

Getting access to environmental information

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Environmental information: What's the point in distinguishing it?

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1. There is a strong international treaty guaranteeing access to environmental info – the Aarhus Convention.
2. This means that:
 - Access to environmental info is often better than to other types of info
 - Similar standards apply across borders, making cross-boundary requests easier
 - There is an international appeals mechanism available

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The Aarhus Convention: what is it?

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- Officially the 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters'
- Treaty signed in 1998 in Aarhus (Denmark) in the framework of UNECE
- Three pillars. Access to environmental info guaranteed in Article 4.
- 47 parties – 46 states + EU



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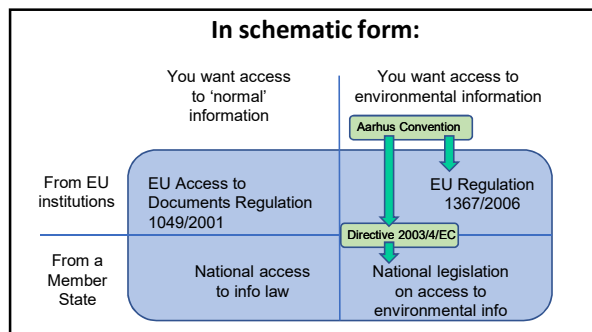
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EU Implementation of the Aarhus Convention⁴

- EU issued a Directive (2003/4/EC) on public access to environmental info, requiring MS to bring their FOI legislation in line with Aarhus
- Different approaches in MS:
 1. upgrades to the main FOI Act
 2. adoption of a separate "E-FOIA" (e.g. UK Environmental Information Regulations 2004)
 3. incorporation of access to info provisions into existing environmental laws
- As regards access to info held by the EU itself, the EU adopted an "E-FOIA", Regulation 1367/2006 (modifying its main "FOIA", Reg. 1049/2001).

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What is 'environmental information'?

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Article 2(1) of the EU Directive (2003/4/EC):

"information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment [...];
- (b) factors [...] affecting or likely to affect the elements of the environment [...];
- (c) measures [...] and activities affecting or likely to affect the elements and factors referred to in (a) and (b) [...];
- (d) reports on the implementation of environmental legislation;
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) [...]."

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Examples of environmental info ⁷

- The contracts for rent of lands of the State Forestry Fund (Moldova ACCC/C/2008/30; ECE/MP.PP/C.1/2009/6/Add.3, 8 February 2011)
- Views of a countryside protection authority on planning approval for new motorway. *"The Community legislature intended to make the concept of 'information relating to the environment' a broad one."* (Judgment of 17 June 1998, Mecklenburg, Case C-321/96)
- Studies relied on by a public authority when setting the maximum permitted residue level for a pesticide on lettuce. (Judgment of 16 December 2010, Stichting Natuur en Milieu and Others (C-266/09)).

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Who must disclose environmental info? ⁸

More bodies than are typically covered by a 'normal' FOI Act. See Article 2(2) of the EU Directive (2003/4/EC):

- a) government or other public administration [...] at national, regional or local level;
- b) **any natural or legal person performing public administrative functions** [...]
- c) **any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment** under the control of a body or person falling within (a) or (b).

(but MS may except bodies/institutions when acting in a judicial or legislative capacity).

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Examples of covered bodies ⁹

- Water companies that have special powers (e.g. imposing hosepipe ban) or lack genuine autonomy vis-à-vis the State (Judgment of 19 December 2013, Fish Legal and Shirley (C-279/12))
- National atomic companies (Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005)
- Municipalities, also when acting as private landowners (Denmark ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, 29 April 2008)
- In the EU context, all institutions, bodies, offices and agencies (see Art. 15(3) TFEU)

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Who may request environmental information? ¹⁰

"Any natural or legal person." See Article 2(2) of the EU Directive (2003/4/EC).

Compare with Regulation 1049/2001: "Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State"

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Processing of the request ¹¹

Environmental info must be disclosed

- As soon as possible or, at the latest, within one month. This can be extended to two months based on the volume and the complexity of the request. See Article 3(2) of the EU Directive (2003/4/EC).
- in the specific form or format requested, unless it is already publicly available in another form or format, or it is reasonable.

"by failing to ensure that the public authority provided the environmental information in the form requested (in the form of a CD-ROM at a cost of €13, instead of paper copies of the documentation of 600 pages at a cost of €2.05 /page), Spain failed to comply" (Spain ACCC/C/2008/24, 30 September 2010.)

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Grounds for refusal ¹²

- Grounds for refusal are similar as found in most FOIAs.

BUT:

- "In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal." See Art. 4(2) of the EU Directive. **I.e. no absolute exceptions, and case-by-case assessment.**
- **When the information relates to emissions into the environment, five exceptions cannot be invoked:** (1) confidentiality of the proceedings of public authorities; (2) confidentiality of commercial or industrial information; (3) personal data; (4) interests of a person who supplied information voluntarily; (5) protection of the environment.

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Example of 'emissions into environment' rule¹³

Judgment of 7 March 2019
Cases T-716/14 and T-329/17 (*Tweeddale and Hautala v. EFSA*)

- 2015: International Agency for Research on Cancer concludes glyphosate is 'probably carcinogenic to humans', EFSA peer review disagrees.
- Request for 12 'most crucial' studies underlying EFSA's conclusion partly rejected due to commercial interests of study owners.
- Court:
 - Information 'relating to emissions into the environment' includes information on possible consequences of emissions
 - studies on toxicity under unfavourable but realistic conditions must be disclosed.

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Ongoing 'emissions into environment' case¹⁴

Greenpeace Belgium v. Federal Food Security Agency

Is information on locations and numbers of cattle held in farms information that 'relates to emissions into the environment'?

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Summing up & tip

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- Access to environmental information is often wider: more bodies are covered, exceptions are narrower
- "Environmental information" is defined broadly and includes non-obvious (e.g. information on human health impacts and impacts on cultural heritage)
- Appeal is ultimately possible to the Aarhus Compliance Committee
- Therefore, it pays to request information that may be environmental under the relevant access to environmental info law
- *But* always indicate in your request that, as far as necessary, you are also relying on the general FOIA, in case the info is deemed not environmental!

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