

Access to Environmental Information

- A presentation of the recent CJEU case law

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by

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Access to environmental information legal sources

Art. 4 Aarhus Convention:

„Access to Environmental Information“

Par. 1: availability on request

Par. 2: as soon as possible, within one month latest

Par. 3 and 4: grounds for refusal, exceptions

Par. 5: obligation to inform about other public authority

Par. 6: remaining information after exemption from disclosure

Par. 7: requirements for refusal of access

Par. 8: charges, reasonable amount

Access to environmental information legal sources

- Primary EU law:

Art. 11 FRC

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Access to environmental information legal sources

art. 42 FRC:

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Access to environmental information legal sources

Art. 15 TFEU:

par. 1: In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies and agencies shall conduct work as openly as possible.

par. 3: Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined with this paragraph.

Access to environmental information legal sources

Secondary EU law:

- **Regulation 1049/2001/EC of 30 May 2001 regarding public access to European Parliament, Council and Commission documents**

Environmental sector:

- **Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment**

Access to public sector information Secondary EU law

- **Directive 2003/4/EC of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, amended by Directive 2013/37/EU of 26 June 2013**
- **Regulation 1367/2006/EC of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies**

National law:

laws on environmental information transforming secondary EU law

Access to environmental information

CJEU case law (1)

Judgment of 16 December 2010 – C-266/09 – Stichting Natuur en Milieu ECLI:EU:C:2010:779

1. *Term environmental information, Art. 2 par.1*

Par. 42/43: provision aims in limitation of the risk that a **component of biological diversity will be affected** and the risk that those residues will be dispersed in soil and groundwater; although such information **does not directly involve an assessment of the consequences** of those residues for human health, **it concerns elements of the environment which may affect human health** if excess levels of those residues are present, which is precisely what that information is intended to ascertain.

-> The **term environmental information in Art. 2** of the Dir. must be interpreted as including all information ...

2. *Exceptions, balancing of interests, Art. 4 par.2*

Par. 57-59: Art. 4 requires an examination of those interests (**balancing exercise**, public interest for disclosure vs. special/private interest for refusal) **in each individual case**; national legislation can determine, by a general provision, criteria to facilitate that comparative assessment of the interests involved, but not prevent authorities from special examination of each situation in connection with a request for information

-> Art. 4 of the Dir. must be interpreted as meaning that the **balancing exercise ... must be carried out in each individual case ...**, even if national legislature determines criteria to facilitate that ... assessment ...

Access to environmental information CJEU case law (2)

**Judgment of 22 December 2010 – C-524/09 – Ville de Lyon,
ECLI:EU:C:2010:822**

Par. 3 and 5: reference to Art. 4 AC, access to environmental information, confidentiality of commercial and industrial information, and Art. 2, 3 and 4 Dir. 2003/4

Par. 41: request ... comes exclusively under the specific rules governing public reporting ... for greenhouse gas emission trading ... (and not Dir. 2003/4)

Par. 50: ... information such as the trading data requested in the main proceedings must remain confidential, with the result that **the Ville de Lyon may only claim access to information relating to transactions involving emission allowances on the same terms as for the general public**, that is ...

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CJEU case law (3)

Judgment of 28 July 2011 – C-71/10 – ECLI:EU:C:2011:525

Art. 4 par. 2 Dir. 2003/4, exceptions/refusal

The reference has been made in proceedings between the Office of Communications and the Information Commissioner concerning an application for information relating to the precise location of mobile phone base stations in the United Kingdom; refusal based on both public security Art. 4 par. 2 lit b) and intellectual property Art. 4 par. 2 lit. e).

Par. 32: Art. 4(2) must be interpreted as meaning that, where a **public authority holds environmental information** or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, **take into account cumulatively a number of the grounds for refusal set out in that provision.**

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CJEU case law (4)

Judgment of 14 February 2012 – C-204/09, Flachglas Torgau, ECLI:EU:C:2012:71

Art. 2 par.2 subpar.2 sent. 1, public authority, (no) ministries acting in legislative capacity

Par. 51: ... may be applied to ministries to the extent that they participate in the **legislative process, in particular by tabling draft laws or giving opinions**, and that option is not subject to the conditions set out in the second sentence of the second subparagraph of Art. 2 par. 2.

Par. 58: ... must be interpreted as meaning that the option given to Member States by that provision ... can no longer be exercised where **the legislative process in question has ended**.

Art. 4 par. 2 lit. a, confidentiality of proceedings of public authorities provided for by law

Par. 65: ... can be regarded as fulfilled by the existence ... in the **national law** ... of a rule which provides, generally, **that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information ... in so far as national law clearly defines the concept of “proceedings”**, which is for the national court to determine.

