

**AD HOC GROUP OF THE STATES PARTIES
TO THE CONVENTION ON THE PROHIBITION
OF THE DEVELOPMENT, PRODUCTION AND
STOCKPILING OF BACTERIOLOGICAL
(BIOLOGICAL) AND TOXIN WEAPONS
AND ON THEIR DESTRUCTION**

BWC/AD HOC GROUP/WP.297
14 August 1998

Original: ENGLISH

Twelfth session
Geneva, 14 September - 9 October 1998

Working paper submitted by the Friend of the Chair on Confidentiality

CONFIDENTIALITY PROVISIONS

The following paper reproduces parts of the Rolling Text but incorporates suggestions by the FOC for rationalising and reordering it and also, where considered appropriate, for additions to it. This is put forward without prejudice to the positions of delegations on any issue.

1. Declarations and other information to be provided on a regular basis

In the course of the discussion on declaration triggers and formats, it remains to be decided whether declarations should contain confidential information. In the context of the CWC, States Parties have a right to classify declarations. Several delegations have argued that an important principle for a future BW Protocol should be transparency, and that declarations should not be classified. In the current text on confidentiality issues, this issue remains open, and several footnotes refer to it.

Without prejudice to the final outcome of the discussion on declarations, it is proposed to insert text to take this issue into account, which could remain in brackets for the time being and include two alternatives. A new paragraph 8 bis of Annex E, section I could read:

[8 bis The designation of information as confidential shall not undermine the obligation for a State Party to demonstrate compliance in accordance with the provisions of the Protocol. Information which shall be transmitted to States Parties according to Article IV, paragraph 5, shall not be classified [, unless explicitly requested and justified by the State Party which provided that information].]

Footnote 123 in Annex E could then be deleted.

In order to clarify that the information contained in reports of visits or investigations should, if necessary, be processed into less sensitive forms, paragraph 5 (b) of Article IV should read:

5. (b) General reports on the results and effectiveness of compliance monitoring activities [; **summary** reports on investigations and visits **in accordance with paragraph 12 of Annex E, section III**, as well as periodical reports required under Article VII];
2. General principles for the handling of confidential information

Annex E, section I currently begins with the formulation of two alternative principles. One refers to access of the Organization to sensitive information, the other to access of an employee to confidential data collected by the Organization. In order to clean up the text, it is proposed to do the following:

- *Rename subsection (A) as proposed below;*
- *Add a new subsection (C), titled "Access to confidential information", and move to this subsection, inter alia, the current paragraph 1 bis of section I and paragraph 1 of section V. The beginning of section I would read:*

{(A) GENERAL ~~PRINCIPLE~~ OBLIGATIONS

1. Pursuant to the general obligations set forth in Article IV, [the Organization] shall require only the minimum amount of information and data necessary for the timely and efficient carrying out of its responsibilities under this Protocol and shall avoid any access to [confidential] information and data not related to the aims of this Protocol. [The Organization] shall develop agreements and regulations to implement the provisions of this Protocol and shall specify as precisely as possible the information to which [the Organization] shall be given access by a State Party. ~~Confidential information shall only be disseminated in accordance with the provisions set forth in section V of this annex.~~]

(B) THE CONFIDENTIALITY REGIME

Retain current paragraphs 2, 3 and 4, move paragraphs 5 and 6 to new subsection (C).

(C) ACCESS TO CONFIDENTIAL INFORMATION

~~5. 1 bis sentence 1~~ Access to confidential information shall be regulated in accordance with its classification and shall be [strictly] on a need-to-know basis.

~~6. section V (A) 1.~~ [Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. For members of the investigation team the notification of a proposed designation in accordance with ... to individual States Parties shall fulfill this requirement.]

7. ~~{6.~~ [If necessary to fulfil its obligations under this Protocol,] the [Secretariat] may grant access to information and data classified as confidential to entities or individuals not on the staff of the [Secretariat] only on specific approval by [the Director-General] [the head of the

Confidentiality Unit] accompanied by consent of the State Party concerned. The [Secretariat] shall notify the State Party concerned of the proposed access and [unless the State Party concerned explicitly disclaims the proposed access within [30] days after the above notification, the proposal may be deemed to be consented to].}

8. ~~1 bis sentence 2~~ {Each access to confidential information shall be recorded on file when accessing and exiting. This record shall be retained for [(time period to be specified)].}

9. 5. To the greatest extent consistent with the effective implementation of the provisions under this Protocol, confidential information shall be handled and stored in a form that precludes direct identification of the facility to which it pertains, if handled outside the Confidentiality Unit.

In order to further rationalize the text, it is proposed to move what remains of section V, i. e. subsections (B) and (C), to the end of section I. Paragraph 4 (b) of Article IV would have to be adapted to reflect that the current section V will be dropped.

