

Using access to environmental information rules

A photograph showing two individuals in full-body yellow protective suits and gas masks standing on a rocky bank. They are holding a large yellow banner that reads "WE HAVE THE RIGHT TO KNOW WHAT'S IN OUR WATER! GREENPEACE". The banner is held up over a river that is heavily polluted with large, white, foamy clumps of waste. In the background, there are lush green trees and some buildings, including a small, dilapidated structure on the left.

**WE HAVE THE RIGHT TO KNOW
WHAT'S IN OUR WATER!**
GREENPEACE

Daniel Simons

Senior Legal Counsel, Greenpeace International

GREENPEACE

Environmental information:

What's the point in distinguishing it?

2

1. There is a strong international treaty guaranteeing access to environmental info – the **Aarhus Convention**.
2. This means that:
 - Access to environmental info rules are largely **harmonised** across Europe
 - There is often a **wider right of access** than to other types of info, and sometimes a **better appeals mechanism**
 - There is also an **international complaints mechanism** available, the Aarhus Compliance Committee.



GREENPEACE

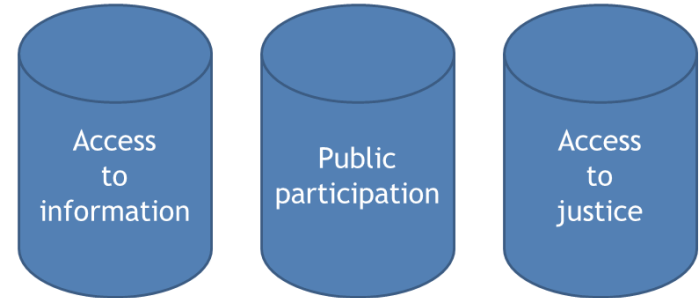
Wider access: quick overview

Examples of what the Aarhus Convention promises you:

- Access may not be limited based on citizenship, nationality or domicile
- Authorities are not allowed to demand reasons for a request
- You have the right to receive information in the form requested
- Information must be given within a month (extendable)
- Access must be free, or fees must be reasonable & published in schedule
- Limited list of exceptions – and authorities should take into account whether the information relates to emissions into the environment
 - ➔ In the EU, five exceptions are knocked out in case of emissions
- Low-cost appeals/review mechanism is guaranteed + access to Aarhus Compliance Committee

The Aarhus Convention: what is it?

- International treaty intended to promote environmental democracy
- 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':