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CJEU case law (5)

**Judgment of 18 July 2013 – C-515/11, Deutsche Umwelthilfe,
ECLI:EU:C:2013:523**

*Art. 2 par.2 subpar.2 sent. 1, public authority, (no) ministries
acting in legislative capacity*

Specifying jurisprudence in Flachglas Torgau:

Par. 36: ... must be interpreted as meaning that ... (the provision)
... **may not be applied to ministries when they prepare and adopt
normative regulations which are lower rank than a law.**

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CJEU case law (6)

Judgment of 19 December 2013 – C-279/12, Fish Legal, ECLI:EU:C:2013:853

Art. 2 par. 2 subpar. 2, private companies as public authorities

Par. 51: Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purposes of **Art. 2(2)(a)** This first category includes all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

Par. 56: ... in order to determine whether entities ... concerned can be classified as legal persons which perform 'public administrative functions' under national law, within the meaning of **Art. 2(2)(b)** ..., it should be examined whether those **entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.**

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CJEU case law (6)

-> Fish Legal

Par. 73: ... undertakings, ..., which provide public services relating to the environment are under the control of a body or person falling within Art. 2(2)(a) or (b) ... , and should therefore be classified as 'public authorities' by virtue of Art. 2(2)(c) of that directive, if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Art. 2(2)(a) or (b) ... is in a position to exert decisive influence on their action in the environmental field.

Par. 83: ... Art. 2(2)(b) ... must be interpreted as meaning that a person falling within that provision constitutes a public authority in respect of all the environmental information which it holds. **Commercial companies, ..., which are capable of being a public authority by virtue of Art. 2(2)(c) ... only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Art. 2(2)(a) or (b) ... are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such services.**

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CJEU case law (7)

Order of 8 May 2014 – C-329/13 – ECLI:EU:2014:815

Validity of the Directive in the light of Art. 6 TEU and Art. 47 par. 2 FRC, right to fair trial, exception Art. 4 par. 2 lit. c, discretion of MS

Par. 33: By referring to the ability of any person to benefit from the right to receive a fair trial, point (c) of the first subparagraph of Article 4(2) of Directive 2003/4 authorises Member States to provide for an exception to the obligation to disclose environmental information in order, specifically, to allow them, if the circumstances so require, to respect the right to a fair trial laid down in the second paragraph of Article 47 of the Charter.

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CJEU case law (8)

Judgment of 16 July 2015 – C-612/13P, Client Earth, ECLI:EU:C:2015:486

Reg. 1049/2001, access to COM information, compatibility of exceptions in Art. 4 par. 2 – protection of investigations - with AC

Par. 42 f.: ... neither the reference, in Article 4(4)(c) of the Aarhus Convention, to enquiries ‘of a criminal or disciplinary nature’, **nor the obligation**, laid down in the second paragraph of Article 4(4) of that convention, **to interpret in a restrictive way the grounds for refusal** of access mentioned in Article 4(4)(c), **can be understood as imposing a precise obligation on the EU legislature**. A fortiori, **a prohibition on giving to the concept of ‘enquiry’ [enquête] a meaning which takes account of the specific features of the Union**, and in particular the task incumbent on the Commission to investigate [enquêter] any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties, **cannot be inferred from those provisions**.

It follows from the foregoing considerations that the **General Court was correct to rule out the possibility of relying on Article 4(1) and (4) of the Aarhus Convention in order to assess the legality of the third indent of Article 4(2) of Regulation No 1049/2001**. Accordingly, the General Court did not err in law in rejecting ClientEarth’s arguments that that provision was incompatible with the Aarhus Convention.

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CJEU case law (9)

Judgment of 6 October 2015 – C-71/14 – East Sussex County Council, ECLI:EU:2015:656

Art. 5 par 1 and 2, charges and costs

Art. 6 access to justice

Par. 45: ... Art. 5(2) ... must be interpreted as meaning that **the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database, ..., used for that purpose by the public authority, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount.**

Par. 61: ... Art. 6 ... must be interpreted as not precluding national legislation under which the reasonableness of a charge for supplying a particular type of environmental information **is the subject only of limited administrative and judicial review** as provided for in English law, **provided that the review is carried out on the basis of objective elements and, in accordance with the principles of equivalence and effectiveness, relates to the question whether the public authority making the charge has complied with the conditions in Article 5(2) of that directive,** which is for the referring tribunal to ascertain.

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CJEU case law (10)

Judgment of 23 November 2016 – C-442/14 – ECL:EU:2016:890

Art. 4 par. 2 lit. d, exceptions, confidentiality of commercial

Par. 49: Art. 4(2) ... must be interpreted as meaning that the fact that **the applicant** for authorisation to place a plant protection product or biocide on the market, **did not, during the procedure for obtaining that authorisation, request that information submitted under that procedure be treated as confidential** on the basis of Article 14 of Directive 91/414, Article 19 of Directive 98/8 or Article 33(4) and Article 63 of Regulation No 1107/2009 **does not preclude the competent authority**, which has received, following the closure of that procedure, a request for access to the information submitted on the basis of Directive 2003/4 by a third party, **from examining the applicant's objection to that request for access and refusing it**, if necessary, pursuant to point (d) of the first subparagraph of Art. 4(2) ... on the ground that the disclosure of that information would adversely affect the confidentiality of commercial or industrial information.

