

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?

- There is no specified time limit within the Access to Information on the Environment Regulations 2007 to 2018 (AIE Regulations) for public authorities to hold environmental information for the purpose of responding to requests for environmental information at a future date.
- Article 7(2)(a) of the AIE Regulations provides that a public authority must make a decision on a request within *one month* from the date it receives a request. Under article 7(2)(b) of the AIE Regulations a public authority may, where it is unable because of the volume or complexity of the environmental information requested to make a decision within one month, extend the deadline for making a decision on a request to not later than *two months* from the date it received the request. (Emphasis added)
- Article 7(4)(c) of the AIE Regulations provides that where a decision is made to refuse, in whole or in part, a request for environmental information, the public authority concerned shall specify the reasons for the refusal.
- Article 7(4)(d) of the AIE Regulations provides that where a decision is made to refuse, in whole or in part, a request for environmental information, the public authority concerned shall inform the applicant of his or her rights of internal review and appeal in accordance with these Regulations, including the time within which such rights may be exercised.

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?

Internal review by the public authority:

- Article 11(1) of the AIE Regulations provides that “[w]here the applicant’s request has been refused under article 7, in whole or in part, *the applicant* may, not later than *one month* following receipt of the decision of the public authority concerned, request the *public authority to review the decision*, in whole or in part.” (Emphasis added)

Appeal to the Commissioner for Environmental Information (the Commissioner):

- Article 12(3) of the AIE Regulations provides that the *applicant*, or a *person other than the applicant, including a third party, who would be incriminated by the disclosure* of the environmental information concerned, may appeal to the Commissioner against the decision of a public authority. (Emphasis added)
- Article 12(4)(a) of the AIE Regulations provides that an appeal to the *Commissioner* must be initiated not later than *one month* after the internal review decision has been received by, or was required to be notified to, the applicant. (Emphasis added)

- Article 12(4)(b) of the AIE Regulations provides that the Commissioner may, where satisfied that it is reasonable in the circumstances of a particular case, extend the time for initiating an appeal to him or her.
- 43% of decisions made by the Commissioner in 2017 considered whether the information requested was “environmental information” or whether the body that received the request was a “public authority”. (Commissioner for Environmental Information, [Annual Report 2017](#), available at: www.ocei.ie)
- In 34% of decisions made by the Commissioner in 2017 a central issue of the appeal was whether information was held by or for the public authority. (Commissioner for Environmental Information, [Annual Report 2017](#))
- 23% of decisions made by the Commissioner in 2017 considered the use of the exceptions to disclosure in the AIE Regulations. (Commissioner for Environmental Information, [Annual Report 2017](#))

Appeal to the High Court:

- Article 13(2) of the AIE Regulations provides that a party to an appeal to the Commissioner, or any other person affected by the decision of the Commissioner, may appeal to the *High Court* on a point of law from the decision not later than *two months* after notice of the decision was given to the party to the appeal or other person affected. (Emphasis added)
- In 2017, the courts delivered two judgments arising from appeals of the Commissioner’s decisions: [Minch v Commissioner for Environmental Information & Anor \[2017\] IECA 223](#) and [Redmond & anor v Commissioner for Environmental Information & anor \[2017\] IEHC 827](#) (which is under appeal to the Court of Appeal) (available at www.courts.ie). Both those appeals concerned whether the information was environmental information within the meaning of the AIE Regulations. (For more information see the case summaries in Commissioner for Environmental Information, [Annual Report 2017](#)).

Judicial Review to the High Court:

- A person may bring a judicial review directly to the High Court against a public authority’s decision.

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

- The Office of Commissioner for Environmental Information (the Office) was established by article 12(1) of the AIE Regulations. Article 12(1) of the AIE Regulations provides that the holder of the Office shall be known as the Commissioner for Environmental Information and “shall be independent in the performance of his or her functions”.
- The values of the Office are: independence, customer focus, fairness, empathy, and innovation (for more information see the Office’s [Strategy Statement 2016-2018](#) and [2018 Corporate Governance Framework Review](#) available at: www.ocei.ie).

