Economic Commission for Europe

Meeting of the Parties to the Convention on
Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Task Force on Access to Justice

Eleventh meeting
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Item 2 of the provisional agenda
Access to justice in cases
on the right to environmental information

Information paper N4 revised

QUESTIONNAIRE
Access to justice in cases on the right to environmental information

At its sixth session[1], the Meeting of the Parties to the Aarhus Convention set out the mandate of the Task Force on Access to Justice to promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention with special attention to information cases. Available information sources such Aarhus Convention national implementation reports and e-justice initiatives provide very basic overall description of existing framework but do not go in the details about its elements such as scope of review, time limits, remedies, costs and etc.

To overcome the information gaps, the Aarhus Convention Task Force on Access to Justice will carry out a survey to collect more detailed information, examples of legislation provisions and case law relevant to access to justice in cases on the right to environmental information. The survey could be an important contribution to identifying good practices, addressing key challenges, populating the jurisprudence database and fostering capacity-building efforts to support work in this area. The survey outcomes will lay the ground for advancing the implementation of article 9, para. 1, of the Aarhus Convention and contribute to the monitoring of SDG 16 targets 16.3 and 16.10.

A draft questionnaire was discussed at the eleventh meeting of the Task Force on Access to Justice in Geneva in Geneva on 27-28 February 2018[2] and thereafter revised by the secretariat in consultation with the Chair in the light of the discussion at the meeting and further comments received.

The present questionnaire is distributed to a selection of institutions specialized in information cases in a representative number of Parties from different subregions. In addition, representatives of judiciary, judicial training institutions, other review bodies, non-governmental organizations and stakeholders are welcome to contribute with input on any issue in the questionnaire.

The outcomes of the survey will be synthesized with information from the national implementation reports to a report which will be discussed at the next meeting of the Aarhus Convention Task Force on Access to Justice in Geneva in 2019 and further reported to the subsequent meeting of the Working Group of the Parties to the Aarhus Convention.

Those who want to take part in the survey are kindly invited to complete and return the questionnaire to the following email address: **aarhus.survey@un.org** with the subject line "11TFAJ survey from [name of country, organization]" for processing **before 1 October 2018**. Kindly be informed that the completed questionnaires will be posted on the website of the twelfth meeting of the Task Force.

[1] See para. 14(a) (i) of decision VI/3 of the Meeting of the Parties adopted at its sixth session (Budva, Montenegro, 11–13 September 2017) available from http://www.unece.org/env/pp/aarhus/mop6_docs.html
[2] More information is available from http://www.unece.org/env/pp/aarhus/tfaj11.html

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Questions concerning access to justice in cases on the right to environmental information:

1. Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information. Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision? How is the applicant *informed* about the possibilities to appeal the decision?

1.1. There are no specific provisions in Georgian legislation regulating the process of responding to requests for environmental information. General provisions on issuing public information are applicable to these cases. These provision are included in General Administrative Code of Georgia (article 40), which stipulates that public institutions are obliged to disclose public information immediately, which in practice has been interpreted by case law to mean no later than the following working day. Public institutions can use a ten day period to respond to requests if it requires retrieving of information from its structural subdivisions or from another public institution, processing of single and uncorrelated documents of considerable size or consulting with its own sub-division or with another public institution. In addition, the law clearly states that if a ten day period is required for issuing public information, a public institution is obliged to notify the applicant upon request.

1.2. Based on Georgia legislation there is no requirement to issue a refusal to disclose public information in writing. Failure of a public institution to respond to a public information request within the timeframes set by the law is considered to be a refusal. However if a public institution refuses to issue public information in writing the law obliges it to explain to the applicant his/her rights and appeal procedures.

2. What are the *time limits to appeal* a decision on access to environmental information? What are the most frequently used grounds for appeal? Are there any issues concerning *who has standing* in such cases? To *what body and in which form* is the appeal made; recourse for review within the public authority or to the higher authority; Information Commissioner, Ombudsman or any other independent and impartial body; or directly to court of law? If appeal to the review body other than a court of law is available in any form, does that request suspend the time limits to appeal to the court? Is there a requirement of *exhaustion* of administrative review procedures prior to bringing the case to court?

