

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 session¹, 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 as 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 2018² 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 general time limit is one month, which can be extended to two months.³ A refusal does not have to be in writing but must give reasons and inform the applicant of the possibilities for appeal.⁴

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?

The time limit for an appeal is one month, but the Commissioner for Environmental Information can extend this if it seems reasonable to do so.⁵ Appeals are made to the Commissioner for Environmental Information.⁶

The Commissioner for Environmental Information's Annual Report for 2017 states that a significant proportion of appeals concern the definitions of "environmental information" and "public authority" and also whether the public authority holds the information sought, or holds further information in addition to that identified for release.⁷

The Regulations limit standing to appeal a decision on access to environmental information to those who have been unsuccessful in an internal review of the decision of a public authority, or a third party who would be incriminated by the disclosure of the environmental information concerned.⁸

The reports of the Commissioner for Environmental Information do not provide statistics on appeals that are deemed invalid because of standing issues.

In theory, it would be open to an applicant who has been refused access to environmental information by a public authority to take judicial review proceedings before the High Court to challenge that decision, but as the Regulations create a statutory appeals mechanism, the courts are very unlikely to grant leave to apply.⁹ There is, therefore, a practical requirement of exhaustion of administrative review procedures prior to bringing the case to court.

³ European Communities (Access to Information on the Environment) Regulations 2007 to 2018 ('the Regulations'), paragraph 7(2).

⁴ Regulations, para 7(4).

⁵ Regulations, para 12(4).

⁶ Regulations, para 12(3).

⁷ Commissioner for Environmental Information, *Annual Report 2017*, 86.

⁸ Regulations, para 12(3).

⁹ Mark de Blacam, *Judicial Review* (Bloomsbury, Third Edition, 2017), p 993.

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

The person who occupies the role of Commissioner for Environmental Information is also the Ombudsman and Information Commissioner,¹⁰ and would benefit from the independence and impartiality of those offices.

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

The normal fee for an appeal to the Commissioner for Environmental Information is €50; it is reduced to €15 where the appellant holds a medical card, is a dependant of a holder of a medical card, or a third party who would be incriminated by the disclosure of the environmental information concerned.¹¹

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 Commissioner for Environmental Information's Annual Report for 2017 states that the average number of days taken for a case to be closed decreased by 54 days from 316 days in 2016 to 262 days in 2017.¹²

An internal review is required before an appeal can be submitted; under paragraph 11 (3) of the Regulations, a decision on this "shall be notified to the applicant within one month from receipt of the request for the internal review." Statistics on the average time which this takes in practice are not available. However, the Commissioner for Environmental Information's Annual Report for 2017 states (at page 83) that "[i]n 18 (35%) out of the 51 cases closed by the OCEI in 2017, 13 public authorities failed to make internal review decisions within the time specified by the AIE Regulations." It is therefore likely that this exceeds one month.

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?

Decisions are made available in writing through the Commissioner for Environmental Information's website at <https://www.ocei.ie/decisions/>. Public authorities are ordered by the CEI to disclose the information, and if they do not, the Commissioner may seek an order of the High Court obliging them to do so.

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?

The normal civil and public service disciplinary processes would apply. The public are not a party to such proceedings. Criminal sanctions would not apply.

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?

There is some anecdotal evidence that this occurs.

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

There is a clear lack of resourcing for the system of access to environmental information, particularly a lack of staff training, which results in requests being ignored, misdirected, or responded to after the deadline.

¹⁰ Regulations, para 12(2).

¹¹ Regulations, para 15.

¹² Commissioner for Environmental Information, *Annual Report 2017*, 79.

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?

The Commissioner for Environmental Information is not adequately staffed; this issue is alluded to his annual reports. Although this situation has improved in recent years, there is also an increase in the volume of AEI requests, resulting in delays remaining significant.

Where litigation is required, the costs can be prohibitive, particularly for a small NGO or individual, even though the special costs rules required under the Aarhus Convention and Directive apply, as specialist legal advice can be very expensive. (Section 50B of the Planning and Development Act 2000 creates an exception to the normal rule that the losing party in litigation must pay both sides' costs, providing instead that each party bears its own costs.)

