating citizens' continued learning in an informational society.

7. To give full effect to a citizen's right to know, an ecology of public policy instruments is required, including mechanisms of consultation, notice and comment, impact assessments and *ex-post* regulatory and legislative evaluation.

8. The entry into force of the Convention on Access to Official Documents (CETS No. 205, the "Tromsø Convention") is a significant step forward in the right direction, which the Assembly welcomes. Still, it notes with concern that the take up of the Tromsø Convention has been very poor.

9. The media hold a key role in agenda-setting and providing timely, pluralist and reliable information. It is therefore crucial that Council of Europe standards on media freedom, editorial independence and pluralism, protection of journalists, funding benchmarks and guarantees, and the transparency of media ownership are fully implemented and adequately monitored.

10. Citizens must be aware of who is behind the news and know the entire ownership structure of media outlets up to beneficial owners as well as information-sharing agreements between the media outlet and other entities. This information is not always easy to find or track, especially if media ownership structures are transnational. The Assembly considers that this information must be made public.

11. Likewise, access to the information contained in company registers is essential for citizen watchdogs, such as anti-corruption civil society groups, and for investigative journalists to track possible illegal actions. Denying access to data on company ownership and structures, or significantly restraining it, including by prohibitive costs, limits the public's right to know, and may open the door to corruption, fraud, money-laundering, human rights violations, and other illegal activity.

2. Draft resolution adopted unanimously by the committee on 21 May 2021.

12. While the right to know aims to enhance meaningful citizen participation in the decision-making process, there needs to be transparency of any participation exercises carried out and of the input from interest groups, including professional lobbyists, business associations and organised civil society.

13. The Assembly is concerned that, in most member States, there are no transparency regimes guaranteeing that civil society, journalists and the public can obtain information about how artificial intelligence is being used and how data feeds into automated decision making. Moreover, the Assembly trusts that ensuring that the wider public has free and easy access to scientific and other scholarly knowledge has significant society benefits.

14. Moreover, the citizen's right to know is intrinsically linked to free, easy and life-long access to cultural instruments as indispensable tools in the development of a critical and independent understanding of information and of the active, inclusive and conscious participation in a democratic society. Art is a beneficial vehicle for the enhancement of critical thinking capabilities. To this end, the wide-spread presence of cultural avenues such as libraries, theatres, museums and live music, is to be promoted and inclusion of all societal actors in cultural life enhanced.

15. The main role and primary responsibility for safeguarding the right to know lies with the member States and with public authorities. However, other actors, such as public and private media, educational and cultural institutions, come into play and must assume their share of responsibility in educating active and knowledgeable citizens. The actions of the various stakeholders must be coherent and synergistic, hence partnerships between these several actors are crucial.

16. Consequently, the Assembly calls on member States to:

16.1. recognise the right to know as the citizen's civil and political right to be actively informed of all aspects regarding all stages of the policy-making and administrative/rule-making processes, in order to allow for full democratic participation, and hold public goods administrators to account according to the standards of human rights and the Rule of Law;

16.2. ratify the Tromsø Convention, if they have not yet done so, also committing to optional provisions on legislative and judicial transparency, and to bring their access to information laws into line with the highest convention standards;

16.3. support the rapid establishment of the Tromsø Convention Monitoring Committee and to commit sufficient funds for it to operate effectively;

16.4. promote and participate in Europe-region-wide knowledge exchanges on best practices regarding the implementation of the right of access to information, which could also be of great value for the Tromsø Convention Monitoring Committee;

16.5. develop and implement, in parallel with the consolidation of existing standards set by the Tromsø Convention, complementary measures for the effective safeguard of the right to know in accordance with the principles set out in this resolution and, in particular, to ensure that there is an effective collection, compilation and timely publication of information of public interest, with a transparency by design approach;

16.6. take inspiration from the European Union Non-Financial Reporting Directive 2014/95, so as to make provisions for extending access to information laws to all private bodies performing public functions or operating with public funds, and for ensuring publication by larger companies of specific information in the crucial domains of public interest such as respect for human rights, anti-corruption and bribery, environmental protection, social responsibility, treatment of employees, diversity within company boards in terms of age, gender, educational and professional background;

16.7. adopt legislation which ensures transparency of lobbying, in line with the Recommendation CM/Rec(2017)2 of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making;

16.8. co-operate with the Group of States against Corruption (GRECO) and other relevant international actors, as well as with civil society, to develop a legal framework allowing and facilitating access to information contained in company registers, also building on best practices developed by countries that have open company registers;

16.9. bring their legislation and practice into line with the Assembly Resolution 2065 (2015) "Increasing transparency of media ownership" and Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, in order to

fully implement Council of Europe standards concerning transparency of media ownership and financing, and to request full transparency in the stipulation and execution of information-sharing agreements that media conclude with third actors;

16.10. establish an independent national monitoring system of the legality, correctness and completeness of information delivered by all national media, and to make the disaggregated data from this monitoring exercise public at least on a monthly basis;

16.11. review funding mechanisms and avoid budget cuts to the media sector, with a view to preserve and enhance an open and pluralistic media landscape, and to fully implement the multiple relevant Council of Europe recommendations on the matter;

16.12. bring their legislation and practice into line with Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, and organise debates on transparency of algorithms used by social media companies, bringing together relevant stakeholders, to discuss how to ensure parliamentary and citizen oversight of these algorithms;

16.13. encourage the producers and publishers of knowledge to make their works available free of charge in open formats, and to support good practices on open access, so that research results are more accessible to all societal actors, with a view to delivering better science and innovation data in the public and private sectors;

16.14. create and reinforce instruments for the wide-spread diffusion of cultural knowledge; promote, in this respect, the role of libraries, museums, theatres, live-music avenues and other cultural institutions, and establish a minimum monitored measure for their presence *pro capita*.

17. Members of parliament have an enhanced right of access to information. Elected officials may be granted access to otherwise confidential information and play a crucial role in mediating public debate between different levels of society and safeguarding minority rights. Therefore, the Assembly calls on the national parliaments to analyse and evaluate the mechanisms of participation in the decision-making process at all levels, including the agenda-setting and allocated times of parliamentary debates and questions, seeking to ensure that the issues of public interest are fully debated and information of public interest enters the public domain.

18. The Assembly calls on members of parliament to engage in a co-ordinated debate on setting common shared rules regarding the application and revision of confidentiality standards among member States and regional institutions, in particular regarding voting procedures, aiming at countering the culture of secrecy in order to avoid public distrust, and with a view to reinforcing the citizens' right to know.

## B. Draft recommendation[3]

1. The Parliamentary Assembly, referring to its Resolution … (2021) "Media freedom, public trust and the people's right to know", welcomes the entering into force of the Convention on Access to Official Documents (CETS No. 205, the "Tromsø Convention"). However, it believes that the right of access to information should be broadened further, and that a strong and comprehensive set of transparency measures giving full effect to the right of access to information should be delivered, to advance toward a wide-ranging *right to know*.

