

# Challenging decisions on access to environmental information



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# Requesting access to environmental information

We will cover:

- Applicable legal provisions: EU and Member State levels
- In what form is access granted?
- What is environmental information?
- Why request environmental information?
- How to submit a request
- Request is denied – what next?



# Legal provisions

- Aarhus Convention
  - Signed and ratified by all EU Member States plus EU itself
- EU institutions and bodies: Article 10 TEU and Article 15 TFEU, Regulation 1049/2001 on access to documents (the “Transparency Regulation”), in conjunction with Regulation 1367/2006 (the “Aarhus Regulation”)
- Member States: Directive 2003/4 on access to environmental information



# Access how?

1. Access upon request by any natural or legal person to a “public authority” (defined according to the function performed/who it is controlled by, rather than legal status). *Article 2(2) AC, Article 2(2) AD; Case C-279/12 Fish Legal*
2. Access through active dissemination (obligation to “progressively” make environmental information directly available to the public) *Article 5 AC, Article 4 AD, Article 4 AR*



Today we focus on 1.

# What is environmental information?

- Wide definition *Article 2(3) AC; Article 2(1)(d) AR, Article 2(1) AD*
- Information in any form (written visual, aural, electronic, etc)
- On the state of the elements of the environment
- Factors affecting or likely to affect the elements of the environment
- Measures affecting or likely to affect such elements and factors
- Reports on the implementation of env legislation
- Economic analyses used in the framework of measures;
- State of human health and safety, conditions of human life.





# Information on emissions into the environment

- Stronger access rights to info on emissions
- Wide definition: Information on emissions from substances that are intended to be released into the environment in the course of normal use
- Not limited to actual emissions – also emissions that are foreseeable under normal or realistic conditions of use
- Includes info concerning the nature, composition, quantity, date and place of the emissions, plus data concerning medium to long-term consequences of those emissions on the environment and human health

- Case C-442/14 Bayer CropScience, Case T-329/17 Hautala and other v EFSA



# Why request access to env info?

- To maximise participation in decision-making processes;
- To hold officials/elected representatives to account;
- To know if a specific piece of information exists (and official confirmation if it does not exist);
- To demonstrate that public authorities/officials are not carrying out their duties correctly and exert pressure;



# Why request access to env info?

- Broader impact of requesting access to env info:
  - To gradually change the attitude/behaviour of public authorities/officials to transparency, i.e. to make it “normal”;
  - To create good precedent for wider civil society to rely on;
  - To push for more active dissemination of environmental Information.





# Making a request for environmental information: the initial request

- **Member States– Directive 2003/4:**
  - An official request referring to relevant provisions of Directive 2003/4 (Articles 3 and 4)
  - Sufficiently precise (public authority has duty to ask for clarification)
  - No need to give a reason to justify the request
  - May ask for information to be made available in specific format
  - Must be made available as soon as possible and within one month
  - Possibility to extend the deadline by a further month in exceptional cases (very complex documents or large number of documents)
  - Possibility to charge “a reasonable amount” for supplying information

C-71/14, East Sussex County Council



# Making a request for environmental information: the initial request

- EU level – Regulation 1049/2001:
- In any written form
- Sufficiently precise (institution has duty to ask for clarification)
- No obligation to state reasons For very long document or a very large number of documents: possibility to confer informally to reach a fair solution (does not allow for postponement of deadlines)
- Deadline for initial reply: 15 working days, can be extended by further fifteen working days in “exceptional cases”



# I. Where to turn with your complaint?

On EU level:

1. Confirmatory application to authority that refused the request
2. Options:
  - a) Judicial challenge to the EU General Court or
  - b) Complaint to the EU Ombudsman (not legally binding on the institutions)



## II. Where to turn with your complaint?

On MS level:

- Must be appeal to two instances (usually administrative appeal + (quasi-)judicial avenue)
- Administrative appeal must be free or at least inexpensive
- Final instance requirements (usually a court):
  - Binding decisions
  - Impartial and independent
  - Provide effective remedies
- Refusal Decision needs to inform you of your avenues to appeal – inquire with authority if not!



