

QUESTIONNAIRE

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?

ANSWER.

These procedures are defined in the Law of the Republic of Kazakhstan (hereafter - RK) "On the Procedure for Consideration of Appeals from Individuals and Legal Entities"¹ and the Law of the Republic of Kazakhstan "On Access to Information"²:

According to the Article 11 of the Law "On Access to Information":

"An answer to a written request is given within fifteen calendar days from the date of receipt of the request by the holder of the information.

In cases when the requested information falls within the competence of several information owners and when an answer to a written request requires receipt of information from other information holders, the review period can be extended only once by the information owner for no more than fifteen calendar days, about which the information user is notified within three working days after the extension of the review period."

According to the Article 11 of the Law "On Access to Information":

"A reasoned response to a refusal to provide information on a written request shall be communicated to the information user within five working days from the date of registration of the request."

According to the Article 18 of the Law "On Access to Information":

"Unlawful restriction of the right to access to information can be appealed to a higher state body (a higher-ranking official) or to a court."

In their replies, state authorities indicate that the recipients of the information have the right to appeal the reply if they do not agree with it.

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?

ANSWER.

According to the Article 18 of the Law "On Access to Information",

"1. Unlawful restriction of the right to access to information can be appealed to a higher state body (a higher-ranking official) or to a court.

2. A complaint against actions (inaction) of officials, as well as decisions of state bodies, shall be submitted to a higher-ranking official or body or to the court **no later than three months after the citizen became aware** of the actions or decisions by the relevant official or body. Missed appeal period does not constitute grounds for a state body, official, or court to refuse accepting a complaint. Reasons for missing the deadline are clarified during examination of the complaint on the merits and can be among the grounds for refusing to satisfy the complaint."

In the experience of the Ecological Society Green Salvation, some of the main reasons for appealing is when state authorities provide incomplete, unreliable information, misinformation and unreasonable refusals to provide information.

According to the Article 8 of the Civil Procedure Code³ (hereinafter - the CPC of RK), any individual or legal entity can appeal against an action and inaction of state bodies.

For appeal in the appellate order, it is necessary to apply to a court.

In the national legislation, there is no requirement to exhaust all administrative procedures before applying to the court.

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

ANSWER.

Complaints against actions of state bodies are reviewed in court.

According to the Article 6 of the CPC of RK:

"1. A court, when reviewing and resolving civil cases, must strictly observe the requirements of the Constitution of the Republic of Kazakhstan, the constitutional laws of the Republic of Kazakhstan, this Code, other normative legal acts, related international treaties of the Republic of Kazakhstan."

According to the Article 13 of the CPC of RK:

"1. Justice in civil cases is carried out on the basis of equality of all before the law and the court."

According to the Article 15 of the CPC of RK:

"1. Civil proceedings are carried out on the basis of adversarial and equal rights of the parties. The parties participating in the civil process are endowed with equal opportunities to defend their position by this Code.

4. Court, while preserving objectivity and impartiality, manages the process, creates the necessary conditions for the parties to exercise procedural rights for a full and objective investigation of the circumstances of the case..."

According to Article 16 of the CPC of RK:

"1. Judge evaluates evidence in accordance with his internal conviction, based on an impartial, comprehensive and complete examination of all the evidence present in a case as a whole, guided by the law and conscience."

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

ANSWER.

Pre-trial costs are insignificant.

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.

ANSWER.

Civil cases are reviewed within the timeframes specified in the Article 183 of the CPC of RK.

"1. The time for considering a civil case must correspond to its actual complexity and to the interests of the persons participating in the case.

2. Civil cases shall be reviewed and resolved by the court within a period of up to two months from the date of the completion of the preparation of the case for a trial."

Statements on the actions (inaction) of state bodies are reviewed within the time limits specified in the Article 296 of the CPC of RK.

"1. The statement shall be reviewed by the court within one month from the day of completion of the case preparation for a trial involving the citizen, representative of the legal entity, head of the state body, local government body, public association, organization, official or civil servant, whose decisions and actions (lack of actions) are being appealed, or their representatives".

Preparation for a trial shall not take more than twenty working days from the date of accepting of a lawsuit into a court proceeding. In exceptional cases, this period can be extended to one month (Article 164 of the CPC of RK).

In practice, cases are examined for a period anywhere from 1-2 months to several years. Execution of court decisions can take years.

According to the national legislation, it is not required to apply administrative procedures before addressing to a court (Article 292 of the CPC of RK).

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?

ANSWER.

Yes. Court decision is issued in electronic and written form. It is available to the public. If the decision is not appealed, it becomes binding and final.

Decisions are implemented voluntarily. If defendants do not wish to comply with the court's decision voluntarily, they are forced to implement it, according to the law "On Enforcement Proceedings and Status of Bailiffs"⁴. In the event of failure to implement a court decision, heads of the state bodies may be brought to administrative and criminal responsibility (Article 669 of the Code of the Republic of Kazakhstan on Administrative Violations⁵, Article 430 of the Criminal Code of the Republic of Kazakhstan⁶).

