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

CONTACT INFORMATION
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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?

The Act No. 211/2000 Collection of Act on free access to information, which is currently in force in Slovakia, covers all information available to public authorities, as well as other entities that are collectively referred by the law as competent obliged entity.
The other text refers to access to an information in general, including the availability of "environmental" information.
The request for access to the information shall be provided by the competent obliged entity without undue delay, no later than eight working days from the date of submitting the application on disclosing the information. The deadline for access to the information can be extended by a further 8 working days in difficult cases.
If the request for access is not satisfied, the competent entity shall issue a decision (in writing) containing a justification as well as an instruction on the right of appeal.

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?

Appeal have to be submitted in 15 days from delivery of the decision which refuse the disclosing of the information to the applicant and may be submitted to the superior (second-level) authority. The most common grounds for appeal are, in particular, the illegality of the reasons why the information was not made available. The exhaustion of ordinary legal remedies in administrative proceedings is a prerequisite for bringing an action to court.

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

N/A

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

The court fee for bringing an action in such cases is € 70. Foundations and charitable organizations, humanitarian organizations, environmental organizations and consumer protection associations are exempted from the payment of court fees.

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.

The Slovak legislation while considering the rules on the procedure of the courts does not specify the length of time for which the court must decide on the action which is brought; this time may vary from court to court and case-by-case. No statistics are available that would only concern such types of court proceedings (actions against decisions on non-disclosure of information).

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?

Yes, all valid court decisions are made in writing, published and are legally binding. The actions concerning the violation of the right of access to information heard by the courts within the administrative judiciary, which is a single instance, and hence the decision of the first instance administrative court (regional courts), is enforceable. At the first instance decision, it is possible, if the legal conditions are fulfilled, to lodge a remedy (a cassation complaint) that does not affect the enforceability of a court decision, if a cassation complaint does not have a suspensive effect (Supreme court, as a cassation court, could make a decision about suspensive effect of the complaint, if the complainer ask on it and are fulfilled legal conditions, for example there is a serious risk of harm to the environment).
In most cases, the court does not order the disclosure of the information, but only derogates the contested decision on a non-disclosure of unlawfulness and, on the grounds of the judgment, indicates the legal opinion on which it was based. Since such a procedure has proved to be ineffective in practice (e.g. following a court decision, a decision to refuse to disclose information from other, equally unlawful grounds was reissued, and the applicant would then have to turn to the court again; moreover, the required information is after so long time no more actual), the possibility for a court to order to disclose the information has been introduced in the Code of Administrative Procedure, if the court is convinced that there are no legal obstacles to the disclosure of the requested information.

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?

Yes, the law on free access to information also establishes an administrative offense (offense).
The offence is committed by person,
- who knowingly issues and publishes false or incomplete information,
- who by issuing a decision or by issuing an order or by any other measure cause a violation of the right on access to information,
- who violates another legal obligation in relation to right on access to information.

In a case where the applicant is also the complainant, on whose application the infringement procedure was initiated, he is also a party to the proceedings.

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?

N/A

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

In practice, there have been several cases of abuse of the right of access to information. One of the most frequent ways of misusing the right to information is to flood the obliged competent authority by a high number of requests for information that he or she has not been able to provide in real time and could completely disable it. This practice has also been reflected in the decision-making activities of the courts that have defined so-called bullying law enforcement (relating to right on access to information), by which courts do not provide the protection.

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?

1. Already mentioned practice of the competent authorities obliged to disclose the information, which repeatedly, despite court rulings, do not disclose the same information, which is for example "politically sensitive" to its content, on unlawful grounds, for compelling reasons or for unjustified reasons. Thus, the claimant must repeatedly bring an action in the same case to a court that fails to provide him with the protection even though he decides to do so. A new institute, under which the court itself may order the disclosure of the information (already mentioned), is still not applied in practice very often (about 6 years after its introduction).

2. The widely applied concept of "bullying law enforcement" (already mentioned) by courts. Still more often we can see a negative practice by where in cases, where is a legitimate requests for information, have been marked as bullying by the competent authorities and the authorities have therefore refused to disclose the requested information.

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?

Already mentioned possibility for the court to order the disclosing of requested information.

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.

Negative practice:
The Act stipulates that if the competent entity does not respond in no way to a request for a disclosure of the information, the law establishes that the liable entity has issued a decision on non-disclose information (so-called fictitious decision). An action on court may be brought against a fictitious decision. The practice is so, that the judges cancel these fictitious decisions because of their unreviewability (the fictitious decision does not contain a justification) and thus without commenting on the case. In practice, the competent entity issued such fictitious decisions several times in a row, and even if they were cancelled, the applicant did not get the information and could not afford his right to access the information. Judicial protection against the unlawful conduct of liable entities is thus illusory in such cases and did not in any way contribute to the protection of rights.

The second way in which competent authority avoided disclosure of the requested information was the indication of the putative or unlawful reasons for a non-disclosure. In these cases, unlike the judicial review of fictitious decisions, the administrative court annulled the decision not to disclose information, while the administrative court also made a reference, but in the subsequent proceedings, the competent authority refused to reject the information with the other - again putative or unlawful - reason and the applicant has no other possibility, just to go back to the administrative court.

Positive Practice:
One of the reasons that the law makes it impossible to disclose the information requested is also trade secret. This reason was often abused in practice - trade secret was also referred to an information, that did not meet the legal requirements for trade secret; however, the authorities did not examine these legal conditions, it was sufficient for them to identify information as trade secret by the businessman concerned.

This also happened in the case of requesting access to information on the consequences of the accident at the Mochovce nuclear power plant; this information was available to the Nuclear Regulatory Authority as the competent authority, but the plant operator described them as trade secret and for this reason their office did not make it available to the applicant. The Supreme Court also ruled in this case, and in its decision Supreme Court annulled the decision on not - disclose information, for the following reasons:

"... it may be inferred that the mere fact that an entrepreneur identifies certain information as a trade secret does not mean that it is also objective if he does not at the same time fulfill all the qualifying features of the concept of commercial confidentiality set out in Section 17 of the Commercial Code. ... In the present case, the defendant did not examine in the decision whether all the definitive signs of trade secrets are fulfilled and its decision is unclear on what objective evidence has argued that all the information required is the trade secret of Slovak Power Plants. It emerges from the decision on

decomposition that, when assessing whether there is any reason to limit access to information, it was based solely on the allegations made by Slovenské elektrárne, a.s., not examining the fulfillment of the remaining three objective conceptual features of trade secret. From that point of view, it can therefore be stated that its decision is based on an insufficiently established factual situation ... '.