The Aarhus Convention: where does it apply ⁵

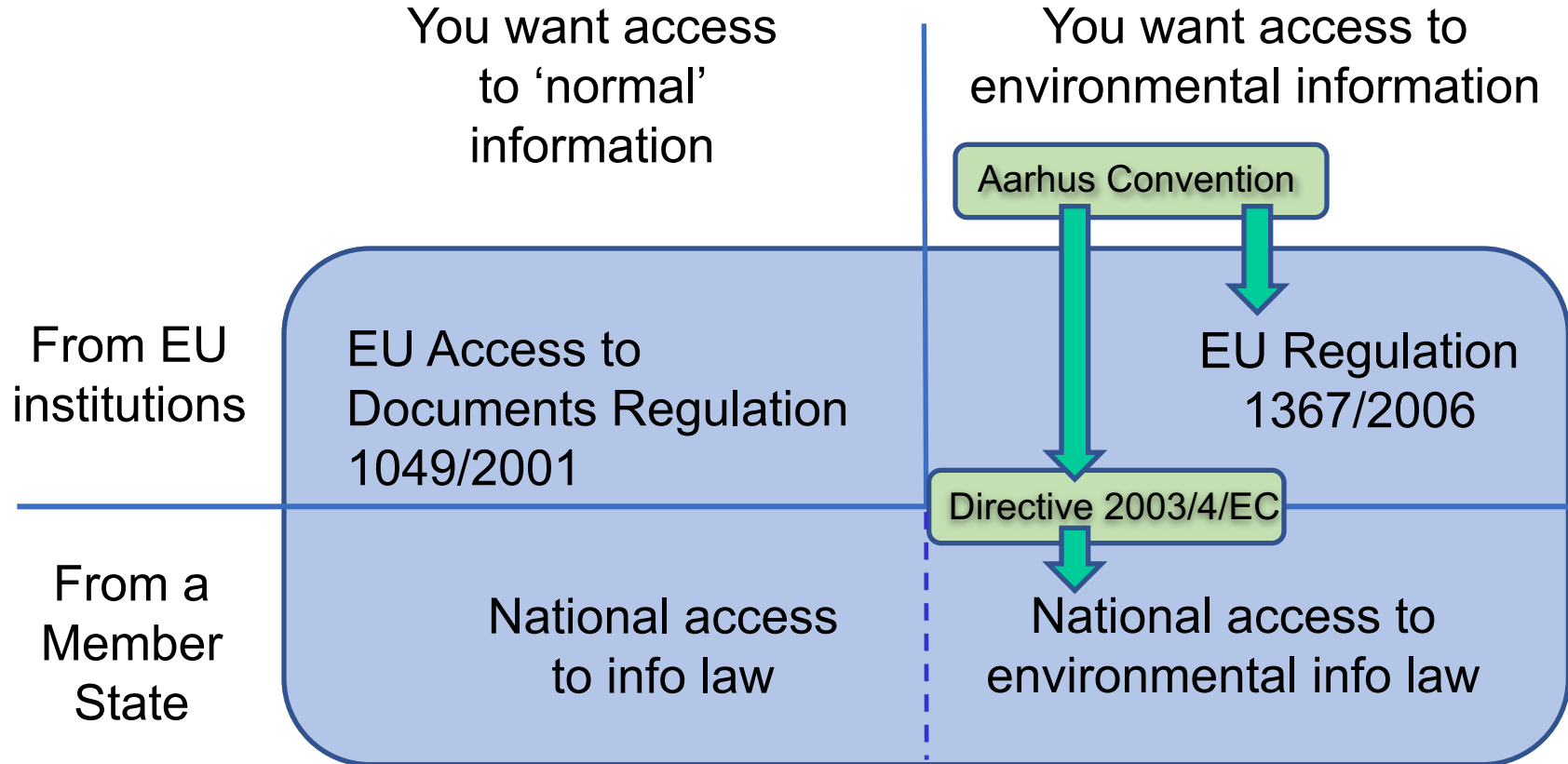
- Open to UNECE Members + countries with Consultative Status
- Currently 47 parties:
46 states + EU



Implementation of the Aarhus Convention in the EU ⁶

- EU has taken charge of ensuring member states implement Aarhus, by enacting **Directive 2003/4/EC** on public access to environmental information
- Different implementation approaches in and within MS:
 1. upgrades to the 'normal' FOI Act
 2. adoption of a separate environmental FOIA
- 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).

In schematic form:



Practical advice

If the information you want is arguably environmental information, always invoke the access to environmental information law AND the normal access law as a backup.

Example:

“The requested information constitutes environmental information, and therefore the request should be processed under the [Access to Environmental Information Regulations]. Should you take a different view, please state reasons and process the request under the [Freedom of Information Act] instead.”

What qualifies as ‘environmental information’?

Article 2(3) of the Aarhus Convention:

“(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms...

*(b) Factors ... and **activities or measures** ... affecting or likely to affect the elements of the environment within the scope of subparagraph (a) ...*

*(c) The **state of human health and safety**, 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 or ... the factors, activities or measures referred to in subparagraph (b) above”*

A few examples of environmental info

- Views of a countryside protection authority on planning approval for a new motorway in Pinneberg. *“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)
- The contracts by which the State Forestry Fund rents out land to private parties (Moldova ACCC/C/2008/30, 8 February 2011)
- 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*, Case C-266/09).
- Raw data on the state of the air and the atmosphere, even if it may be misleading (United Kingdom ACCC/C/2010/53, 11 January 2013).