Par. 103: Art. 4(2) second subpar. must be interpreted as follows

- **'emissions into the environment' ... covers the release into the environment of products or substances such as plant protection products or biocides ..., to the extent that that release is actual or foreseeable under normal or realistic conditions of use;**

Access to environmental information

CJEU case law (10)

-> Judgment of 23 November 2016 – C-442/14 – ECL:EU:2016:890

– ‘information on emissions into the environment’ ... covers information concerning the nature, composition, quantity, date and place of the ‘emissions into the environment’ of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance’s drift during that application, whether the data come from studies performed entirely or in part in the field, or from laboratory or translocation studies.

Par. 106: Art. 4(2) subpar. 2 must be interpreted as meaning, in the event of a request for access to information on emissions into the environment whose disclosure would adversely affect one of the interests referred to in points (a), (d) and (f) to (h) of the first subparagraph of Article 4(2) of that directive, that only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate those data from the other information contained in that source, which is for the referring court to assess.

Access to environmental information case study: facts

The German National Railroad Project

Facts:

The railway project “Traffic Project German Reunification no. 8” for a high speed train connection from Berlin to Munich was established by federal law. The realization of each section of the project is based on separate plan approval orders from the relevant public authorities.

The German national railway system is owned by a private limited stock company with a majority held by the State. Federal Constitution requires a system under final control of state institutions. The railway itself (trains, personnel), the maintenance and building of tracks, of facilities like station buildings etc. are operated each by separate subsidiary (private) companies.

A city geographically located next to the railway track is affected by the project. To increase the train capacity of the track, the project foresees to transfer the local train traffic from the main track to a newly erected track which will go through city territory.

Access to environmental information case study: facts

The city decided to challenge the mentioned section of the project before the courts with the aim to remain the local train traffic on the main track and avoid the new track in the city. To gather necessary information for the lawsuit the city approached the private limited company in charge of track construction (Construction Company, CC) to give access to information by inspection of documents in files. The documents were supposed to contain financially relevant information e.g. on costs for the new track in both alternatives for local train traffic, evaluation of train capacity on the tracks in both alternatives, general information on costs for track construction and prices for real estates needed for the construction of the new track.

The CC refused access to the documents. It replied that there is no such obligation for private companies and a municipality as a public entity – such as the city - is not eligible for requesting information. The requested documents would contain only financial but not environmental information. Access to such information would also establish a violation of the confidentiality of commercial information.

Access to environmental information case study: questions

Questions:

1. Is the CC obliged to provide for information under direct application of Directive 2003/4/EC? Is it a “public authority” in the sense of art. 2 par. 2 of the Directive?
2. Has the municipality the right to request for access to information? Is it part of “the public” in the sense of everyman?
3. Is the requested information “environmental information” in the sense of art. 2 par. 1 of the Directive?
4. Can the CC refer to the exception of the confidentiality of commercial information/secretcy of business information under art. 4 par. 2 lit. d of the Directive?
5. Is there a different assessment under application of the relevant national law?

Is your request for
environmental information
satisfied?

Thank you for your attention!

Access to environmental information case study: national decision

Bundesverwaltungsgericht, judgment of 23 February 2017 – BVerwG 7 C 31.15 -

1. Is the CC obliged to provide for information under direct application of Directive 2003/4/EC? Is it a “public authority” in the sense of art. 2 par. 2 of the Directive?

par. 40 ff.: art. 2 par. 2 lit. c: any natural or legal person having public responsibilities or functions or providing public service -> all market related activities in public interest, art. 14 and 106 par. 2 TFEU; operation and maintenance of national railway system is for public welfare; no referral to fundamental right of informational self determination for (private) legal persons, even when performing activities for public welfare, construction of railway tracks affects environmental factors in the sense of art. 2 par. 1; CC is under control of governmental bodies

2. Has the municipality the right to request for access to information? Is it part of “the public” in the sense of everyman?

par. 35 ff.: art. 3 par. 1: availability of EI by public authorities; art. 2 par. 5 + 6; rec. 1: to applicant and public => everyman right
Same for municipalities as long as they have the same interest in information as a private person, recognized by CJEU, judgment of 22. Dec. 2010 – C-524/09 – Ville de Lyon, par. 50; also in case of performance of environmental tasks = right to self administration, rural planning; possible influence in self administration matter sufficient

Access to environmental information

case study: national decision

3. Is the requested information “environmental information” in the sense of art. 2 par. 1 of the Directive?

par. 53 ff.: art. 2 par. 1 lit. c -> plan for track construction affects elements or factors of the environment, wide understanding of “measures”, and of “information” in the sense of all single data, must not be related to a concrete planning and not restricted to realized measures, also information on alternative planning aspects at an early stage

4. Can the CC refer to the exception of the confidentiality of commercial information/secretcy of business information under art. 4 par. 2 lit. d of the Directive?

par. 62 ff.: exclusive technical or commercial knowledge, legitimate interest for not distributing, scale from competition law, under full control of the court (not only under the interest of the owner of the information)

par. 88 ff.: referral is also possible for private legal persons with public majority performing tasks in the public interest, not limited to natural or legal persons eligible for fundamenal rights or in an immediate competition situation