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?

ANSWER.

Yes.

According to the Article 78 of the Code of the Republic of Kazakhstan on Administrative Violations:

"1. Illegal refusal to present documents and materials, collected in an established order, that directly affect rights and freedoms of an individual, or providing an individual with incomplete or knowingly false information,

- entails a penalty for the officials in the amount of fifteen monthly calculated units.

2. Committing by an official of acts described in the part one of this article, if these acts caused harm to the rights and lawful interests of individuals,

- entails a fine in the amount of fifty monthly calculated units."

According to Article 456-1 of the Code of the Republic of Kazakhstan on Administrative Violations:

"1. Illegal refusal to provide information or provide knowingly false information in cases when such information is subject to provision at the request of the user of information in accordance with the legislation of the Republic of Kazakhstan, with the exception of actions for which responsibility is provided for by other articles of this Code,

entails a fine for officials, small businesses, non-profit organizations...

2. Placing knowingly false information in the mass media, on the Internet resource of the information owner, on the Internet portal of open data or in other ways provided for by the legislation of the Republic of Kazakhstan -

entails a fine for officials, small businesses, non-profit organizations...

3. Illegal attribution of information that is not information with limited access to information with limited access, with the exception of actions provided for in part three of the Article 504 of this Code,

entails a fine on officials..."

According to the Article 274 of the Criminal Code of the Republic of Kazakhstan,

"1. Dissemination of knowingly false information that poses a threat of disturbing public peace or causing significant harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law,

- shall be punishable by a fine ... or correctional labor in the same amount, or by bringing to public works for up to four hundred hours, or by a restraint of freedom for up to one year, or by imprisonment for the same period."

According to the Article 305 of the Criminal Code of the Republic of Kazakhstan,

"1. The concealment or distortion of information about "events, facts or phenomena that endanger life or health of people or the environment, committed by a person who is obliged to provide the population with such information -

shall be punished by a fine ... or corrective labor in the same amount, or by enlisting in public works for up to six hundred hours, or by a restraint of freedom for up to two years, or by imprisonment for the same period, with deprivation of the right to hold certain posts or engage in certain activities for up to three years or without it."

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

ANSWER.

We do not have such information. But spreading defamation and undermining business reputation are common actions carried out even by government agencies.

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

ANSWER.

The organizational records data that show the number of requests and responses received, as well as the quality (completeness and reliability) of the information provided. For example, in the first half of 2018, 74 inquiries were sent, 44 responses received, 16 of them contained incomplete or inaccurate information.

Consequences of failure to provide information and provision of incomplete, unreliable information are expressed in the following:

- the public concerned can not effectively participate in the decision-making process related to the environment;

- repeated requests are sent;

- lawsuits are submitted to the court;

- the violators continue their activity, which can have serious consequences for life and health of people, and the environment.

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?

ANSWER.

"The law does not provide for independent judiciary." The executive branch of sharply limited judicial independence". Kazakhstan 2016 human rights report, p.8: <https://kz.usembassy.gov/wp-content/uploads/sites/46/2017/08/265750.pdf>. Since 2016, the situation has not changed much.

Another barrier is absence of a specialized court (or judges) on environmental issues.

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?

ANSWER.

No.

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.

ANSWER.

Cases illustrating the main obstacles to access to justice.

- When reviewing cases, the courts, with rare exceptions, do not take into account international environmental agreements (convention), despite the fact that the latter have priority over the laws of Kazakhstan (Article 4, Part 3 of the Constitution of the Republic of Kazakhstan). Experience of our organization allows to make a conclusion that state bodies do not observe and courts ignore the Aarhus Convention, Convention on Biological Diversity, Convention on World Heritage. During the period from 2015 to early 2018, the Supreme Court rejected more than ten motions of the ES, based on the Aarhus Convention, Convention on Biological Diversity, and World Heritage Convention.

- Judges, with rare exceptions, ignore the Supreme Court's normative resolution "On the Application of the Norms of International Agreements of the Republic of Kazakhstan", which states that "... improper application by a court of the norms of international agreements of the Republic of Kazakhstan may constitute grounds for cancellation or modification of a judicial act. Incorrect application of a norm of an international agreement can be concluded in the fact that the courts did not apply the norms of international agreements to be applied or applied norms of international agreements that are not applicable, or when the courts have misinterpreted the norms of international agreements."⁷

- During judicial proceedings, courts allow loose interpretation and application of laws.

For example, when considering cases on construction of a road to the ski complex "Kokzhailau"⁸, the judge determined that the "Rules for Maintenance and Protection of Vegetation of the City of Almaty" apply to the lands of a specially protected natural area of national importance. He "justified" his decision by the fact that part of the national park is located in the administrative boundaries of the city⁹. The judge of the Board of Appeal of the Almaty City Court came to the same conclusion¹⁰. The courts gave a loose interpretation of the paragraph 55 of the mentioned Rules, which indicated that their action does not apply to specially protected natural areas of national importance.

