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
Geneva, 27 and 28 February 2018
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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1. Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information.
The time limit is **10 days** and applies to all kinds of information requests: Law 26/2016, of August 22, article 15, nº 1

Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision?
Yes: article 15, nº 1, al. c) of Law 26/2016, of August 22 states that when the public authority refuses to give access to information it must "Communicate in writing the reasons for the total or partial refusal of access to the document, as well as the guarantees of administrative and contentious appeal that the applicant has against this decision, namely the presentation of a complaint to CADA [Comissão de Acesso aos Documentos Administrativos/ Commission on access to administrative documents] and the judicial intimation of the entity required"

How is the applicant *informed* about the possibilities to appeal the decision?
The applicant is informed through the refusal, as explained above

2. What are the *time limits to appeal* a decision on access to environmental information?
The time limit is **20 days** and applies to all kinds of information requests: Law 26/2016, of August 22, article 16, nº 1

What are the most frequently used grounds for appeal?
There are several reasons for appeal, among which the pure silence of the authority, the refusal based on the allegation that the procedure about which the information is requested is not yet concluded and confidentiality of the documents are the most common.

Are there any issues concerning *who has standing* in such cases?
No, because the locus standi is very wide — article 5, nº 1, of Law 26/2016, of August 22, states that "All, without having to state any interest, have the right of access to administrative documents, which includes the rights of consultation, reproduction and information about their existence and content".

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?
There's no recourse within the public authority, because access to information is not considered a "decision" — although right of petition is admissible
In case of lack of response to the request or of partial or complete refusal to grant access, the applicant can react in two ways, successively or simultaneously:

- in 20 days, present a complaint to the Commission on access to administrative documents, as stated on article 16, nº 1, of Law 26/2016, of August 22;
- in 20 days, request a judicial injunction to obtain informations, which is an urgent procedure, before the administrative court, as stated on article 105, nº 2, of Law 15/2002, of 22 February, as ultimately altered by Decree-Law 214-G/2015, of October 2 (Code of Administrative Process) .

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?
Yes: if the applicant decides to present a complaint to the Commission on access to administrative documents, in 20 days after the notification of the refusal, the time limit to apply to the administrative court is interrupted until the authority decides to give access, confirm the refusal or stays silent — Law 26/2016, of August 22, article 16, nºs 2 to 5.

Is there a requirement of *exhaustion* of administrative review procedures prior to bringing the case to court?
No.

3. If appeal is made to an independent body mentioned above, how is the *independence and impartiality* of that body ensured?
The Commission on access to administrative documents (CADA) is an independent body with a very heterogeneous composition, as established on article 29 of Law 26/2016, of August 22. It has 11 members, as follows:

a) The Chair, a Judge counsellor of the Supreme Administrative Court, appointed by the Superior Council of Administrative and Fiscal Courts;

b) Two deputies elected by the Assembly of the Republic, one on the proposal of the parliamentary group of the largest party that supports the Government and the other on the proposal of the largest opposition party;

c) A professor of law appointed by the President of the Assembly of the Republic;

d) Two personalities designated by the Government;

e) One person appointed by each of the Governments of the Autonomous Regions [which are two: Madeira and Azores];

f) A personality designated by the National Association of Portuguese Municipalities;

g) A lawyer appointed by the Bar Association;

h) A member appointed from among its members by the National Data Protection Commission.

The members have guarantees of independence associated to their statute. As affirmed on article 32, nº 3, of Law 26/2016, of August 23, "The members of CADA can not be prejudiced in the stability of their employment, in their professional career, in particular in the promotions to which they have acquired right, neither in the public contests to which they submit themselves and in the social security system of which they benefit to the date the beginning of the mandate". Number 4 of the cited article adds that "The members of CADA are irremovable and their functions cannot be terminated before the end of the mandate."

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

The presentation of the complaint to The Commission on access to administrative to documents is free of charge. The request of a judicial injunction is free if presented by a popular actor (natural person or association) (article 4, nº 1, al. b) of Decree-Law 34/2008, of February 26, as ultimately altered by Law 24/2016, of December 28 – Regulation of processual costs); if not, the cost are calculated as fixed on article 12, nº 1, al. b) of the Regulation of processual costs (which requires the consultation of Annex I, that indicates the cost is 0.5 UC). In 2017, the cost was 51,00€ (see also article 5 of the Regulation of processual costs).