Whom can you request environmental info from?¹¹

More bodies than are typically covered by a 'normal' FOI Act. See Article 2(2) of the Aarhus Convention:

- a) Government at national, regional and other level;
- b) **Natural or legal persons performing public administrative functions [...]**
- c) **Any other natural or legal person having public responsibilities or functions, or providing public services, in relation 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).

Examples of covered bodies

- Water/sewage companies that have special powers or lack genuine autonomy vis-à-vis the State (Judgment of 19 December 2013, Fish Legal and Shirley (C-279/12))
- National atomic companies and State-owned road construction companies (Kazakhstan ACCC/C/2004/1, 11 March 2005; Hungary ACCC/C/2004/4, 14 March 2005)
- Municipalities, also when acting as private landowners, e.g. culling birds (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)

Who may request environmental information?¹³

“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”

Processing of the request

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 4(2) of the Aarhus Convention.
- 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.)

Cost of processing

- Public authorities may make a “reasonable charge” for “supplying any environmental information”. See Article 4(8) of the Convention and Art. 5 of the EU Directive (2003/4/EC).
- The schedule of charges must be published.
- Charges may include postal and photocopying costs, and time spent on answering the request (at a reasonable rate), but NOT the cost of maintaining suitable databases and systems, etc. (Judgment of 6 October 2015, East Sussex County Council, Case C-71/14)

Grounds for refusal

- Information requested is not held (but duty to refer request or requester);
- Request is “manifestly unreasonable” or “too general” (but duty to assist);
- “Material in the course of completion” or “internal communications”
- Affects “the confidentiality of the proceedings of public authorities”
- International relations, public security or national defence;
- The course of justice, ability to receive a fair trial or conduct criminal / disciplinary enquiry
- Confidentiality of commercial or industrial information
- Intellectual property rights
- Personal data
- Interests of person who supplied the information voluntarily
- Protection of the environment

Grounds for refusal (2)

17

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 are knocked out in EU MS:** (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.
- Only (1) and (2) are knocked out vis-à-vis EU bodies.

Example cases on 'emissions into environment'¹⁸

- Two big EU cases about glyphosate (main ingredient of RoundUp)
- Context: International Agency for Research on Cancer found in 2015 that glyphosate is 'probably carcinogenic'
- European Food Safety Authority (EFSA) peer review disagreed



Case 1: Stichting Greenpeace Nederland and PAN Europe v Commission (T-545/11 RENV, 21 Nov 2018)

- GPNL & PAN sought access to documents from initial authorisation procedure for glyphosate (chemical composition, impurities etc.)
- Commission refused on IP & commercial confidentiality grounds. But could it?
- Commission argument: exception is knocked out only for (i) emissions from installations such as factories and power stations and (ii) only where *actual* emissions into the environment are concerned.
- Court: exception also knocked out for emissions of herbicides, but they must be “foreseeable”, not “hypothetical”
- Conclusion: emissions are not “foreseeable” yet at the time of approval of an active substance like glyphosate, only once end product is approved. No disclosure.

Case 2: Tweedale and Hautala v. EFSA

(T-716/14 and T-329/17, 7 March 2019)

20

- Request for 12 ‘most crucial’ studies underlying EFSA’s conclusion that glyphosate is not carcinogenic
- Rejected due to commercial interests of study owners. EFSA: lab tests based on doses that are different from expected real-life conditions, therefore “hypothetical”
- General Court: “EFSA cannot validly argue that the requested studies are not related to the intended uses ... their purpose ... is to determine the carcinogenic effects of exposing humans to glyphosate ... under the most unfavourable realistic conditions which could possibly occur ... they must be regarded as information which ‘relates to emissions into the environment.’”

Ongoing 'emissions into environment' case ²¹

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'?

Summing up

22

- 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!