2. Therefore, the Assembly recommends that the Committee of Ministers instructs the Steering Committee on Human Rights (CDDH), in collaboration with the Steering Committee on Media and Internet Society (CDMSI) as required to:

2.1. evaluate compliance by member States with Recommendation CM/Rec(2017)2, Recommendation CM/Rec(2018)1 and Recommendation CM/Rec(2020)1, and to identify further action required for their effective implementation;

2.2. prepare a comprehensive report on the models for independent monitoring and oversight of the right of access to information in the member States, also bearing in mind the dimension of democratic culture developed by DGII in the Reference Framework of Competences for Democratic Culture;

2.3. launch a study to identifying good practice in the ecology of policy instruments that provide accountability throughout the policy-making and administrative process, considering in particular the conditions under which consultation, impact assessment of proposed legislation, freedom of information, the Ombudsman, *ex-post* legislative review, and administrative judicial review generate accountability;

2.4. draft, also based on this study, one or more soft law instruments, containing guidelines on:

2.4.1. proactive publication of information of public interest with a transparency by design approach; this should also regard private bodies that have a public mandate or operate in domains of high public interest, such as defence of human rights, environmental protection and combatting corruption;

2.4.2. monitoring the implementation and identifying good practice in developing policy instruments that provide accountability throughout the policy-making and administrative process;

2.4.3. public access to information relating to the legislative and judiciary branches, including parliamentary question mechanism and debate rules, as well as free access to all judicial decisions, provided proper balance between the right of access and the protection of privacy is respected;

2.4.4. transparency of lobbying by private actors;

2.4.5. public access to company registers, specifying the types of data and documents that should be published.

3. The Assembly also recommends that the Committee of Ministers develop co-operation with relevant regional and international bodies such as UNESCO, the World Bank and the Organization for Security and Cooperation in Europe on monitoring the right of access to information under the United Nations Sustainable Development Goals Indicator 16.10.2, aiming for a strong connection between transparency, open access, sustainable development, and defence of democratic and just societies.

3. Draft recommendation adopted unanimously by the committee on 21 May 2021.

## C. Explanatory memorandum by Mr Roberto Rampi, rapporteur

### 1. Introduction

1. For a democratic society to function properly and vigorously, there is an essential condition: the citizens must be well informed, actively participate in policy- and decision-making processes, and have the practical possibility and effective means to exercise democratic control over the action of governments and legislators.To make conscious and valid choices, the citizens must have the freedom, the capacity and culture to choose with full knowledge of the facts, including the evidence base of public-governmental choices, and to analyse critically the various points of view and express themselves without fear.

2. Beyond traditional and new media, the citizens are entitled to have also other channels through which the information of public interest should be provided to them, such as the public administration, governmental offices and parliaments. The recent entry into force of the Convention on Access to Official Documents (CETS No. 205, the "Tromsø Convention") is a significant step forward in this direction. But this is just the first step.

3. I strongly believe that we must continue this move forward toward a *right to know*, *a* wide-encompassing citizens*'* entitlement to be actively informed of all aspects regarding the administration of all public affairs. The objective of this report is advancing the recognition and effective safeguard of the right to know, in order to secure legitimate, transparent, and accountable policy- and decision-making processes at all levels of governance. A natural result of the implementation of the right to know will no doubt be the strengthening of citizens' trust in institutions and the foundations of democratic societies.

4. The three core elements of ensuring that citizens can enjoy their right to know are ensuring a comprehensive right of access to information, protecting freedom of expression and media freedom and guaranteeing a right to participate in public decision-making processes.

5. The Council of Europe, as the continent's leading promoter of democracy, human rights and the rule of law, has already done much to advance the right to know through its standard-setting on the right of access to information since 1981, and through its significant body of work on freedom of expression, the freedom, pluralism and diversity of the media, and promotion of media literacy. Less has been done on the right to participate, which is not explicitly protected by the European Convention on Human Rights (ETS No. 5).

6. This report examines the full set of standards developed by the Council of Europe on the right of access to information and focuses on the current challenges to guaranteeing to citizens a comprehensive right to know, suggesting a series of future actions by the Organisation.

7. Throughout the report I have identified the other inter-governmental fora, such as European Union, the United Nations Educational, Scientific and Cultural Organization (UNESCO), Organisation for Economic Co-operation and Development (OECD), Organization for Security and Co-operation in Europe (OSCE), the Open Government Partnership and the Group of States against Corruption (GRECO) of the Council of Europe, which are currently working on the issues mentioned, as well as relevant standards and ongoing research and standard-setting processes.

8. My analysis builds on the excellent background report by Ms Helen Darbishire, Executive Director of Access Info Europe,[4] who I warmly thank for her outstanding work. I have also taken account of the contribution by other experts,[5] and by several members of the committee.

### 2. The right to know: a new notion at the Council of Europe

9. According to the Global Committee for the Rule of Law "Marco Pannella", the right to know is a citizen-centred perspective on the range of rights, in particular those protected by Article 10 of the European Convention on Human Rights on freedom of expression and information. It has been defined as "a citizen's civil and political right to be actively informed of all aspects regarding the administration of all public goods during the entire political process, in order to allow for the full and democratic participation in public debate regarding such goods and hold public goods administrators accountable according to the standards of human rights and the rule of law."[6]

---

4. Access Info Europe, Madrid.

5. Mr Claudio Radaelli, Professor of Comparative Public Policy, School of Transnational Governance, European University Institute, Florence; Mr Ezechia Paolo Reale, Secretary General, Siracusa International Institute for Criminal Justice and Human Rights, Siracusa; Ms Laura Harth, Representative to the UN Institutions for Nonviolent Radical Party, Transnational Transparty, Rome.

10. In order for each and every person to be well informed, to be able to fully comprehend and use the information received, to be able and to be free to form and express opinions, and to have the rights and infrastructure necessary to participate fully in public life, States must undertake a series of measures, both to ensure respect for and to actively promote these rights.

11. The Council of Europe has developed a significant body of standards on media freedom, enumerating and clearly defining the obligations upon States to ensure plurality and diversity in the media sphere. The Council of Europe has also done extensive work on media literacy.

12. In 2020, still just a few decades into the Fourth Industrial Revolution, the digital revolution, it is clear that there are two main challenges with media freedom. The first is that the existing standards are not fully implemented or adequately monitored in many Council of Europe member States. The second, that the digital age has brought new challenges which are requiring an urgent rethink of the standards, such as how to combat the use of social media to disseminate misinformation.

13. It is also clear that however well-regulated and pluralist the media environment, the citizen's right to know is not complete without a series of complementary measures. In particular, there is an urgent and outstanding need to deliver a strong and comprehensive set of transparency measures which give full effect to the right of access to information. It is only when there is sufficient information entering the public domain that media freedom is meaningful. It is only when there is sufficient information available to an individual that his or her right to participate in public debate and in public affairs is meaningful.

14. As a starting point it should be underlined that the considerable advances in the right of access to information in the past 20 years have resulted in a definition of a right, and indeed its incorporation into the international human rights framework, which is very close to the concept of the right to know.

15. Specifically, a right of citizens to access information held by public bodies and the positive obligation to pro-actively publish information has been clearly established. The right of access to information has been recognised by the UN Human Rights Committee, the Inter-American Court of Human Rights, and, to a certain extent, by the European Court of Human Rights, as well as by the special mandates on freedom of expression, including the Representative on Freedom of the Media of the OSCE.

16. Furthermore, many constitutions recognise a right of access to information, and the European Union recognises a fundamental right of access to its documents. Besides, while these laws generally regulate the right to request information, many also impose proactive publication obligations on public bodies.

17. A total of 130 countries worldwide, including all Council of Europe countries with the exception of Andorra, have some kind of access to information or freedom of information law, and these are now seen as a *sine qua non* of a democratic society. The quality of the laws and their implementation varies, and it is these shortcomings in law and practice that continue to limit the public's right to know in 2020 and weaken the value of this right in the face of inaccurate, distorted, or deliberately false information.

18. The importance of a right of access to information in advancing the United Nations Sustainable Development Goals, and in particular Goal 16 on promoting "peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels," means that there is a specific indicator, Indicator 16.10.2, on the "number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information."

