



LEUPHANA
UNIVERSITÄT LÜNEBURG



AARHUS CONVENTION
for our environment

FINAL FINDINGS ON THE STUDY REGARDING ACCESS TO ENVIRONMENTAL INFORMATION IN GERMANY

AARHUS CONVENTION TASK FORCE ON ACCESS TO
INFORMATION
GENEVA, 16 - 17 NOVEMBER 2020

Thomas Schomerus



The socio-legal research project looks at access to information under the German Environmental Information Act (EIA).

➤ **contracting authorities:**

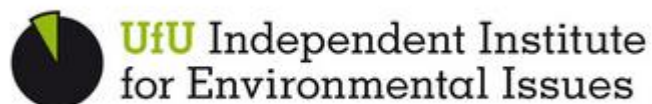
- ❖ Federal Environment Agency (UBA)
- ❖ Federal Environmental Ministry (BMU)

➤ **contractors:**

- ❖ Independent Institute for Environmental Issues (UfU)
- ❖ Free University of Berlin
- ❖ Prof. Dr. Thomas Schomerus

➤ **duration of the project:** 10/ 2016 – 5/2019

- German version to be **published** within the next weeks
- no **English version** available so far



UfU Independent Institute
for Environmental Issues



Federal Ministry for the
Environment, Nature Conservation,
Building and Nuclear Safety



The comprehensive study consists of four parts.

- The **empirical part** is based on stakeholder interviews and an online survey.
- The **legal part** provides an analysis of ACCC-findings & recommendations, EU- & national jurisdiction and legal literature.
- The **policy-transfer study** aims to draw lessons from international and sub-national (federal states) good practice examples for the promotion and implementation of open government and environmental information laws in Germany.
- The further developed **EIA-guidelines** give precise recommendations for the handling of information requests for the Federal Ministry of the Environment and the Federal Environment Agency.



In general, the EIA has proved its worth, but there are some shortcomings.

- The right of access to environmental information is still **widely unknown**.
- There are **no general efforts to record** the number of EIA-requests.
- The majority are **oral requests**.
- Only five **private bodies** acknowledged their EIA-information obligation.
- There is a **lack of judicial clarification** to determine what private bodies fall under the EIA-scope.
- Difficulties have emerged regarding **compliance with deadlines** when third parties are involved.
- **Active dissemination** of environmental information by means of websites is increasingly prevalent.
- There is a **lack of standards and guidelines** for a coordinated and comprehensive implementation of the active dissemination of information requirement.



The EIA must be further developed.

- There is **no central federal environmental information portal**.
- Applicants increasingly use the **internet** before making a request.
- The number of written requests show a slightly **rising trend**.
- Up until present, federal resources have been **sufficient**. In future, a rise of interest in environmental and climate change issues and increased awareness may lead to a **change in user behaviour**. As a result, it is likely that existing **capacities** will no longer be sufficient to meet the demand.
- Since 2005, there have been **52 administrative law cases** on the federal EIA.
- Both, applicants and bodies subject to an information obligation complained on the **lack of an EIA-advisory and arbitration body** comparable to the office of the federal ombudsperson for data protection.



The report gives clear recommendations.

➤ general recommendations for action

- ✓ increase the **use and awareness** of the UIG
- ✓ improve **organization** and practical learning
- ✓ who supports and clarifies in disputes? - plea for a **EIA representative**
- ✓ expansion of **active information**

➤ general optimization potentials for the EIA

- ✓ linking environmental information to **Sustainable Development Goals** (SDGs)
- ✓ further development of **transparency culture** towards open government



Annex 1:

Do COVID19-data fall under the term “environmental information” according to Art. 2 (3) AC?

➤ **The Higher Administrative Court for Lower Saxony said “no”:**

1. **Indoor air does not constitute "air"** within the meaning of Section 2 (3) No. 1 UIG /Art. 2 No. 1 lit. a EU-Dir. 4/2003) and therefore no environmental component of environmental information law.
2. The **environmental relevance** of a measure within the meaning of Article 2 (3) No. 3 b UIG must reach a certain intensity, a simple "casual" touch of environmental goods is not sufficient.
3. The term environmental information on emissions within the meaning of Article 2 (3) No. 2 UIG is to be understood exclusively as information about which substances in what quantity leaves a plant and is released into the environment. This does **not include information on processes within an installation.**

➤ **The lower instance, the Administrative Court Hannover said “yes”:**

1. The decrees which the Ministry of Justice issues on dealing with the **Corona pandemic fall under the term environmental information** within the meaning of Article 2 (3) UIG.
2. The **public interest in a discourse** can justify access to information.





Annex 2:

According to the Aarhus Convention Compliance Committee, data on the COVID-19 pandemic can fall under the term “environmental information”.

➤ **Statement on the application of the Aarhus Convention during the COVID-19 pandemic and the economic recovery phase, 2 September 2020:**

12. While the obligation to collect and disseminate environmental information, as set out in article 5, applies with equal force during the COVID-19 pandemic and in the subsequent economic recovery phase, the Committee reminds the Parties that **such information includes information concerning the pandemic itself when amounting to environmental information** within the meaning of article 2(3) of the Convention.



Annex 3: In a “Stuttgart 21” case regarding a preliminary ruling before the EU Court of Justice, Advocate General Hogan gave his opinion on the interpretation of the exception clause “internal communication” (case C-619/19).

➤ The German Federal Administrative Court asked:

(1) Is point (e) of the first subparagraph of Article 4(1) of [Directive 2003/4] to be interpreted as meaning that the term “**internal communications**” **covers all communications which do not leave the internal sphere of an authority** which is required to provide information?

(2) Is the **temporal scope** of the protection of “internal communications” under point (e) of the first subparagraph of Article 4(1) of [Directive 2003/4] **unlimited**?

(3) If Question 2 is answered in the negative: Does the protection of “internal communications” under point (e) of the first subparagraph of Article 4(1) of [Directive 2003/4] **apply only until the authority required to provide information has taken a decision** or completed any other administrative process?’

➤ The Advocate General answered:

(1) Article 4(1)(e) of Directive 2003/4/EC ...must be interpreted as meaning that the term ‘internal communications’ **covers any document intended to be addressed to someone**, regardless of its content, and which has not yet left the sphere of a public *authority* ... on the date on which the competent authority has to take a decision on the request which has been made to it.

(2) The **temporal scope** of the exception provided for in Article 4(1)(e) of Directive 2003/4 **is unlimited**. The time elapsed may, however, constitute an **element which indicates that the internal communication requested must be disclosed** and must therefore be included in the balancing exercise imposed by Article 4(1)(e) and the second subparagraph of Article 4(2) of Directive 2003/4.



Thank you for your attention!

Leuphana University Lüneburg

Prof. Dr. iur. Thomas Schomerus

Judge, Higher Administration Court, Lower Saxony

Universitätsallee 1

21335 Lüneburg

Germany

0049-4131.677-1344

schomerus@leuphana.de

» <http://www.leuphana.de/professuren/energie-und-umweltrecht.html>



https://de.wikipedia.org/wiki/Thomas_Schomerus