2.1. The above-listed topics on access to environmental information are regulated by general rules on access to public information, thus relevant provisions are included in General Administrative Code of Georgia as well as Administrative Procedure Code of Georgia.

2.2. An applicant is required to file a complaint (within administrative body) regarding a decision on access to public information within a period of one month. If an administrative body refuses to disclose public information by failing to respond to a request within the timeframes set by the law (see 1.2.) the one month period for appealing the decision is calculated from the expiry of the time for rendering a decision (Article 180 of General Administrative Code of Georgia and Article 22 of Administrative Procedure Code of Georgia).

2.3. Complaints on access to information can only be made in writing (Article 179 of General Administrative Code of Georgia). Based on Georgian legislation if there is an official at the administrative body superior to the official having issued the refusal to provide applicant with public information, administrative complaint is reviewed and resolved within the public institution. A complaint is reviewed by a superior administrative body if it is filed against an administrative act issued by a senior official of a public institution

(Article 178 of General Administrative Code of Georgia). If a case is appealed at a court without exhausting the administrative complaint procedures described above the court will declare the claim inadmissible (Article 2(5) of Administrative Procedure Code of Georgia).

2.4. Person whose request to receive information has been denied has *locus standi* when referring the case to the court or when filing an administrative appeal (to a higher public official or superior public institution as described in 2.3.).

2.5. In Georgia there is no Information Commissioner or any other independent party who would have the authority to review freedom of information appeals and render a binding decision. Although the Ombudsman is entitled to review the claims of anyone whose rights have been breached he/she is not granted the right to take binding decisions, rather the leverage granted to the Ombudsman is issuing a recommendation for a public institution advising it to abide by the requirements of law.

3. If appeal is made to an independent body mentioned above, how is the *independence and impartiality* of that body ensured?

N/A (no such independent review body in Georgia).

4. What *costs (fees, charges)* are connected to review before the court of law or other review bodies in these cases?

4.1. Filing an administrative complaint to a higher public servant or a superior public institution (as described in 2.3.) is free of charge.

4.2. General rules of calculating court fees on non-proprietary disputes apply to the cases of access to information (Article 4(1.K) of the law of Georgia on State Duty). Based on the law fee for filing an appeal to first instance courts (City or District Courts) equals to – Gel 100, to second instance courts (Tbilisi and Kutaisi Appeal Courts) – Gel 150, to the third instance court (the Supreme Court of Georgia) – Gel 300.

5. What is the average time needed for the court of law or another independent and impartial body to decide an information case, i.e. from the introduction of the appeal to the notification of the decision? If the national rules of appeal require administrative reconsideration before the appeal is submitted to the court of law or another review body, that time should also be also separately specified.

5.1. According to Georgian legislation public institutions are given a period of one month to review and take decision on an administrative complaint, including a complaint on access to public information (administrative reconsideration). The review period can be extended for an additional month under special circumstances when the matter under question is particularly complex (Article 183 of General Administrative Code of Georgia).

5.2. Disputes at first and second instance courts, including appeals on access to public information, have to be resolved no later than two months from the date of receiving the application. If the dispute is particularly complex, this time limit may be extended by not more than five months (Article 59(3) of Civil Procedure Code of Georgia). In case of the Supreme Court of Georgia based on the same law (article 391(6)) cases should be decided within a period of six months.

5.3. Based on the practice of IDFI it is hard to generalize and give average period within which courts usually decide upon cases. Nevertheless several times IDFI has faced the cases when courts violated timeframes for rendering decisions, stating that the reason for the delay was overload of the court with cases. Moreover based on the case law of IDFI freedom of information disputes last for at least as long as a year when they are appealed against at higher courts and go through all three court instances.

6. Are decisions of courts and other review bodies in information cases in writing, publicly available, binding and final? If the appeal is successful, how is the independent body's/court's *decision enforced*; by ordering the public authority to disclose the information; by disclosing the information directly; by suing the public authority if they persist in refusing to disclose the information or by any other means?

6.1. There is no law in Georgian jurisdiction imposing obligation on the courts to proactively publish their decisions. Although there are online platforms which include number of decisions they only compose a small share of all court decisions.