19. Where international standards have been less clear, and less ambitious, is when it comes to defining the extent to which the right to information applies to information held by private bodies. Whilst no private body may interfere with exercise of freedom of expression, it is not clear to which extent they much facilitate it by providing information.

20. There have been, however, a series of advances with the aim of ensuring integrity and accountability in public life. Progress has been made in setting standards on opening company registers, on the regulation and transparency of lobbying, and on non-financial reporting requirements whereby companies report on human rights and environmental impacts. The gradual strengthening of rules for the protection of whistle-blowers is an example of where complementary measures have been developed to ensure that information enters the public domain.

---

6. Global Committee for the Rule of Law "Marco Pannella", Right to Know Concept Definition Document (2017).

21. The link between participation and access to information is also recognised. The Inter-American Court of Human Rights chose to link the right to freedom of expression, although they had the option of linking it to participation, a right that appears in the Inter-American Convention but not in the European Convention on Human Rights.

22. The Court of Justice of the European Union, has, however, underscored the relationship between accessing documents and participation in decision making, stating that "If citizens are to be able to exercise their democratic rights, they must be in a position to follow in detail the decision-making process" and that they should "have access to all relevant information." [7]

23. In the past decade, the global transparency movement has been greatly strengthened with the emergence of the concept of "open government", something very much in line with the right to know as put forward by the Assembly. The OECD's 2017 definition is that "Open Government" is "a culture of governance that promotes the principles of transparency, integrity, accountability and stakeholder participation in support of democracy and inclusive growth."[8]

24. The Council of Europe has not always been the primary driver of some of these developments. Regulatory leadership has often come from the European Union, with standard setting by bodies such as the OECD and the OSCE, as well as intergovernmental processes such as the Open Government Partnership.

25. That is not to say that the Council of Europe has not made a contribution to the debate, as it undoubtedly has, particularly on issues relating to media freedom. The jurisprudence coming out of the European Court of Human Rights, on both the right of access to information and in areas such as protection of whistleblowers, as well as protection of media freedom more broadly, has contributed directly to regulatory advances.

26. Furthermore, the work of GRECO, has contributed to strengthening the transparency and accountability frameworks at the national level in member States. The specific transparency recommendations that GRECO makes, be it directly with relation access to information laws or with respect to other norms – transparency of public procurement or assets declarations for example – helps advance the overall right to know framework at the national level.

27. The Council of Europe, and the Assembly could, nevertheless, have a stronger impact with the development of a consolidated series of actions on the complementary measures that comprise the right to know. By engaging with the access to information and open government communities across Europe, both civil society and inter-governmental bodies, this impact could be reinforced.

### 3. The right of access to information in 2020

28. The first international human rights tribunal to give full recognition to the right of access to information was the Inter-American Court of Human Rights which, in the case of *Claude Reyes v. Chile* in September 2006 found that "One good definition comes from the UN Human Rights Committee, in its General Comment No. 34 of July 2011, which affirmed that there exists a fundamental human right to access information held by public bodies and private bodies performing public functions, and that it is linked to the well-established right to freedom of expression set out in Article 19 of the International Covenant on Civil and Political Rights".[9]

29. The European Court of Human Rights has been less clear cut in recognising an absolute right of access to information, although in a series of key cases it has linked the right of access to information to freedom of expression. The notable cases are *TASZ v. Hungary* (2009), *Youth Initiative for Human Rights v. Serbia* (2013), *Magyar Helsinki Bizottság v. Hungary* (2016), and *Centre for Democracy and the Rule of Law v .Ukraine* (2020).

30. Whilst the advances made by the European Court of Human Rights (the Court) are welcome, there is something of an over-insistence on the link between the right of access to information and freedom of expression, so that the wider value of citizens exercising their right to know risks being undermined. In particular, this is because the Court has developed four criteria, namely: (a) the purpose of the information request; (b) the nature of the information sought; (c) the particular role of the seeker of the information in receiving and imparting it to the public; and (d) whether the information was ready and available.[10]

---

7. Council of the EU v. Access Info Europe, Final Judgment in Case 280/11 P. Last accessed 10 January 2014.
8. OECD Recommendation of the Council on Open Government, 14 December 2017.
9. UN Human Rights Committee General Comment No. 34 – Article 19: Freedoms of Opinion and Expression CCPR/C/CG/34, Paragraphs 18 and 19.

31. On the one hand, it is positive that this right has being strengthened for journalist and other watchdogs such as civil society organisations, but on the other it is of great concern that this, in turn, weakens the right for members of the general public wishing to exercise their more general right to know about the conduct of public affairs.

32. The standard set by the Court is out of step with other international human rights bodies, and sets a lower standard than the framing of the right in many national laws in the Council of Europe region, thanks in part to constitutional provisions which make clear that there is no conditionality on the exercise of the right.

33. The Court jurisprudence is also at odds with the Convention on Access to Official Documents, which makes clear that no motives for requesting information need be provided.

### *3.1. The Council of Europe Convention on Access to Official Documents ("Tromsø Convention")*

34. The Council of Europe Convention on Access to Official Documents, is the world's first binding treaty on the right of access to information. It was drafted between 2006 and 2008, and was opened for signature in 18 June 2009, in Tromsø at a meeting of Ministers of Justice.

35. The rate of ratifications has been slow, but the Tromsø Convention came into force on 1 December 2020, after Ukraine became the 10th country to ratify it.

36. It is noted with concern that most member States of the Council of Europe are parties to the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, but the take up of the Tromsø Convention has been very poor in comparison.

37. Key elements of the Tromsø Convention are that it gives a right of access to all information held by obliged public bodies, with only limited exceptions all of which are subject to harm and public interest tests. The requesting process must be simple – permitting anonymous requests is encouraged – and free of charge. Access to documents or information must be given in the preferred format of the requester. The Tromsø Convention does not establish time frames but does require that requests are handled "promptly". There is a right of appeal to either an independent oversight body or the courts.

38. The Tromsø Convention was acknowledged, even at the time of its conclusion, to be, in the words of its Explanatory Report, "a minimum core of basic provisions."[11] The Convention has been somewhat superseded by developments in the 12 years since drafting was concluded, including by many new laws, and by the jurisprudence of the Court and other human rights courts.

39. For the Council of Europe to advance a full right to know, it is essential that it takes into account the prevailing international standards, which incorporate elements not in the Tromsø Convention, such as a positive obligation to proactive publication of significant volumes of documents and data, and a requirement to establish an independent oversight body with adequate powers to protect and enforce the right to information.

40. Moreover, within the Tromsø Convention, it is optional to apply transparency obligations to the judicial and legislative branch. I wish to address those shortcomings and propose to advance standard-setting on these issues as part of an overall transparency framework.

## 4. The limits on the right to know

41. The Tromsø Convention sets out eleven grounds for exceptions to the right of access to information, each representing a legitimate interest, each subject to a harm and public interest test.

42. These exceptions reflect the standards in many national laws. This was partly due to the fact that by 2006 when drafting of the Convention commenced, a huge amount of standard-setting work had been done. The drafting of many new access to information laws in Europe in the late 1990s, particularly in the new democracies in central and eastern Europe, helped generate a consensus on the limits. The debates that had gone into the Committee of Ministers' 2002 Recommendation on Access to Official Documents, had resulted in a set of exceptions, each subject to a harm and public interest test, that reflected what had been incorporated into many of the new national laws. Hence the definition of these exceptions was one of the least contentious points in the Convention.[12] They have since become a standard for the European region.[13]

---

10. Centre for Democracy and the Rule of Law v. Ukrain, https://hudoc.echr.coe.int/eng#.
11. Explanatory Report to the Tromsø Convention, Introduction, Paragraph (iii).
12. Ms Helen Darbishire, the author of the expert report, was present at all the drafting sessions, participating as a civil society representative, and witnessed the debates.