# III. Where to turn with your complaint?

## MS examples:

- GER: *Widerspruch* to higher instance authority -> possible submission to Administrative Court
- BE: Appeal to Federal Appeal Committee for Environmental Information -> possible submission to *Conseil d'Etat*
- UK: Review by administrative authority -> possible appeal to Information Commissioner (similar in IRE but CEI)
- FR: Appeal to CADA (*Commission d'accès aux documents administratifs*)-> appeal to Court (can apply for interim measures to court directly)



# Part 2: How to challenge a refusal to disclose information

**CONFIDENTIAL**





# The exceptions from disclosure

- Article 4 of Regulation 1049/2001 + Article 6 Regulation 1367/2006 list exemptions from disclosure for EU institutions = closed list
- Largely the same for MS under Article 4 Directive 2003/04
- CJEU has established that the same case law applies for request to MS and to EU authorities (*T-329/17 Hautala and Others v EFSA*, paras 102-105)



# Main grounds to challenge refusals

1. Lack of reply;
2. Mischaracterization of the scope of the request;
3. Failure to identify environmental information;
4. Failure to consider partial disclosure (Art 4(6)) Reg 1049/2001; Art 4(4) Dir 2003/4);
5. Failure to rely on an exception / give reasons (Article 296 TFEU);
6. Errors in law in relying on specific exceptions (Art 4(1)-(3) Reg 1049/2001; Art 4(1)-(2) Dir 2003/4);
7. Weigh public interest in disclosure (Art 4(2)-(3) Reg 1049/2001; Art 4(2), 2<sup>nd</sup> ind, Dir 2003/4);
8. Failure to characterize information as relating to emissions into the environment (Art 6(1) Reg 1367/2006; Art 4(2), 2<sup>nd</sup> ind, Dir 2003/4).



## (5) Obligation to provide reasons

- Failure to mention any exception OR to justify its use
- Burden of proof rests with authority:
  - the institution “must, in principle, explain how access to [a] document could specifically and actually undermine the interest protected by that exception. Moreover, the risk of the interest being so undermined must be reasonably foreseeable and must not be purely hypothetical”

C-57/16 P *ClientEarth*, para. 51 – see also: C-266/05 P *Sison v Council*, para. 61



# (5) Unless: presumption of confidentiality

- Presumption of non-disclosure, shifts burden of proof
- Confirmed by the Court for:
  1. State aid file;
  2. Court submissions as long as proceedings are pending;
  3. Documents exchanged in merger proceedings;
  4. Documents relating to an infringement procedure, including during PILOT phase;
  5. Files related to a competition investigation.



# (6) Misapplication of exceptions

General obligations in applying exceptions:

1. Exceptions are to be interpreted narrowly (Art 6(1) Reg 1367/2006; Art 4(2), second ind, Dir 2003/4 + applies to all info, see e.g. C-57/16 P *ClientEarth*, para. 78)
2. In the EU: Greater need for transparency in legislative procedures
  - Article 10(3) TEU, C-57/16 P *ClientEarth*, paras 84-87



# 1<sup>st</sup> exception: International relations etc

- Protects: Public security, defence and military matters, international relations, (on EU lvl: financial, monetary, or economic policy of the EU or a MS)
- Wide discretion but must still show specific + actual effect on protected interest
- Example: trade agreement – question whether reveals strategic objectives in negotiations (*C-350/12 P Council v in 't Veld*, paras 63-64)



Contained in: Art 4(1)(a) Reg 1049/2001 & Art 4(2)(b) Dir 2003/4



## 2<sup>nd</sup> exception: Personal data

- Protects: Confidentiality of personal data / file of person that did not consent to disclosure
- Must establish that disclosure is necessary -> interests of data subject are weighed against other interests
- Example: names of external scientific experts that prepared specific advice (C-615/13 *ClientEarth v EFSA*)

Contained in: Art 4(1)(b) Reg 1049/2001 & Art 4(2)(f) Dir 2003/4



## 3<sup>rd</sup> exception: Court proceedings

- Protects:
  - EU: court proceedings / legal advice
  - MS: course of justice & fair trial guarantee + criminal/disciplinary enquiries
- Examples:
  - Opinions by EU legal service to be disclosed unless specific risk (C-39/05 P and C-52/05 P, *Sweden and Turco v Council*, paras 38-40, 44)
  - Court pleadings after judgement? (pending: C-470/19 *Friends of the Irish Environment*)



