

## 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<sup>1</sup>, 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 2018<sup>2</sup> 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.

<sup>1</sup> 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](http://www.unece.org/env/pp/aarhus/mop6_docs.html)

<sup>2</sup> More information is available from <http://www.unece.org/env/pp/aarhus/tfaj11.html>

**CONTACT INFORMATION**

Please provide name and contact data of the person who filled in the questionnaire:

First Name: Franziska Last Name: Scheuber

Position: Legal counsel

Organization: Pro Natura (Friends of the Earth Switzerland)

Address: Dornacherstrasse 109

Telephone: +41 61 317 92 46

Fax:

E-mail: franziska.scheuber@pronatura.ch Website: www.pronatura.ch

*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.

Preliminary remark: The relevant national legislation in Switzerland is the Federal Act on Freedom of Information in the Administration (FoIA). It is obligatory for all national authorities, as well as for the regional authorities who don't have a proper Act on Freedom of Information. Most of the answers below are based on this Federal Act.

National authorities (art. 12 FoIA): 20 days; with possibility to prolong exceptionally for a further 20 days

Regional authorities (Cantons): Similar rules as for national authorities.

Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision?

Yes.

How is the applicant *informed* about the possibilities to appeal the decision?

The possibilities are indicated in the written decision.

2. What are the *time limits to appeal* a decision on access to environmental information?

20 days

What are the most frequently used grounds for appeal?

As far as we know: Access denied.

Are there any issues concerning *who has standing* in such cases?

No.

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?

National authorities (art. 13 et seq. FoIA): A request for mediation must be filed in writing with the Federal Data Protection and Information Commissioner within 20 days of receipt of the decision from the authority or the date of the authority's failure to comply with the deadline. Should mediation succeed, the matter is deemed to have been settled. Should mediation fail, the Federal Data Protection and Information Commissioner shall provide the participants to the mediation proceedings with a written recommendation within 30 days of receipt of the request for mediation. Within ten days of receipt of the recommendation, the applicant or the person consulted may request a (second) decision of the public authority. A decision shall be issued within 20 days of receipt of the recommendation or the request for a decision. This decision can be taken to court of law.

Regional authorities (Cantons): Similar rules as for national authorities.

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.

Is there a requirement of *exhaustion* of administrative review procedures prior to bringing the case to court?

Yes.

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

By laws, e.g. the FoIA itself.

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

Review by the Federal Data Protection and Information Commissioner or the public authority: No costs. Review by the court of law: If the case is lost, there are court fees to be paid (estimated: 1000 – 4000 CHF, but maybe also higher)

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.

We don't know.

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

Binding and final, yes. Not always publicly available.

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?

By ordering the public authority to disclose the 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?

We don't know.

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?

No.

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) The national authorities invoke too often exceptions to the right of access. This is in breach of art. 4 (4) Aarhus Convention, which states that the grounds for refusal shall be interpreted in a restrictive way.

2) Not concerning access to justice, but access to information: In some Cantons members of the public and NGOs have to pay regularly for the access to essential environmental information (the official journal, stating all the building applications, is paying).

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 mediation with the Federal Data Protection and Information Commissioner (see question 2).

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.

Important information cases:

1) We had some years ago one procedure in the Canton Bern about unlawful killing by cantonal administration of protected grey heron and goosander (genetically independent alpine population with only 200 breeding pairs) in which art. 9 (2) was hurt. Three cantonal authorities and even the Swiss Agency for Environment (BAFU) denied access to judicial review. It was only the Federal Supreme Court which stated that there was a right of appeal (Decision 2C\_1176/2013 of 17th April 2015 = BGE 141 II 233).

2) In 2015, a NGO demanded from the Federal Office for Agriculture (FOAG) access to information as well as admittance as a party in the ongoing revision procedures of authorizations for certain pesticides (art. 4 and 9 Aarhus Convention). The FOAG denied both. An appeal to the Federal Administrative Court was successful, and it was confirmed by the Federal Supreme Court in 2018 (Decision 1C\_312/2017 of 12<sup>th</sup> February 2018 = BGE 144 II 2018). It stated that NGOs must be generally admitted to such procedures and therefore also be given all the necessary information.