6.2. Decisions of the first and the second instance courts can be appealed against at higher instance courts. Decisions of the Supreme Court of Georgia are final. If the appeal is successful court order relevant public authority (defendant in the case) to disclose requested public information. If the defendant fails to fulfill the court ruling LEPL National Enforcement Bureau is responsible for executing the court decision. However the case on executing the court decision has to be brought to LEPL National Enforcement Bureau by the applicant himself/herself, which requires certain legal knowledge and is time consuming. If a public entity does not disclose public information even after the involvement of LEPL National Enforcement Bureau the process of criminal prosecution can be launched against a responsible civil servant with the charge of failure to execute a court decision (Article 381 of the Criminal Code of Georgia).

7. Can disciplinary, administrative or criminal *sanctions be exercised* against the public officials if disclosure of environmental information is refused unlawfully? Would it be possible for the applicant or other members of the public to be a party to such proceedings?

7.1. There are on specific provision in Georgian legislation imposing sanctions on public officials unlawfully refusing to disclose environmental information. However in certain circumstances refusal of a public servant to disclose public information, can be interpreted as a failure to fulfill the duties of the public official and thus serve as the ground for imposing a disciplinary sanction (Article 85 (1.a) of the Law of Georgia on Civil Service). Applicant or any other member of the public is not allowed to be a party of the disciplinary proceedings.

7.2. If a responsible public servant fails to disclose public information after the involvement of LEPL National Enforcement Bureau in the process (as described in 6.2.), criminal prosecution can be launched against him/her with the charge of failure to execute a court decision. In this case applicant can be involved in the process as a witness or a victim. In addition, public will be entitled to attend court hearings held on the case.

8. Do you have any experience of situations/cases where individuals or ENGOs asking or environmental information have been *penalized, persecuted or harassed* in any way for their involvement?

8.1. IDFI is not aware of the cases when applicants requesting environmental information have been *penalized, persecuted or harassed* in any way for their involvement.

9. Do you have any experience of *misuse or abuse* of the right to environmental information and the consequences thereof?

9.1. IDFI is not aware of the cases of misuse or abuse of the right to environmental information.

10. In your view, what are the *main barriers* in your legal system concerning access to justice for the members of the public in cases on the right to environmental information?

10.1. Based on the case-law of IDFI there are number of main barriers concerning access to justice in cases of freedom of information in Georgia (thus including right to environmental information). Firstly, the time frame for rendering a decision on a dispute by general courts of Georgia foreseen by Georgian legislation is unreasonably long when it comes to the cases on access to information. This results in the situation when public interest on the information seaked by an applicant is already lost by the time court litigation is over and information is disclosed (in case if a court appeal is granted). In addition, in many cases courts do not abide themselves by the time limits foreseen by the legislation, thus court litigation lasts even longer than the timeframes foreseen by the legislation.

10.2. The process of enforcing court decisions has its disadvantages as well. Several months long process of enforcement has to be launched at LEPL National Enforcement Bureau by an applicant himself/herself in order to receive information which had been ruled by a court to constitute open public information.

10.3. Court fees also constitute one of the main barriers of access to justice. In order to appeal a decision in all three court instances applicant would have to pay court duty amounting to Gel 550 in all. This amount is considerably high as compared to the average salary rates in Georgia (Based on the statistical data of 2017 average salary amounts to Gel 940).

10.4. The above-described problems are added by the fact that there is no independent review body in Georgia (FOI Commissioner), who would receive access to information complaints, review them free of charge and render decisions binding upon institutions. The review process would also be less time-consuming as compared to court litigation.

10.5. Access to court decisions is another problematic issue in Georgia, hindering the right of anyone interested to access results of court deliberation during open hearings. Based on Georgian legislation court hearings are open for public, however court administrations refuse to disclose decisions based on the argument of protecting personal data. This is particularly problematic as there is no law requiring publication of all court decisions (in depersonalized form). This results in the situation when public has no access to court decisions and substantiation, including those concerning access to environmental information.

10.6. Low citizen awareness on their right to environmental information can also be seen as one of the main reasons affecting access to justice. Citizens are often unaware of their right to access any public information kept at a public institution. In case of those who request public information and are then refused the disclosure, there is low awareness on the timeframes and procedures of appealing the refusal, which in many cases disables applicants to file complaints/appeals and seek justice.