43. That said, ensuring a standardised application of these exceptions in a region with as diverse a set of transparency cultures as Europe is an ongoing issue. In one country public procurement contracts may be available in their entirety and the names of a lobbyist readily available, in another commercial confidentiality and personal data protection will prevail and justify refusal of access. The concepts of what is "international relations" or "national security" varies from country to country.

44. The most complex area is that of personal data protection where the European Union General Data Protection Regulation (which entered into force on 25 May 2018, and which sets the standard for the entire European region, and indeed globally) has not been adequately designed to ensure that information relating to public actors, such as elected officials and high level public officials, enters the public domain. This conflict is requiring case-by-case debates about whether certain classes of information should be released. Hence the need for specific regulation in specific fields (lobby transparency, beneficial ownership transparency, publication of assets declarations, publication of names of recipients of large State subsidies, etc.).

45. To the extent that a country has an information commissioner or similar body, these play an essential role in determining the limits of the exceptions, often drawing on comparative information in doing so.

### 5. Proactive publication standards

46. As noted above, international standards, including General Comment No. 34 of the UN Human Rights Committee, have made clear that the right of access to information has two dimensions: on the one hand, States have to respond to requests (the "reactive" dimension), and on the other hand, information should be published pro-actively (the "proactive" dimension").

47. The importance of the proactive dimension of the right cannot be understated.

48. The European Court of Human Rights made clear as early as 1991 that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[14] The same is true of all information held by public bodies when it comes to participation: without timely publication of information, the possibility of forming an opinion about ongoing debates, exercising the right to freedom of expression by commenting and possibly participating more directly, are undermined.

49. In a ruling from 2013, the European Court of Human Rights hinted, if only in a subtle way, at the possibility of obligations to pro-actively publication information. In a case where an Austrian civil society organisation sought access to land records from a regional land register, the Tyrolean Real Property Transactions Commission, the court ruled that the refusal to provide this information was a violation of freedom of expression, but stated that given the "considerable public interest" in the land records, it "finds it striking that none of the Commission's decisions was published, whether in an electronic database or in any other form."[15]

50. Not only does proactive publication ensure easier and more timely public access to information, but it also takes the burden off public officials. As the Global Committee for the Rule of Law "Marco Pannella" has noted in its Right to Know Concept Definition Document (2017), the European Ombudsman has recommended that data be structured in ways that permit automatic and timely release rather than having undergo the burdensome task of preparing answers to requests.[16]

51. In terms of standards for proactive publication, a huge body of work has already been done. Increasing numbers of access to information laws as well as many complementary laws require proactive publication.[17]

---

13. As an example, Spain ensured that the list of exceptions in its 2013 Transparency Law were in line with the Convention (although at the last moment one extra exception was thrown in for "auxiliary" documents). See Law on Transparency, Access to Public Information, and Good Governance, Ley 19/2013, https://transparencia.gob.es/transparencia/transparencia_Home/index/MasInformacion/Ley-de-Transparencia.html.

14. *The Sunday Times v. United Kingdom (No. 2)*, 1991, https://hudoc.echr.coe.int/eng#.

15. *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria*, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-139084. Last accessed 10 January 2014. Paragraph 46.

16. Global Committee for the Rule of Law "Marco Pannella", Right to Know Concept Definition Document (2017).

17. For an overview, see the Proactive Publication Standard, namely a proposed standard prepared by the organisations Access Info Europe, www.access-info.org, and Sustentia, www.sustentia.com, which has been submitted to various organisations including UNESCO, the OECD, and the Latin American network of information commissioners, Red de Transparencia y Acceso a la Información (RTA).

52. Drawing on comparative law studies conducted by Ms Helen Darbishire,[18] examples of information that should be pro-actively published include operational information on the functioning of public bodies, and information specifically relating to participation opportunities. The full range of 231 indicators in the 17 Sustainable Development Goals related to a large number of datasets, all of which should be published pro-actively.

53. International anti-corruption instruments, including the UN Convention against Corruption and the Council of Europe anti-corruption conventions identify many types of information that should be collected and published, such as public procurement data, assets and conflict of interest declarations, and data related to law enforcement efforts to combat national and transnational corruption and fraud.

54. Given that the Council of Europe Tromsø Convention did not establish even minimum standards on proactive publication, there is space for future standard setting work on the matter.

## 6. Decision-making transparency

55. A well-defined and well-implemented access to information regime – one which includes both a right to request information and also clear proactive publication obligations – should result in sufficient information entering the public domain for members of the public to follow decision-making processes.

56. Ideally, it will be possible to follow decision making in close to real time so that genuine participation is possible, irrespective of whether formal participation and consultation processes have been established.

57. For this to happen, all inputs into a decision must be made public. These would include, *inter alia*, the documents and data used in analysing the situation, any commissioned studies or reports, the legal advice prepared by the government's own lawyers, and copies of any submissions made by interest groups, be they civil society, academic experts or lobbyists.

58. There are very few countries that have achieved this in practice. A number of reasons for this can be identified, here are three of the principal ones:

### *6.1. Insufficient proactive publication rules*

59. As noted above, if the legal framework (access to information rules and more broadly) does not encompass proactive publication, then the only mechanism for obtaining information is through requests, which can be a time-consuming business even in the most agile access to information regimes, and can result in information being provided only in time to hold decision makers to account but not to be able to engage in an informed manner in the debates.

### *6.2. Record keeping: no standards, few rules*

60. One of the biggest challenges that transparency is facing right now is the lack of record keeping. Access Info has conducted research (at present unpublished) which revealed that in many European countries there are weak rules on record keeping. Guidelines for public officials have not been updated since before the digital era fully took hold, and although final decisions are often recorded, there is insufficient traceability of the decision-making process. Even where minutes of meetings are kept, they are often rather brief and do not contain the justifications for decisions taken. Only if a specific piece of legislation requires a justification (something we see in the field of public procurement for example) will that exist. Furthermore, many decisions are taken as a result of exchanges carried out by email, in a more informal way, or even using other communication platforms such as WhatsApp and Telegram which make it harder to track the course of the decision-making process. Without wishing to interfere unnecessarily with the speed and effectiveness of decision making, there are measures that can be recommended, based on existing best practices. These include defining which types of decisions require pre-decisional documents to be published (to permit participation) and which require specific records to be kept and made public. Useful work on standards has been done by bodies such as the International Council on Archives and while these apply more to the archival process, they are a good reference.[19] There are also statements from information commissioners – including on the "duty to document" – and there are also good practices at the member State level that can be drawn upon.[20]

---

18. Comparative research into access to information and related laws over the past 15 years, including, for example, as set out in the World Bank publication "Proactive Transparency: The Future of the Right to Information?"
19. International Council on Archives.

### *6.3. Need for digitisation and "transparency by design"*

61. The Covid-19 pandemic highlighted the challenges that countries face with their own information management. We saw countries across Europe struggling to provide accurate daily data updates on infection rates and deaths. The pandemic revealed how weakness in data-collection systems across a country can impede rapid data compilation at the central level. This is resulting in decision making that is often based on imperfect or even little or no data. This is a transparency issue but also a governance issue. Access Info reported in 2020 that many countries across Europe do not publish full data sets on the Sustainable Development Goal indicators, and interviews with government officials revealed that this was usually due to data collection challenges.[21] There is increasing discussion in open data and transparency circles – in particular among governments and civil society engaged in the Open Government Partnership – about how to ensure "transparency by design" so that administrative processes are planned in such a way that the data collected can both be transmitted with speed to decision makers and made available to the public relatively automatically. To achieve this also requires "privacy by design" so that personal data is excluded from publication.