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?

The CEI facilitates mediation between parties in dispute.

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.

In *An Taoiseach v Commissioner for Environmental Information and Fitzgerald*,¹³ the High Court found that Government meetings are 'internal communications' for the purpose of art.4(1)(e) of Directive 2003/4 and the respondent did not have the power to disapply Art.28.4.3° of the Constitution, which makes cabinet meeting confidential.

In separate cases, the CEI has found that four bodies are "public authorities" within the meaning of the Regulations: Raidió Teilifís Éireann,¹⁴ Anglo-Irish Bank (which was nationalized after the financial crisis),¹⁵ the National Asset Management Agency (established after the financial crisis to take over non-performing loans),¹⁶ and Bord na Móna.¹⁷ In *NAMA v Commissioner for Environmental Information*,¹⁸ the High Court found that NAMA is a public authority and is required to comply with a request for EI. However, the CEI found that the Courts Service of Ireland was excluded from the definition because it was acting in a judicial capacity,¹⁹ and the Irish Fish Producers' Organisation is not a public authority.²⁰

In *Minch v Commissioner for Environmental Information*,²¹ the Court of Appeal upheld a decision of the High Court²² overturning a decision of the CEI refusing access to a report entitled 'Analysis of Options for Potential State Intervention in the Roll Out of Next Generation Broadband'. The CEI had held that information must fall within one of the categories in Article 3(1) of Directive 2003/4 to constitute environmental information, not simply relate to one of them. The High Court held the question of remoteness was not the correct approach as it failed to take into account that Article 3(1)(c) includes measures, programmes, policies etc which are likely to affect elements of the environment, not just those which have affected those elements, but did not provide an alternative test. The Court of Appeal held that

¹³ [2010] IEHC 241.

¹⁴ CEI/09/0015 Pat Swords and Raidió Teilifís Éireann (10 May 2010).

¹⁵ CEI/10/0007 Gavin Sheridan and Anglo Irish Bank (1 September 2011)

¹⁶ CEI/10/0005 Gavin Sheridan and National Asset Management Agency (13 September 2011)

¹⁷ CEI/12/0003 Andrew Jackson and Bord na Móna (23 September 2013).

¹⁸ [2013] IEHC 86.

¹⁹ CEI/08/0005 Peter Sweetman and Courts Service

²⁰ CEI/15/0011 Fahy and Irish Fish Producers' Organisation (30 November 2015).

²¹ [2017] IECA 223.

²² [2016] IEHC 91 and [2017] IECA 223.

as the Report had simply examined various financial models for broadband roll-out, it cannot be said that it had developed to the point where its contents represent a “plan” or “policy” or “programme” such as would constitute a “measure” for the purposes of Article 3(1)(c) of the 2007 Regulations.²³

However, the report “involved a cost benefit analysis or other economic analysis for the purposes of Article 3(1)(e) of the 2007 Regulations”,²⁴ as the economic analyses which it contained were used in the formation of the National Broadband Plan, and the latter is likely to affect the environment.²⁵

In *Cusack and Eirgrid*,²⁶ the respondent had refused access to some information relating to a plan to construct a new high voltage power line running over 200 km on the basis of the confidentiality exception in Article 9 (1) (c) of the Regulations. This was overturned by the CEI on the basis that this was environmental information and was not protected by this exception because the financial data involved was aggregated to a level which would make it impossible for a competitor to calculate the cost of particular elements of the system.

In *Right to Know CLG v An Taoiseach*,²⁷ the High Court quashed a refusal by the Department of An Taoiseach to provide access to cabinet papers discussing Ireland's greenhouse gas emissions as it had not considered the public interest in favour of disclosure, and the reasons given for the decision were inadequate. (Cabinet papers are normally confidential under Article 28.4.3° of the Constitution of Ireland.)

²³ [2017] IECA 223 at 42.

²⁴ [2017] IECA 223 at 43.

²⁵ [2017] IECA 223 at 47.

²⁶ CEI/14/0016 (22 January 2016).

²⁷ [2018] IEHC 3710.