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 applicant presents a complaint to CADA, the time limits are established on article 16 of Law 26/2016, of August 22, and they go up to two months; if the application goes directly to court, the decision in 1st instance should be delivered in not more than a month, but it can be appealed and then the time limit is unpredictable (note that the appeal, in general, has not suspensive effect: article 143, nº 1 of the Code of Administrative Process). The judge can impose compulsory sanctions to the administrative authority for each day of arbitrary non compliance (article 108, nº 2 of the Code of Administrative Process).

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.

Does not apply.

6. Are decisions of courts and other review bodies in information cases in writing, publicly available, binding and final?

i) In what concerns CADA recommendations, they are public and acessible in the webpage http://www.cada.pt; they are not binding nor final;

ii) In what concerns administrative courts orders, they are not public unless they are appealed to a superior court (decisions of first instance courts aren't public; decisions of second instance courts and of the Supreme Administrative courts are accessible online in http://www.dgsi.pt;); they are binding and final (after appeal, if it happens).

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?

i) If it's a CADA recommendation, it's not binding and the administrative authority can adopt it or not;
ii) If it's a court injunction, the court establishes a time limit to the administrative authority to give access to the information required by the applicant, which is at the maximum 10 days (article 108, nº 1 of the Code of Administrative Process). In case of non-compliance, the court can impose compulsory sanctions for each day of delay (article 108, nº 2 of the Code of Administrative Process).

7. Can disciplinary, administrative or *sanctions be exercised* against the public officials if disclosure of environmental information is refused unlawfully?
There can be disciplinary, criminal and civil responsibility of the civil servant directly responsible for the accomplishment of the order (article 159, nºs 1 and 2, of the Code of Administrative Process).

Would it be possible for the applicant or other members of the public to be a party to such proceedings?
The applicant is not a party in the administrative procedure to investigate disciplinary responsibility; and neither can be a party in the criminal process, because the crime of disobedience is public and the jurisprudence rule that in this type of crimes, which are of public interest, private parties can not intervene (see, *inter alia*, sentence of the Civil Court of Second Instance (Oporto) of January 21, 2011, proc. 574/08.8TAVRL-A.P1).
On the contrary, the applicant can present a judicial request to demand civil responsibility to the administrative authority when the refusal or delay has caused damages.

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?
No.

9. Do you have any experience of *misuse or abuse* of the right to environmental information and the consequences thereof?
We have cases of abuse of right of access to information, namely repetitive requests, but we don't have cases like that in the domain of access to environmental information.
In what concerns misuse, we don't have any experience.

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?

Access to justice to enforce the right of access to environmental information is, in general, easy and quick. As we explained above, we have an urgent remedy, an injunction, which has very low cost, is expedite and whose decision can be compulsorily imposed by the Court. However, the decision can be appealed (both by the applicant and the administrative authority), the effect is not suspensive and, although the appeal is also urgent, the slowness of the justice system may imply a long delay in the final decision.

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?

In Portugal, the judicial injunction to promote access to information, based on articles 104 to 108 of the Code of Administrative Process, is an urgent procedure and has minimal costs.

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.

A possible example is the decision of the Supreme Administrative Court of Portugal on 7 January 2009 (Proc. 0848/08) on the interpretation of the scope of Law 19/2006, of 12 June (which transposed Directive 2003/4/EC and was revoked and substituted by Law 26/2016, of August 22). According to that decision, Article 3 (a) ii of Law 19/2006, of 12 June, equated “public authority” not only with public entities with juridical personality, such as “public institutes”, “public associations”, or “public enterprises”, but also any corporations where the State is share-holder, as well as any “concessionaire of a public service”, which provides services relating to the environment or which are likely to have an environmental impact. It is applicable to legal persons whether or not they belong to the indirect administration of central, regional or local levels. The Court found such an interpretation in no way contrary to Directive 2003/4/EC, where it is expressly provided that the provisions contained therein "are without prejudice to the right of a Member State to maintain or introduce measures to ensure broader access to the information" (see recital 24). The Court considered the corporation in question, as a concessionaire, enjoying assets belonging to the public domain, should be considered a public authority, under the terms and for the purposes established in Law 19/2006, and is therefore obliged to the duty to provide environmental information, which the environmental non-governmental organization requested. This interpretation is still enshrined in Article 4 (4) a) of Law 26/2016, of August 22.