In addition, the judge allowed a loose interpretation of the paragraph 6 of the Article 108 of the Land Code. The latter states that "inclusion of land plots in a city, town, or village boundaries does not entail termination of the right of ownership or land use rights to these plots." None of the

judges was affronted by the fact that the city authorities have no right to interfere in the activities of the specially protected natural area of national importance.

In addition, the courts ruled in favor of the defendant on the question of cutting down the "Red Book" plants and construction development at their place of growth. During the court hearing, the defendants were unable to explain according to which law such activity was allowed, because according to the national legislation, no state authority has the right to issue permits for cutting down the "Red Book" plants and construction development at their place of growth.

- Courts apply inactive regulatory legal acts. For example, the organization filed a statement to acknowledge the materials of inventory and forest pathological research of vegetation prepared in violation of the legislation to be illegal.¹¹ When preparing these materials, the defendant used a normative legal act that has no legal force on the territory of the national park, and an instruction that is not a normative legal act of the Republic of Kazakhstan. But neither the judges, nor the prosecutors expressed even the slightest objection to these so-called "legal grounds".

- Courts mislead the bodies of international conventions¹².

- The courts do not consider impartially the evidence presented by the public and openly take the side of state bodies¹³.

Judges poorly examine case materials¹⁴.

Judges do not recognize the right of the public to have access to justice¹⁵.

Courts' decisions obliging to provide information are extremely poorly executed. Sometimes, the process of receiving the requested information can take years.

For example, the decision of the Supervisory Board of the Supreme Court dated on November 27, 2013, has not been implemented for five years. It was made at the request of the public about inaction of the head of the Department of Sanitary and Epidemiological Control in the city of Almaty. He did not provide control over designation of sanitary protection zones with special signs on site and did not provide the requested information.

Thus, the decisions of the courts lead to legitimization of the state bodies actions which contradict to international treaties and national legislation; these actions pave the way for new and more serious violations of human rights to a favorable environment; contribute to the growth of corruption, social tension, and reduction of environmental security; hinder the development of environmental democracy; they undermine trust in state bodies and international reputation of the country.

Ecological Society Green Salvation
Almaty, Republic of Kazakhstan
September 25, 2018.

¹ Law of the Republic of Kazakhstan "On the Procedure for Consideration of Appeals from Individuals and Legal Entities"(with amendments as of May 16, 2018).

² Law of the Republic of Kazakhstan "On Access to Information"(with amendments as of June 8, 2018).

³ Civil Procedure Code (with amendments as of July 5, 2018).

⁴ Law of the Republic of Kazakhstan "On Enforcement Proceedings and Status of Bailiffs" July 12, 2018).

⁵ Code of the Republic of Kazakhstan on Administrative Violations (with amendments as of July 22, 2018).

⁶ Criminal Code of the Republic of Kazakhstan (with amendments as of July 12, 2016).

⁷ No. 1 Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan of July 10, 2008 "On Application of the Norms of International Agreements of the Republic of Kazakhstan."

⁸ 2016. Case No. 3 on acknowledging of the conclusion of the state environmental assessment of the EIA for the project "Construction of a road to the ski resort "Kokzhailau" to be illegal and repealed (See case No. 10, 2015): http://esgrs.org/?page_id=11726.

⁹ Decision of the SIEC of Almaty No. 2-16009/2015 dated on November 6, 2015.

¹⁰ Resolution of the Appeal Board of the Almaty City Court No. 2A-8416/2015 dated on December 28, 2015.

¹¹ 2016. Case No. 7 on acknowledging of the «Inventory and Forest Pathological Research of green vegetation» prepared by the «K...» LCC with violations of the legislation to be illegal and to be repealed: http://esgrs.org/?page_id=11726.

¹² 2017. Case No. 4 on acknowledging of the actions of the «Department of Natural Resources and Nature Use Management of the city of Almaty», which provided untruthful information, to be illegal.

¹³ 2016. Case No. 2 on the provided untruthful environmental information about construction of a cable road on the territory of a national park by the Forestry and Wildlife Committee (See case No.8, 2015): http://esgrs.org/?page_id=11726.

¹⁴ 2016. Case No. 3 on acknowledging of the conclusion of the state environmental assessment of the EIA for the project "Construction of a road to the ski resort "Kokzhailau" to be illegal and repealed (See case No. 10, 2015): http://esgrs.org/?page_id=11726.

¹⁵ 2016. Case No. 7 on acknowledging of the «Inventory and Forest Pathological Research of green vegetation» prepared by the «K...» LCC with violations of the legislation to be illegal and to be repealed: http://esgrs.org/?page_id=11726.