3. Measures to protect confidential information obtained in the course or as a result of on-site activities

Several delegations have rightly pointed out that there is a problem of overlap between section III and provisions dealing with the conduct of visits and investigations in section F of Article III and Annexes B and D. This applies in particular to questions of managed access. In order to avoid unnecessary repetitions and competing wordings, it is proposed to draw a line along the following principle:

- *Provisions related to protection of confidential information but referring exclusively to details of conducting on-site measures should be dealt with under the relevant sections of Article III and Annexes B and D. Since different kinds of on-site measures require different rules for managed access, it appears useful to deal with them in relation to the specific type of on-site measure. Only general principles might remain in Annex E.*

- *Provisions related to the protection of information that, in one form or other, will be taken away from the site can be dealt with in Annex E, since this entails specific responsibilities of the Secretariat that go beyond the completion of activities on-site. This applies, inter alia, to samples and reports.*

It is therefore proposed to rephrase Annex E section III as follows:

- *Paragraph 1 should be limited to the statement of a general principle, while details will be dealt with under Article III section F and Annexes B and D.*

(A) PRINCIPLE OF LEAST INTRUSIVE ACTION

1. Investigating or visiting teams shall be guided by the principle of conducting on-site activities and investigations in the least intrusive manner consistent with the timely and

effective accomplishment of their mission. ~~[In particular, the number, duration and intensity of on-site activities [visits] [and investigations] actually carried out shall be kept to the minimum necessary.]~~ [Investigating or visiting teams shall [at any time] take into consideration proposals which may be made by the States Parties to keep the amount of confidential information coming to their knowledge to the minimum necessary.]

- *Paragraph 2 should be amended to clarify that members of investigating or visiting teams shall abide by all the provisions related to protection of confidentiality, including those set forth in other parts of the Protocol. The current wording is not clear and does not make sense when referring visiting teams to the investigations annex.*

{2. Members of the investigating or visiting team shall strictly abide by the **confidentiality** provisions set forth in Article IV and ~~relevant this Annexes governing the conduct of investigations.~~ They shall **fully** respect the procedures designed to protect sensitive installations and to prevent the disclosure of confidential data **set forth in Article III and Annexes B and D.**}

- *Paragraph 3 is proposed to be deleted, since it refers to the Technical Secretariat in general and is already covered by section I, paragraph 1 and section II, paragraph 3.*

- *Paragraph 4 should be moved to the end of subsection (C), since it is a more specific rule which seems appropriately placed there.*

- *Subsection (B) should be deleted, since it refers to the specifics of conducting on-site measures. The concept of an escort is already included in the "Procedures for visits", in Article III, section F, subsection I, paragraph 30. Since the concept also appears useful in the context of an investigation, it is proposed to move paragraphs 5 and 6 to Article III, section F, subsection III (G).*

- *In subsection (C), it is proposed to delete provisions that should better be dealt with under the managed access provisions. In line with the general considerations formulated above, it is proposed to add a paragraph on the treatment of records made by the investigating or visiting team, and to insert paragraph 3 of current section V. Subsection (C) should read as follows:*

(C) PROTECTION OF SENSITIVE INFORMATION AND EQUIPMENT

7. Pursuant to Article IV, paragraph 3, each State Party may, when receiving an investigation ~~[or visit], indicate to the investigating [or visiting] team the equipment, documentation or areas that it considers sensitive and not related to the purpose of the investigation [or visit].~~ ~~[The investigating [or visiting] team shall avoid any access to that equipment, documentation or areas, provided that it agrees that the access is~~ **information and data** not necessary to fulfil the obligations of the investigating ~~[or visiting] team.~~ Likewise, the investigating ~~[or visiting] team shall not make any records of information collected incidentally and not related to their mandate.~~

7 bis Investigating or visiting teams shall, upon request, supply copies of their records to the investigated or visited State Party.

8. If removal of information or data from a facility is necessary to achieve timely and effective implementation under [this Protocol], the amount of information and data to be removed from a facility shall be kept to the minimum necessary.

8 bis ~~[section V-3. [The Secretariat] shall upon the request of a State Party [be prepared to] examine in an appropriate manner information and data which the State Party regards as being of particular sensitivity. Such information and data would not necessarily have to be physically transmitted to [the Secretariat], provided that it remained available for ready further examination by [the Secretariat] on premises of the State Party.]¹²⁷~~

8 ter ~~[4. Confidential information including, *inter alia*, photographs, plans and other documents required only for the purpose of on-site activities of a specific facility or for which special investigation according to Annex E, section I, paragraph 13, paragraph 8 bis was requested by a State Party shall, to the extent possible, be stored with [the National Authority] of the State Party or be kept under lock and key at the facility to which it pertains.]~~

- *Subsection (D) remains as it stands.*
- *Subsection (E) remains with a slight amendment.*

11. The report to be prepared after each investigation **or visit** shall contain only facts relevant to compliance with **the Convention or [this Protocol], as set out in the mandate.**

4. Procedures in case of breaches

Some delegations have stated that this section could be further streamlined and have suggested alternative text. It is proposed to rationalize and reorder the text as follows:

(A) BREACH OF CONFIDENTIALITY

1. *There has been a proposal to delete paragraph 1. Although the CWC does not have any definition of a breach of confidentiality, similar text can be found in the OPCW Confidentiality Policy. An illustrative, non-exclusive description could be useful. It is therefore proposed to retain paragraph 1.*

