

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 incases

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

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

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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?
 - a. Law on Environmental Protection (Official Gazette of the Republic of Serbia, No.135/04, 36/09, 36/09, 72/09, 43/2011 and 14/2016) specifies in Article 78 that the access to environmental information is regulated by the Law on Free Access to Information of Public Importance.
 - b. Law on Free Access to Information of Public Importance (Official Gazette of the Republic of Serbia, No. 120/04, 54/07, 104/09 and 36/10) specifies in Article 16 paragraph 2 that “If the request regards information, which is presumed to be of relevance to the protection of a person’s life or freedom, i.e. to the protection of public health and the environment, the public authority must inform the applicant it holds such information, allow insight in the document containing the requested information i.e. issue a copy of the document to the applicant within 48 hours upon receipt of the request.”
 - c. In the event a public authority refuses to inform the applicant, either entirely or partially, whether it holds the sought information, to allow the applicant insight in the document containing the requested information, to issue i.e. send to the applicant a copy of the document, it shall be obliged to issue, without delay, and within 15 days of receipt of the request at the latest, *a decision on the rejection of the request and give a written explanation of such a decision*, and to notify the applicant in the decision of the legal means at his/her disposal to appeal such a decision.(Law on Free Access to Information of Public Importance, Art. 16, paragraph 11).
 - d. Law on General Administrative Procedure (Official Gazette of the Republic of Serbia, No.18/2016) specifies within Article 141 that the written decision of a public authority responsible for making first-instance decisions must contain the notice of legal remedy.
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?
 - a. A request for free access to information of public importance is submitted to a public authority possessing environmental information. In the event a first-instance authority does not reply to a submitted request or refuses to inform the applicant, the party may lodge a complaint with the Commissioner for Information of Public Importance and Personal Data Protection (hereinafter referred to as : the Commissioner).
 - b. Article 22 of the Law on Free Access to Information of Public Importance specifies that an applicant may lodge a complaint with the Commissioner if:
 - i. A public authority rejects or denies an applicant’s request, within 15 days upon receipt of the relevant decision or other document;
 - ii. In contravention of paragraph 2 of Article 16 of this Law, the public authority failed to reply to a submitted request within the prescribed deadline;
 - iii. A complaint cannot be lodged against the decision of the National Assembly, the President of the Republic, Government of the Republic of Serbia, the Supreme Court of Cassation of Serbia, the Constitutional Court

and the Republic Public Prosecutor. An administrative dispute complaint may be lodged against the decision, in Article 22 paragraph 2, in accordance with law, on which the court notifies Commissioner ex officio.

- iv. In the event the applicant is not satisfied with a decision of the Commissioner, he/she can initiate an administrative dispute. Moreover, if a public interest is violated, then the Republic Public Prosecutor may initiate a dispute.
 - v. Analyzing appeals submitted to the Commissioner's Office, the vast majority concerns inquiries on the budget allocations to local authorities for environmental protection, and very few ones are related to environmental issues. In 2017, 59 complaints were lodged in the field of environmental protection, which amounts to 1,68 % of the total number of complaints lodged during that year.
3. If appeal is made to an independent body mentioned above, how is the *independence and impartiality* of that body ensured?
 - a. Law on Free Access to Information of Public Importance defines Commissioner as autonomous and independent in the exercise of his/her powers (Art. 32). In the exercise of his/her powers, the Commissioner shall neither seek nor accept orders or instructions from government bodies or other persons and shall not be held liable for an opinion he/she expressed or a recommendation he/she made while performing his/her duties;; in the event of a legal proceeding initiated over an act of crime committed in the exercise of his/her functions, he/she may not be detained without the consent of the National Assembly.
 4. What *costs (fees, charges)* are connected to review before the court of law or other review bodies in these cases?
 - a. Appellate procedure before the Commissioner is free of charge as specified in the Law on Republic Administrative Taxes (Official Gazette of the Republic of Serbia, RS No.43/2003, 51/2003, 61/2005, 101/2005, 5/2009, 54/2009, 50/2011, 70/, 55/2012, 93/2012, 47/2013, 65/2013, 57/2014, 45/2015, 83/2015, 112/2015, 50/2016, 61/2017, 113/2017, 3/2018 and 50/2018) Art. 19, paragraph 1, point 6a.
 - b. Please note that there are no taxes to be paid for submitting a request or a complaint to the Commissioner's Office. However, when filing a complaint before the Administrative court of the Republic of Serbia a fee in the amount of 390 dinars (approx. 3,5 EUR) must be paid to that very institution.
 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.
 - a. The Law on Free Access to Information of Public Importance stipulates that the Commissioner shall reach a decision promptly and within 30 days from the submission of the complaint at the latest, upon giving the public authority and, if necessary the applicant, the opportunity to reply in writing. (Law on Free Access to Information of Public Importance, Art. 24). However, the average time needed to decide upon information cases almost always exceeds the above-mentioned deadline, due to a large amount of complaints submitted to the Commissioner Office, the number ranging from 3.500 to 4.000 cases per year (although not all of them are related to environmental protection). The cases of environmental protection have absolute priority in decision-making process. However, we should point out that the Law on Environmental Protection, in Art. 3, paragraph 1 point 33a has substantially narrowed the category of environmental 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?
 - a. Article 28 of the Law on Free Access to Information of Public Importance stipulates that the Commissioner's decisions shall be binding, final and enforceable. The Commissioner's decisions shall be administratively enforced by the Commissioner through enforcement means (enforcement actions or fines, as appropriate), in accordance with the Law on General Administrative Procedure. Complaints against Commissioners' enforcement acts shall not be admissible. The Government shall, upon request, assist Commissioner in the administrative enforcement of such decisions by taking actions within its sphere of competence, with recourse to direct enforcement, in order to ensure compliance with the Commissioner's decisions.
 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?

- a. Law on Free Access to Information of Public Importance (Art. 46) imposes fines between 5,000 and 50,000 dinars upon the responsible person in a public authority if it fails to disclose information or in any other way hampers the access to information.
 - b. Public Prosecutor, Administrative inspectorate and applicant can initiate such proceedings (Art. 179 and 180, Law on Misdemeanors, Official Gazette of the Republic of Serbia, No. 65/13, 13/16 and 98/16 and Art. 45, Law on Free Access to Information of Public Importance)
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?
- a. No such data
9. Do you have any experience of *misuse or abuse* of the right to environmental information and the consequences thereof?
- a. No such data
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?
- a. In our view, within the Serbian legal system the main issue is the one related to the responsibility for not acting in accordance with the Law on Free Access to Information of Public Importance, which remains open, disputable and unresolved to this day. Moreover, the mechanisms for the enforcement of the Commissioner's decisions have been blocked. There is a negative conflict of jurisdiction, i.e. all bodies (National Bank of Serbia, Misdemeanor Courts, General Courts, Public Enforcement Officers and Tax Administration) refuse to enforce the Commissioner's decisions and, as a result, there are no decisions on imposed fines.
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?
- a. We suggest that you address the Ministry of Environmental Protection of the Republic of Serbia in order to get the answers to these questions.
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. A case from February-March 2018 stands out in particular, as the matter of appeal is in fact a denied request for information regarding laboratory analysis of illegally buried waste of unknown origin and composition. This case had a wide public attention in the media, hence the Commissioner issued a decision to the Ministry of Environmental Protection to grant the access to requested information. This decision was successfully enforced.