## 7. Algorithmic transparency

62. In recent years, the rise in the use of algorithms and artificial intelligence is changing the way in which governments function and the ways in which decisions are taken. We are seeing an increasing use of automated decision making (ADM), including for decisions that affect the everyday life of citizens, such as how school and university places are allocated, how subsidies are calculated, or how traffic flows in a city are managed; often it is not transparent to the public that artificial intelligence (AI) underpins decisions which affect them. There is also increased use of algorithms in the private sector, for example, when deciding on issuing credit and bank loans.

63. The EU GDPR which came into force on 25 May 2018 contains a clause which, from a data protection and data sovereignty perspective gives individuals the right not to be subject to a decision based solely on automated processing when that decision produces legal effects concerning him or her or similarly significantly affects him or her.

64. When, however, the decisions do not have such a direct effect on the individual, but are rather broader in nature – the traffic flows example, in planning infrastructure projects, or, to take an example of current relevance, in modelling the spread of infectious diseases and allocating resources to the health service – it may not be so obvious to citizens that this is happening and they do not have the same rights as under the GDPR.

65. This is an area which is a prime example of where technology is moving at such a fast pace that law and policy often lags behind. This lack of regulation, and the lack of understanding from the public, is resulting in governments use of AI and ADM without strong regulation or oversight, and certainly with a lack of transparency. In most countries we do not have transparency regimes that guarantee that civil society, journalists, and the public can obtain information about how AI is being used and how data feeds into ADM.

66. There are some notable exceptions. For example, in France, the Commission on Access to Administrative Documents concluded in 2017 that an algorithm is an administrative document for the purposes of access to information requests.[22] In other countries requests to obtain information about the use of algorithms, the source code, or the data used inputs, have not always prospered, resulting in the public being left in the dark about how decisions have actually been arrived at.

67. The Committee of Ministers of the Council of Europe, in its Recommendation CM/Rec(2020)1 on the human rights impacts of algorithmic systems, has made an important contribution here.[23] The Recommendation includes specific language on transparency, recommending that actors that use algorithmic processes should be able to provide easy and accessible explanations with respect to the data that is used by the algorithm, the procedures and criteria the algorithm uses to make its decision. Data collection methods should be made accessible in order to spot the potential biases that may be embedded in the algorithm's

---

20. Beyond Europe, the Australian and New Zealand Information Commissioners issued a statement on record keeping in the context of decisions taken relating to the Covid-19 pandemic: www.oaic.gov.au/updates/news-and-media/joint-statement-on-covid-19-and-the-duty-to-document/.
21. Access Info Europe, Report "Opening Up SDG 5".
22. La Commission d'accès aux documents administratifs, page 5: «la commission a pu sans difficulté qualifier les algorithmes de documents administratifs», www.cada.fr/lacada/rapports-d-activites.
23. Recommendation CM/Rec(2020)1 on the human rights impacts of algorithmic systems.

design. More generally, appropriate levels of transparency should be maintained throughout the process of procurement, design, development and use of algorithmic systems, notwithstanding claims of intellectual property or trade secrets.

68. These recommendations do not, however, go so far as to define that users of access to information laws can obtain all the information about the use of algorithms from public body, including the design, sources code, and input data. There is an opportunity here for the Council of Europe to set standards and promote debate among member States on a stronger right of access to information, a right to know, about the use of algorithms. This is something that the Open Government Partnership is working on and there are opportunities for synergies in this context.

69. A specific media freedom issue related to the issue of algorithmic transparency is the question of the large social media companies and how their algorithms determine which content a particular user views. These algorithms are having a direct impact on the right to know of millions upon millions of people, and yet there is almost no transparency about how these systems operate nor do individual users have much control over how their particular news feeds are constructed.

## 8. Legislative transparency and legislative footprints

70. It is clear that an effective right to know, which delivers an informed citizenry able to participate in the democratic life of their countries, must ensure that the public is informed about all aspects of the legislative process.

71. In this context, it is rather remarkable that the Tromsø Convention does not make it mandatory for ratifying countries to apply the right of access to information to the legislative branch, with the exception of administrative information (which would cover finances of the parliament, for example, but not reports on discussions on draft legislation in committees).

72. In this respect, the Council of Europe standard is at odds with, say, the Organisation of American States' Model Law Inter-American Law on Access to Information, which does require transparency of the legislative branch, and also of the judicial branch.

73. It is positive to note that, in total, 31 out of 46 access to information laws in the Council of Europe region do apply to the legislative branch (although there can be some exceptions when it comes to document held by elected representatives, for example).[24]

74. In practice, many legislatures have a long history of open decision making, although that is not always the case when it comes to discussing or voting outside the plenary (in committees for example), and nor is there transparency of lobbying.

75. In terms of standards, there is the Declaration on Parliamentary Openness (2012)[25] which is supported by a strong community of civil society organisations, many of whom are in Council of Europe member States.[26]

76. The Open Government Partnership has supported many of its participating countries in making commitments on parliamentary openness (as many as 145 commitments globally thus far) and in involving parliaments in open government processes and debates.[27]

77. There is an increasing body of good practice on legislative footprints as well as on ensuring participation in the development of legislation, and this is something that the Council of Europe could study in depth to develop specific recommendations. Eventually full "normative" footprints should be developed to deliver transparency of the entire decision making and legislative process, from the inception of rules and norms in the executive branch through to their adoption as legislation.

24. Data from the RTI Rating, www.rti-rating.org.
25. Declaration on Parliamentary Openness, www.openingparliament.org/declaration/.
26. The list of organisations supporting parliamentary openness can be found here: www.openingparliament.org/organizations/.
27. Open Government Partnership (OGP) policy area page on opening legislatures: www.opengovpartnership.org/policy-area/legislature/.

78. There is also good jurisprudence from the Court of Justice of the European Union on the importance of legislative transparency for participation in decision making (cases include *Access Info Europe v Council* (2013) and *De Capitani v. European Parliament* (2018). As this jurisprudence makes clear, the legislative process often starts at the executive level, so there need to be mechanisms which deliver traceability and transparency of the entire process, not just the debate over bills once they enter a parliament.

**9. Judicial transparency**

79. There are no recognised standards on judicial transparency, at least not in the European region. As noted above, the Tromsø Convention has as optional the application of the right to request information to the judicial branch. The only requirement is for administrative information to come under the scope of national access to information laws. The way in which "administrative" is defined varies across Council of Europe member States.

80. In practice, a long history of open court proceedings and physical access to court documents and to jurisprudence, has been weakened in recent years in many countries through a combination of security concerns (for physical access) and by failures to publish all decisions online so that anyone may access them (reasons including, *inter alia*, data protection concerns).[28]

81. Only 25 out of 47 Council of Europe countries have access to information laws that apply to the judicial branch.[29]

82. Some work has been done, including by the Council of Europe and International Commission of Jurists to recommend transparency of judicial councils and the appointment of judges, as well as recommendations by the Council of Europe on media access to judicial proceeding, but there do not exist clear, comprehensive, standards on how the right of access to information / the right to know should apply to the judicial branch.There are good practices that can be identified from Council of Europe member States, which could form the basis of developing concrete recommendations.