(B) OBLIGATION FOR INQUIRY

2. *Remains as it stands.*
- 3./ *It is proposed to delete paragraph 3 and retain paragraph 3 bis without brackets.*

3 bis *The distinction made in current paragraph 3 is taken up further down in the proposed changes to paragraph 5 (now 8).*

4. *Remains as it stands.*

5. 7. *Current paragraph 7 will become new paragraph 5.*

6. 8. *Current paragraph 8 will become new paragraph 6.*

(C) INTERIM MEASURES

7. 9. *Current paragraph 9 will become new paragraph 7.*

(D) MEASURES IN CASE OF BREACHES OR ALLEGED BREACHES

8. 5.-(a) When the inquiry pursuant to paragraph 3 establishes that there has been a breach of confidentiality **by a staff member of the [Technical] Secretariat**, the Director-General shall impose appropriate punitive and disciplinary measures ~~on staff members who have violated their obligations to protect confidential information in accordance with the Staff Rules and Regulations~~ **in accordance with Article IV, paragraph 6 bis.** (b) In case of a breach of confidentiality **by an agent or official of a State Party** ~~a person referred to in (b) of paragraph 3~~, consultations shall be held between the Organization and States Parties concerned to address the case.

9. 6. ~~[In cases where a State Party considers that there has been a breach of confidentiality by a staff member of the [Technical] [Secretariat] [Body], consultations shall be held between the Director-General and the State Party, and the Director-General shall initiate promptly an inquiry. If such consultations are not concluded successfully [within 60 days], the State Party shall have the right to initiate the proceedings of the] [For breaches involving both a State Party and the [Organization], a Confidentiality Commission, set up in accordance with paragraph 7, Article IV and paragraph 24 (j), Article IX of this Protocol, [to] [shall] consider the case. The Commission shall seek to settle the case through mediation, enquiry, conciliation, arbitration or other peaceful means. The Commission may request the Director-General to submit the result of the inquiry to the extent possible.~~

In Article IV, it is proposed to delete paragraph 8 bis and to retain the more precise paragraph 8, with the following modification to clarify the relation to Article XII. Recourse to the Confidentiality Commission would then be a special case of the procedures on the settlement of disputes, where a reference to Article IV has been introduced in paragraph 3 of Article XII.

{8. Any State Party to this Protocol which considers that it has been affected by a breach of confidentiality or that its natural or legal persons have suffered from damage through such a breach ~~may~~ **shall** seek to settle the dispute in accordance with the provisions set forth in Article XII ~~or by~~, **which may include** referring it to the Confidentiality Commission in accordance with paragraph ~~6~~ **9** of Annex E, section IV.}

5. Liability of inspectors and the organization

Different opinions have been voiced concerning the question whether inspectors or even the Organization should be liable for any damages resulting from a breach of confidentiality. Since potentially the financial implications could be quite substantial, it has been argued that a liability of the Organization would be necessary. On the other hand, an unqualified liability clause might entail unforeseeable financial demands on the Organization and hence States Parties to the Protocol.

There seems to be agreement, however, on the possibility to waive the immunity of staff members and inspectors in case of serious breaches. Accordingly, it is proposed to include corresponding language in the text, which has been taken from the current section on privileges and immunities in Annex D. Separate decisions are required for the waiver of the immunity in respect of juridical proceedings and the execution of a judgement.

Concerning the Organization, it is proposed to provide for similar procedures. However, a decision of the Conference of States Parties would be required for any waiver of immunity. This seems to guarantee sufficient protection of the interests of the Organization.

It is proposed to delete paragraph 6 of Article IV, to amend paragraph 6 bis of Article IV as follows and to delete the brackets.

{6 bis The Director-General shall impose appropriate punitive and disciplinary measures on inspection and staff members who violated their obligations to protect confidential information. In case of serious breaches, the immunity from jurisdiction may be waived by ~~the Director-General~~ **in accordance with the provisions in Annex E.**}

It is further proposed to amend the above proposed new subsection (D) "Measures in case of breaches or alleged breaches" of section IV in Annex E as follows (language is taken from Annex D, section I "General Provisions", subsection (C) "Privileges and immunities", paragraphs 22, 24 and 26 and slightly amended).

10. In case of serious breaches, the immunity of staff members of the [Technical] Secretariat from jurisdiction may be waived by the Director-General in any case where, in his or her opinion, the immunity would impede the course of justice and can be waived without prejudice to the purposes for which the immunity is accorded and the implementation of the provisions of this Protocol. In the case of the Director-General, the [Executive] Council shall have the right to waive the immunity. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver shall be necessary. Waiver must always be express.

11. In deciding whether to waive immunity, the Director-General shall pay due regard to the views of the Confidentiality Commission.

12. In case of serious breaches, the immunity from jurisdiction of the [Organization] as a body responsible for the acts of staff members may be waived by the Conference of States Parties in any case where the immunity would impede the course of justice and can be waived without prejudice to the purposes for which the immunity is accorded and the interests of the [Organization]. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgement, for which a separate waiver by the Conference of States Parties shall be necessary. Waiver must always be express.