Contained in: Art 4(2), 2<sup>nd</sup> ind Reg 1049/2001 & Art 4(2)(c) Dir 2003/4

## 4<sup>th</sup> exception: Commercial/industrial info + IP

- Protects:
  - Intellectual property
  - Commercial/industrial info if provided by law + necessary to protect legitimate economic interest
    - For instance: info on commercial strategies of undertakings, sales figures, market shares, customer relations

*C-477/10 P Commission v Agrofert Holding, para. 56*

Contained in: Art 4(2), ind. 1, Reg 1049/2001 & Art 4(2)(d) Dir 2003/4



## 4<sup>th</sup> exception: Commercial/industrial info + IP

- It "is not possible to regard all information concerning a company and its business relations as requiring the protection which must be guaranteed to commercial interests" (T-437/08 *CDC Hydrogene Peroxide*, para. 44)
- "it must be shown that the documents at issue contain elements which may, if disclosed, seriously undermine the commercial interests of a legal person." (T-189/14, *Deza v ECHA*, para. 56 & T-516/11 *MasterCard*, para. 82 – question now pending before ECJ in C-175/18 & 178/18)



## 5<sup>th</sup> exception: Internal use

- Protects: information drawn up for / containing opinions for internal use, if disclosure would seriously undermine decision-making

Contained in: Art 4(3) Reg 1049/2001 & Art 4(1)(e) Dir 2003/4



## 5<sup>th</sup> exception: Internal use

- "the mere reference to a risk of negative repercussions linked to access to internal documents and the possibility that interested parties may influence the procedure do not suffice to prove that disclosure of those documents would seriously undermine the decision-making process of the institution concerned."

C-60/15 P *Saint-Gobain Glass v Commission*, para. 83





# 5<sup>th</sup> exception: Internal use

- Common argument of authorities: Needs “space to think”, disclosure would undermine credibility
- Court clarified that transparency ensures credibility, demonstrates independence and that institution acts in the general interest

C-39/05 P & C-52/05 P *Sweden and Turco v Council*, para. 59 & C-57/16 *ClientEarth v Commission*, para. 104.



## 6<sup>th</sup> exception for EU: Investigations

- Protects: Purpose of inspections, investigations, audits
- Problematic exception:
  - applies to infringement proceedings and preparations thereof (see presumptions of non-disclosure above)
  - effectively all information collected on EU law violations by Commission

Contained in: Art 4(2), 3<sup>rd</sup> ind Reg 1049/2001



## 6<sup>th</sup> exception for MS: Confidentiality of proceedings + unfinished documents

- Protects:
  - Material in the course of completion + unfinished documents/data
  - Confidentiality of proceedings, if provided by law

Contained in: Art 4(1)(d) & 4(2)(a) Dir 2003/4



# Material in the course of completion

“relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared”

ACCC/C/2010/51 (Romania) para. 85



# Confidentiality of proceedings

- “concrete events such as meetings or conferences and does not encompass all the actions of public authorities” // “operational and internal procedures of an authority” (ACCC/C/2010/51 (Romania), para. 89)
- “proceedings” does not apply to “the entire administrative procedure at the end of which those authorities hold their proceedings” (C-60/15 P, *Saint Gobain Glass Deutschland v Commission*, para. 81)



## (7) Public interest in disclosure

- Authority must always weigh public interest in disclose & consider whether information relates to emissions
  - Immediate threat to public health / environment?
  - Complication on EU level: “take into account” vs “overriding”
- (Art. 4(2)-(3) Reg 1049/2001 + Art 6(1) Reg 1367/2006 + Art 4(4), last sent., Aarhus Convention & Art 4(2), second ind., Dir 2003/4)



## (8) Information on emissions

- Some exceptions do not apply to information on emissions into the environment
- On EU level: commercial interests of a natural or legal person and intellectual property & the purpose of inspections and audits (not investigations)
- On MS level: confidentiality of proceedings, commercial or industrial information (but not intellectual property), personal data, voluntarily supplied information, environmental protection

Art 6(1) Reg 1367/2006 & Art. 4(2), second ind., Dir 2003/4



# Thank you!

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\* Guide on access to justice in environmental matters at EU level:

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