**10. Private bodies operating with public funds and/or performing public functions/delivering public services.**

83. The idea that there is a bright line between access to information held by the public administration and the private sector is one that is less widely held than in the past, and yet it persists and merits discussion.

84. The nature of democratic societies and the nature of "governance" have evolved over the years. In 1766 the aim of the Swedish freedom of the press act was that parliamentarians and the tiny printed press of the time could access documents held by the administration (largely the king and the courts). By 1978, France's first law was entitled the law on improving relations between the administration and the public – «Loi n° 78-753 du 17 juillet 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public» – and it is very clearly framed in terms of access to "administrative documents".

85. In recent decades, just as the right to information has advanced, the lines between public and private have become ever-more blurred and many public services and public works are now delivered by private companies. In this context, it has been increasingly recognised that the public has a right to know about the relationships with these companies, as well as the services they provide. This would seem obvious and yet, of the 46 access to information laws in the Council of Europe region, just 25 apply fully to private bodies that perform a public function and/or receive significant public funding. A further 15 laws apply partially to such bodies.

86. In line with this national legislative reality, there was notable reluctance among member States to include a mandatory provision on access to documents held by private bodies in the Tromsø Convention. As a result, it is optional for States to extend the right of access to "natural or legal persons insofar as they perform public functions or operate with public funds, according to national law." The "according to national law" clause here is absolutely key, because it permits hugely varying definitions even for those countries that opt up to this provision. For example, in one country private companies delivering health care, waste collection, water

28. Slovenia is a country where there has recently been a debate about the refusal to provide access to all court decisions. See (in Slovenian): www.24ur.com/novice/slovenija/omejevanje.html.
29. Data from the RTI Rating: www.rti-rating.org.

supply, and school buildings maintenance could be deemed all to be providing public services, be subject to requests, and hence to accountability mechanisms. In a neighbouring country none of these could be included under the transparency rules.

87. Furthermore, the Tromsø Convention fails to specify the kind of information held by private companies that they should make public for reasons of general interest.

88. Looking beyond the Tromsø Convention, there are, however, a panoply of standards and laws relating to transparency of private bodies, and any registered business is obliged to make much information public, often in the context of specific sectoral recommendations.

89. There are two ways in which this transparency is achieved. The first is by being required to provide information to public bodies, which will then publish it; the second is a requirement on the private body itself to publish the information.

90. By way of example, an issue of concern to many citizens is the outcomes of restaurant hygiene inspections. In some countries, these are not only published by public authorities but there are requirements that they be made public with a notice posted in the establishment. In such cases, public health considerations have been deemed by the legislator to override the commercial interests of individual restaurant (which would no doubt see their business suffer if they receive a bad mark).[30]

91. Other examples of where data is collected by governments and then made public include the range of measures to ensure transparency of public procurement, an essential anti-corruption tool.

92. The EU's Non-Financial Reporting Directive 2014/95 requires publication by larger companies of specific information in the domains of environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery, and diversity on company boards in terms of age, gender, educational and professional background.

### 11. Lobby transparency

93. For decision making to be transparent, it is imperative to understand all the inputs into the decision-making process, which in the case of many policy decisions and legislative initiatives implies that there needs to be transparency of any participation exercises carried out and, importantly, the input of interest groups, including professional lobbyists, business associations, and organised civil society.

94. Standards have been developed on the regulation and transparency of lobbying in recent years, including:

– The International Lobby Regulation Standards (2015), the result of an extensive two-year process by leading civil society organisations (Transparency International, Access Info) which involved consultations with professional lobbyists. The standards were launched at the 2015 Summit of the Open Government Partnership (Mexico Summit) and were included as a recommendation to Open Government Partnership Member States in the 2016 Paris Declaration;[31]

– OECD, Recommendation of the Council on Principles for Transparency and Integrity in Lobbying (2016);[32]

– Council of Europe Recommendation of the Committee of Ministers to member States on the legal regulation of lobbying activities in the context of public decision making (2017).[33]

95. Still, too few Council of Europe member States have adopted legislation which ensures transparency of lobbying. I have not found a survey which captures exact data on current state of play across the 47 member States. GRECO has collected data on rules related to lobbying of persons entrusted with top executive functions, as part of the Fifth Evaluation Round, but not more broadly.[34]

---

30. See the UK Government's web page on Food Standard Ratings, https://ratings.food.gov.uk/, which interestingly also includes the inspections of canteens in public authorities. Similarly, in France, there is a search function available from the government on confidence in food hygiene: www.alim-confiance.gouv.fr/. The Germany civil society information request platform FragdenStaat.de has also used the German access to information rules to collect data on restaurant inspections from across the country: https://fragdenstaat.de/.
31. International Lobby Regulation Standards: http://lobbyingtransparency.net/.
32. OECD Anti-corruption and Integrity Hub: www.oecd.org/corruption-integrity/explore/topics/lobbying.html
33. Council of Europe Recommendation on regulation of lobbying.
34. GRECO Evaluation Rounds: www.coe.int/en/web/greco/evaluations.

## 12. Open company registers

96. Company registers contain information on the owners and structures of companies. Collecting and publishing this data has various benefits for society. For government officials and law enforcement, it ensures those responsible for complying with all the laws to which companies must adhere are known. For other businesses it enables them to know with whom they are doing business. For citizen watchdogs such as anti-corruption civil society groups and investigative journalists, it ensures that they can track fraud and corruption.

97. During the Covid-19 pandemic we have seen the challenges that governments have had in knowing which companies they were doing business with. The consequences were a significant number of cases of fraud, newly created "fake" companies being successful in selling protective equipment and ventilators to unwary European governments. The lack of open company ownership data hampered efforts by both governments and investigative journalists to track these companies. In this pandemic year, it has become clear that denying the public access to company ownership data is a significant limitation on the public's right to know.

98. For these reasons various intergovernmental bodies and processes have recommended opening company registers. The OECD, the World Bank, the Open Government Partnership and other fora such as pledges made by the G8 (as it was) in 2013 and the London Anti-corruption summit in 2016 have all recognised the benefit of opening company registers. The European Union's 5th Anti-Money Laundering Directive requires the creation of registers of beneficial owners of companies, and that these be available to the public. The European Union's 2019 Directive on Open Data and the Re-Use of Public Sector Information (Open Data Directive) also identifies Company Registers as a "high value dataset" and negotiations are underway to specify precisely which data should be opened up.

99. At present, however, very few Council of Europe member States have open company registers (there are good practices in some countries such as Denmark, the United Kingdom, and Ukraine). In the remainder, the company registers are not open, at least not to those without the resources to pay for records, which can cost between € 0.03 per entry in the Netherlands to € 767 per company registration in Russia. The total costs of the registers can run to € 75 000 in the Netherlands to € 286 000 in Estonia and € 380 355 in North Macedonia.

100. These are prohibitive costs for investigative journalists and civil society organisations investigating corruption, fraud, money-laundering, organised crime, human rights violations, and other illegal activity. These costs are also overly high for small and medium enterprises (SMEs, which represent the vast majority of businesses in the European region) wishing to know with whom they are doing business.

101. Civil society campaigners across the Council of Europe region are currently pressing their governments to open up their company registers and deliver a right to know about who owns the companies we do business with and which receive public funds.

## 13. Transparency of media ownership

102. In order for a citizen to be able to know who is behind the news he or she watches or reads, it is imperative to know who the owner of the media outlet is, which includes the entire ownership structure up to beneficial owners.