10.7 In Georgia court hearing on administrative cases are based on an inquisitorial system and judges are given opportunity to be actively involved in the process of investigating all case materials, including direct one of the parties to provide the court with additional materials which could contribute to the process of adjudication on the case (Article 4 of the Administrative Procedure Code of Georgia). Thus the law grants judges on administrative hearings opportunity to direct state entities refusing to disclose information (e.g. based on the argument of personal data) to submit the information to the court, which will then independently evaluate whether the information under dispute constitutes open public information or not. However, it should be stated that courts in Georgia are highly reluctant to use this power. Regardless of a number of motions filed by IDFI, the organization has not had a single case when a judge on an administrative hearing regarding access to information would direct a state entity (respondent) to provide the court with additional case materials. Thus, reluctance of judges to use powers granted to them by an inquisitorial system can be seen as one of the barriers to access justice on freedom of information cases.

11. Does your legal system provide with any *innovative approaches* concerning administrative and judicial review procedures in cases on the right to environmental information, for example concerning the requirement for the procedure to be expeditious, the use of alternative dispute resolutions (ADRs), costs, remedies, means for execution of review decisions on disclosure or use of e-justice initiatives?

No provisions listed above are foreseen by Georgian legislation.

12. Can you please provide us with a short description of particularly important or innovative information cases, as well as cases which illustrate the main barriers concerning access to justice in these matters.

12.1. A couple of strategic litigation cases conducted by IDFI should be mentioned here. The first case concerns the issue of access to official e-mail correspondence of public officials. In March, 2015 IDFI referred with a FOI request to the Ministry of Justice requesting official email correspondence on urgent procurements conducted by the head or by a relevant public official of the Ministry of Justice (via official email account). The ministry refused to disclose information arguing that e-mail correspondence did not constitute public information as defined by Georgia legislation. After unsuccessful attempt to receive information by filing an administrative complaint, IDFI appealed the case to Tbilisi City Court. The first instance court refused to grant the appeal. The decision was unsuccessfully appealed to Tbilisi Court of Appeals, after which IDFI took the case to the Supreme Court of Georgia. The first and the second instance courts agreed with the rationale of the Ministry of Justice and stated that email by its definition was one of the means of conducting non-official correspondence and constituted temporary data, which was used for the exchange of internal information. They argued that information sent or received via email did not include any final decisions and did not confirm a legally significant act, thus did not constitute official documents. The Supreme Court of Georgia did not share the rationale of the fist and the second instance courts, granted the appeal of IDFI and ruled that official email correspondence sent or received by official email account constituted open public information, thus should have been made accessible to anyone interested. The Supreme Court ruling on the topic was of precedential importance. The court discussed the topic of access to official email correspondence for the first time and unambiguously stated that not only information related to simplified procurement, but any other official communication conducted via official email account constituted open public information. The decision of the Supreme Court of Georgia was issued in September, 2017. However,

Ministry of Justice fulfilled the decision of the court only in March, 2018, several months after the entry into force of the Supreme Court decision.

12.2. The second litigation of particular importance conducted by IDFI concerns tax secrecy. In April, 2015 IDFI sent a freedom of information letter to the Georgian Revenue Service and requested information on whether the Revenue Service had conducted inspections of Free Industrial Zones (FIZ) in the country. IDFI also requested the reports or protocols prepared by the Revenue Service as a result of these inspections. The Revenue Service refused to disclose information by referring to the argument of tax secrecy. In this case as well IDFI went through a lengthy process of court litigation. After conducting in-depth analysis of the information requested by IDFI and carefully studying legislative acts regulating the topic Tbilisi Court of Appeals rendered a decision favorable for IDFI and noted that requested information related to technical and infrastructural arrangements and compliance with established standards of the free industrial zones, thus it could not be considered to be tax secrecy. The court asserted, that information on the inspection of FIZs by the Revenue Service and relevant documents did not constitute tax secrecy; Therefore, the Revenue Service was ordered to fully disclose the information requested by IDFI. The court decision entered into force in January, 2018, after which IDFI had to refer to LEPL National Enforcement Bureau, since the Revenue Service refused to comply with the court decision and disclose requested information. As a result, in June, 2018 IDFI received the information requested in April, 2015 only after enforcement activities were conducted by LEP National Enforcement Bureau.