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

Appeal to the Commissioner for Environmental Information:

- Under article 15(3) of the Regulations, a fee of €50 must be charged for making an appeal to the Commissioner unless the person concerned qualifies for a reduced fee of €15.
- Under article 15(4) a reduced fee of €15 applies where the person making an appeal is:
 - a medical card holder,
 - a dependant of the medical card holder, or
 - a person other than the applicant, including a third party, who would be incriminated by the disclosure of the environmental information concerned.

- Where the original decision of the public authority was untimely (article 10(7) of the AIE Regulations refers), the Commissioner may waive all or part of the appeal fee (article 15(6) of the AIE Regulations refers).

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.

Internal review by the public authority:

- Article 11(3) provides that a public authority must notify the applicant of its internal review decision within *one month* from when it received the request for the internal review.

Appeal to the Commissioner for Environmental Information:

- The average number of days taken for a case to be closed was 262 days in 2017. (Commissioner for Environmental Information, [Annual Report 2017](#))

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?

Commissioner for Environmental Information:

- All decisions of the Commissioner are published in the Office's website at www.ocei.ie. The Commissioner's decisions are final and binding on the affected parties, unless a further appeal is made to the High Court on a point of law.
- Article 12(5) of the AIE Regulations provides that where the Commissioner receives an appeal he or she shall review the decision of the public authority; affirm, vary or annul the decision, specifying the reasons for his or her decisions; and where appropriate, require the public authority to make available environmental information to the applicant.
- Article 15(7) of the AIE Regulations provides that a public authority shall comply with a decision of the Commissioner within three weeks of the date it received the decision.
- Article 15(8) of the AIE Regulations provides that where a public authority fails to comply with a decision of the Commissioner within the three week period set down in article 15(7), the Commissioner may apply to the High Court for an order directing the public authority to comply with his or her decision, and on the hearing of such application, the High Court may grant such relief accordingly.

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?

- Nothing is provided for in the AIE Regulations.

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 the Office does not 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.

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

- In general no, however, the Commissioner has on occasion found that a request was manifestly unreasonable pursuant to article 9(2)(a) of the AIE Regulations which has come close to representing a misuse of the right to access to environmental information under article 6 of the AIE Regulations. All decisions of the Commissioner are available at www.ocei.ie.

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?

- Given the independence of the Commissioner and the Office, it would not be appropriate for the Commissioner or the Office to comment on this matter.

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?

- Nothing is provided for in the AIE Regulations.

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.

- The Court of Appeal delivered its judgment in [Minch -v- Commissioner for Environmental Information & Anor](#) [2017] IECA 223 on 28 July 2017 (Minch) (available at www.courts.ie). The Court, in considering whether a report entitled ‘Analysis of options for potential State intervention in the roll out of next-generation broadband’ (the Report) constitutes a measure affecting or likely to affect the elements of the environment, stated that the “the reference to “likely to affect” the environment should really be understood in the sense of being “capable” of affecting the environment.” The Court found that the Commissioner had not erred in his findings that the Report in itself was not environmental information within the meaning of article 3(1)(c) of the AIE Regulations. However, the Court went on to find that the National Broadband Plan (NBP) was a plan that was likely to affect the environment within the meaning of article 3(1)(c) of the AIE Regulations. On the assumption the Report was used within the framework of the NBP, the Court affirmed the High Court’s finding that the Report constituted environmental information “on” economic analyses or assumptions used within the framework of a measure affecting or likely to affect the environment.
- The Supreme Court delivered its judgment in [National Asset Management Agency -v- the Commissioner for Environmental Information](#) [2015] IESC 51 on 23 June 2015 (available at www.courts.ie). The Court found that National Asset Management Agency (NAMA) is a public authority for the purposes of the AIE Regulations, but for different reasons than those relied upon by the Commissioner in reaching the same conclusion. The Court found that NAMA qualified as a public authority under the second category of the public authority definition, as a legal person performing public administrative functions. In determining that NAMA was captured by the public authority definition, the Court had the benefit of the judgment of the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which had not been available to the Commissioner at the time of her decision. In light of the *Fish Legal* judgment, the Supreme Court was satisfied that NAMA is a public authority exercising public administrative functions on the basis that, although it is obliged to act commercially, it is vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law. The Court also endorsed a purposive approach to interpreting the AIE Regulations. Judge O’Donnell explained that, in interpreting the Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The Regulations must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further, but not fall short of, the terms of the Directive. In interpreting the AIE Regulations, therefore, it is necessary to consider exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.