103. If company ownership registers were open, this information would be available. It would not, however, be easy to find or track, especially as media ownership structures are transnational. The solution to this is to require that, country-by-country, and even media-by-media, the information about the full ownership structure of any media outlet is made public. This must be done in a way that makes it easy for the public to find and understand this information.

104. PACE has done a significant amount of work on transparency of media ownership, as part of the essential infrastructure needed to guarantee plurality and diversity of the media sphere. Ms Helen Darbishire, the author of the background report, has contributed to that standard-setting in the past, participating in PACE hearings and presenting the research findings by Access Info Europe and the Ten Recommendations on Transparency of Media Ownership endorsed by many civil society organisations.[35]

35. See Access Info Europe's work on Transparency of Media Ownership and the 10 Recommendations, which can be found on the resource page here: www.access-info.org/media-ownership-transparency/.

105. In particular, there is the Assembly Resolution 2065 (2015) "Increasing transparency of media ownership", which sets out the transparency standards, and Recommendation 2074 (2015), which expresses concern about the "alarming" situation with a "growing lack of transparency of the ownership structures of media outlets in Europe". This successful standard-setting work resulted in Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, which sets out clearly the transparency standards to be implemented.

106. The recommendation also calls for transparency of media organisation and financing. I think that this transparency should include any non-financial agreements which are in some way beneficial to the media outlet and may have an impact on its independence or perceived independence, and which should therefore be known to the public.

### 14. Open access to scientific and scholarly knowledge

107. Ensuring that the wider public has free and easy access to scientific and other scholarly knowledge is increasingly recognised as having significant society benefits.

108. The digital era has contributed to the drive towards "open access" to such knowledge, with one landmark being the 2003 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, which called for unfettered access to "original scientific research results, raw data and metadata, source materials, digital representations of pictorial and graphical materials and scholarly multimedia material."[36]

109. To achieve such access means encouraging the producers and publishes of knowledge to make their works available free of charge in open formats. There has been a focus in recent years on all material created with public funds, although many argue that wider access than this should be granted.

110. The international organisations working on open access include UNESCO, which "promotes and supports the online availability of scholarly information to everyone, free of most licensing and copyright barriers, for the benefit of global knowledge flow, innovation and socio-economic development."[37]

111. UNESCO notes in particular the role of science in advancing the Agenda 2030 and the Sustainable Development Goals (SDGs), and hence that it is imperative that research outputs are available to all stakeholders.

112. The European Commission also supports open access with the goal of ensuring that research results are more accessible to all societal actors, with a view to delivering better science and also innovation in the public and private sectors.[38] The Commission supports open access through measures such as requiring that all projects receiving Horizon 2020 funding make sure that any peer-reviewed journal article they publish is openly accessible, free of charge. EU Member States are also encouraged to put publicly funded research results in the public domain in order to strengthen science and the knowledge-based economy.

113. The Council of Europe could complement and add value to these initiatives by amplifying the open access initiative to its 20 member States which are not members of the European Union. It could also liaise with UNESCO, which as well as working on open access, is charged with monitoring the right of access to information under SDG Indicator 16.10.2, and hence there is a strong connection between transparency, the right to know, open access, sustainable development, and defence of democratic and just societies.

### 15. Information commissioners

114. The right of access to justice in defence of any other right is a core principle of any human rights framework.

115. With respect to the right of access to information, the Tromsø Convention requires that member States ensure a mechanism for defence of this right, by requiring that "An applicant whose request for an official document has been denied, expressly or impliedly, whether in part or in full, shall have access to a review procedure before a court or another independent and impartial body established by law" (Article 8.1).

---

36. See the 2003 Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities here: https://openaccess.mpg.de/Berlin-Declaration.
37. UNESCO Open Access page: https://en.unesco.org/themes/building-knowledge-societies/open-access-to-scientific-information.
38. European Commission Open Access page: https://ec.europa.eu/research/openscience/index.cfm?pg=openaccess.

116. In practice, for the 46 Council of Europe member States which have access to information laws, there are a range of models as to how this review mechanism is established, broadly falling into three categories:

i. **Independent Oversight Body**: An independent body is mandated to oversee the access to information law and to hear appeals. In some cases, these bodies have the power to issue binding decisions; in others, they are merely recommendations. The decisions of this body can usually be appealed to the courts. If not, turning to the courts is an alternative.

ii. **Ombudsman**: The access to information law and/or general administrative law provides recourse to the Ombudsman. This may or may not be followed by an appeal to the courts, or a court case is an alternative or an additional route.

iii. **Courts only**: To defend the rights under the access to information law, an appeal to the courts is the only route. This requires a lawyer and may incur court fees.

117. The independent oversight body model, such as an Information Commissioner, has been established in 19 Council of Europe countries. These are Albania, Belgium, Croatia, Cyprus, France, Germany, Hungary, Iceland, Ireland, Italy, Malta, Montenegro, North Macedonia, Portugal, Serbia, Slovenia, Spain, Switzerland, and the United Kingdom, as well as Kosovo*[39]. In Belgium, Germany, Spain, and Switzerland, there are also regional information commissioners.

118. The Nordic countries such as Finland, Norway and Sweden favour the Ombudsman option, which works as the decisions are usually complied with even if not binding. The Baltic countries, Bosnia and Herzegovina, and Greece also have an ombudsman model. In Ireland the Information Commissioner is part of the Ombudsman's office but has specific powers.

119. The great benefit of the information commissioner model is that it provides the requester with a specialised body on the right of access to information which is specifically charged with its supervision. In some cases – Albania, Croatia, Germany, Slovenia, Serbia, and the UK for instance – these bodies are also combined with the data protection authority, but they are still specialised in information rights.

120. For the individual seeking to defend his or her right to know, the great benefit of the information commissioner model, is that it is free of charge, and allows for very easy access. No specialised legal knowledge nor a lawyer is required.

121. The stronger information commissioners can issue binding decisions and sanction non-compliance or require a court to order compliance with a decision. This is the case in, for example, Croatia, Germany, Slovenia, and the United Kingdom.

122. Weaker models include the ombudsman model and some oversight bodies, such as France, Portugal and Spain, which cannot issue binding decisions. Whether or not decisions are complied with will depend very much on the political culture. In France and Spain there are recent cases of non-compliance by central government ministries on issues that are important for the citizen's right to know, such as spending of budget funds.

123. There are significant other variations between the oversight models in Europe, which merit a detailed report in and of themselves. These include the broader mandate that these bodies have, such as whether or not they are charged with training public officials, with raising public awareness, and/or with monitoring compliance with the right and gathering data and statistics. As well as varying mandates and powers, the budgets and levels of independence from government also varies. All of these variations have a consequence on how well the right to know and access to information laws are implemented, country-by-country, across the Council of Europe region.

124. The variety of models across Europe for oversight of the right of access to information reflects a lack of clear standards. The Tromsø Convention, as developed back in 2008, failed to set these standards, in spite of recommendations from civil society at the time that it would be valuable to do so. It is now high time that this be done.

125. In October 2020, the OSCE's Representative on Freedom of the Media (RFOM) held a webinar on access to information oversight bodies, with representatives from Albania, Ireland, and Spain talking about their respective institutions. The OSCE RFOM plans to advance with the discussions on standards in this

39. *All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

area. This could be the perfect partner for the Assembly and the Council of Europe to collaborate with in setting a specific set of guidelines on the best model for an oversight body, based on the collective experience and lessons learned from across the Council of Europe region.

### 16. The role of parliamentarians in advancing the right to know

126. As representatives of the people, parliamentarians do have an enhanced right of access to information. This is manifested in at least two ways. One is that parliamentarians may be granted access to otherwise confidential information, such as information relating to national security provided to parliamentarians engaged in a committee that delivers civilian oversight of the security forces.

127. Another is the mechanism of parliamentary questions, which enables elected officials to request either documents or explanations and to receive an answer from the relevant government department. This control function is an essential part of democracy, and in many countries predates access to information regimes.

128. There are however, across the Council of Europe region, a variety of practices when it comes to the respect for the mechanism of parliamentary questions. I have not conducted a detailed survey, but am aware of a series of problems, the poor quality of answers and, a particular concern, the very slow timeframes for responding to parliamentary questions.

129. Given the importance of the mechanism of parliamentary questions for ensuring that certain information enters the public domain, particularly in countries where the right of access to information is not particularly strong, it would be necessary that work be done to evaluate this system across the Council of Europe region. This is something that should be of particular importance to the members of the Assembly, given their role as parliamentarians.

130. The public's right to know is also served by ensuring the issues of public interest are fully debated by parliamentarians, in plenary sessions as well as in committees. This requires the parliamentary procedure rules be designed in a way which facilitates wide-ranging debates. Given that there are a variety of norms and practices across the Council of Europe member States, this is something which should be examined, in order to collect best practices and make recommendations.

### 17. Democratic culture

131. The cultural and educational systems play a crucial role in the personal development of the citizens and in helping them to make informed choices and to actively participate in social life. According to the Council of Europe "Reference framework of competences for democratic culture", education and culture are essential tools in the endeavour of awakening the critical spirit of citizens and in the protection of democracy.

132. While democracy cannot exist without democratic institutions and laws, such institutions and laws cannot work in practice unless they are grounded in a culture of democracy, that is, in democratic values, attitudes and practices shared by citizens and institutions. For a democratic system to be alive, valid and dynamic, citizens must commit to participate actively in the public life. If citizens do not adhere to the democratic values, attitudes and practices, then democratic institutions will not be able to function in reality: they would remain a "dead letter on a piece of paper".

133. The instruments to ensure effective access to information are fundamental but they cannot work properly if the environment itself does not guarantee an overall climate conducive to information-sharing and pluralistic debate that contribute to create a citizen's informed opinion. From the particular perspective of the right to know, the democratic culture is a fundamental concept to adopt in order to make this right fully implemented in our society, since there is no reason in giving the citizens a right if the citizens themselves do not have the necessary competences to use it in the first place.

134. Institutions and citizens' competences and actions are interdependent. Furthermore, where there are systematic patterns of disadvantage and discrimination, and where there are differences in the allocation of resources within societies, some may be disempowered from participation on an equal basis. Disadvantaged citizens can be excluded from participating as equals through the language and actions of those who have the privileges associated with, for example, a high level of education, high status through their occupation or networks of powerful connections. There is a danger that people who are marginalised or excluded from democratic processes and intercultural exchanges become disengaged from civic life and alienated from participation and deliberation.

135. Therefore, the possibility of the correct understanding of information and the public debate that follows from it by public opinion is conditioned by the cultural and literacy level of the population. Education must cover the democratic values since young age in order to make future citizens conscious about their political choices and let them be able to have an informed and critical opinion. Acquiring and maintaining the aptitude to take part actively in democratic processes should continue throughout life.

136. This is why, one of the prerequisites for implementation of the right to know is the proper functioning of an educational and cultural environment predisposed to enhancing and stimulating citizens' continued learning in an information society. Everyone should have the necessary competence and culture to critically analyse the various points of view. The citizen's right to know is intrinsically linked to free, easy and life-long access to cultural instruments as indispensable tools in the development of a critical and independent understanding of information and the active, inclusive and conscious participation in a democratic society. Art has been a proven beneficial vehicle for the enhancement of critical thinking capabilities. To this end, wide-spread presence of cultural avenues such as libraries, theatres, museums and live music, is to be endorsed and its inclusion of all societal actors enhanced.

**18. Conclusions**

137. Every citizen in a democratic society must have the freedom, the effective capacity, and the culture to participate in a real debate of ideas, based on exact and complete factual elements. This regards not only the exercise of the right to vote, but also the commitment and constructive participation in decision-making processes, in democratic control over the action of governments and legislators, and in public life in general.

138. For such an active participation in the public life, the citizen needs to be very well informed. We live today in the age of the information society and there are multiple channels through which we can receive information. The role of the media in providing timely and reliable information is crucial. The social networks are also an abundant source of information, although these channels are too often polluted with disinformation, hence must be checked on a permanent basis.

139. Beyond this, there are other legitimate and very important sources of reliable and permanent information on which every citizen is entitled to count on: these are public authorities, legislative bodies of various level, and judicial structures. The recent entry into force of the Tromsø Convention is a significant step aiming at harmonising the national legal systems regarding access to information. Yet, the take up of the Tromsø Convention has been very poor.

140. This is even more regretful as the convention is limited to a minimum core of basic provisions, so it would be only natural that all member States ratify the convention. This would be the first step, as the right of access to information should be broadened further, to cover all areas that are not yet covered by the convention.

141. Beyond the right of access to information, our Organisation should advance toward a right to know, namely a wide-encompassing citizens' entitlement to be actively informed of all aspects regarding the administration of all public goods during the entire political process, to participate responsibly and consciously in public debate on such goods and to hold public goods administrators accountable according to democratic standards.

142. The right to know is a prerequisite for citizens to better understand and fully benefit from their other rights, and to participate in an informed way in the public debate and in the life of the political community at different levels. It is also a prerequisite for the control, by citizens and their elected representatives, of the action of the government and therefore of the democratic responsibility of the latter.

143. There are three main active dimensions for implementation of the right to know: obligations that public authorities have to respect independently of specific requests; the right for citizens to be notified, informed, have access and contribute to the development and appraisal of laws, regulations, and other policy instruments; and an educational and cultural environment prone to enhancing and stimulating citizens' continued learning.

144. The main role and primary responsibility for safeguarding the right to know lies with the States and more generally with public authorities. Still, other actors, such as public and private media, educational and cultural institutions, come into play and must assume their share of responsibility in educating active and knowledgeable citizens. The actions of the various stakeholders must be coherent and synergistic, hence partnerships between these several actors are crucial.

145. The right to know supposes that not only the citizens have the right of access to information, but also that public bodies should publish this information pro-actively, with a transparency by design approach. This approach should be applied to several domains, such as: the artificial intelligence and the way data feeds into automated decision making; the activity of legislative and judicial branches of power; the information concerning all private bodies performing public functions or operating with public funds; company registers; lobby regulation: scientific and other scholarly knowledge.

146. Similarly, citizens must be aware of who is behind the news and what is the entire ownership structure of media outlets up to beneficial owners. This information must be made public as it is crucial for ensuring media freedom and avoiding manipulations of public opinion.

147. Parliamentarians have a particular role to play in enlarging the right to know. Beyond adopting legislation guaranteeing the right to know, they should take advantage of the mechanism of parliamentary questions, which enables them to request either documents or explanations and to receive an answer from the relevant government department. National parliaments should ensure that for sake of transparency, the issues of public interest are fully debated in plenary sessions and in committees.

148. Last but not least, one of the prerequisites for implementation of the right to know is the proper functioning of an educational and cultural environment prone to enhancing and stimulating citizens' continued learning in an information society. The right to know is intrinsically linked to free, easy and life-long access to cultural instruments as indispensable tools in the development of a critical and independent understanding of information and the active, inclusive and conscious participation in a democratic society. Wide-spread presence of cultural avenues such as libraries, theatres, museums and live music should be endorsed and developed further.