

Public Information and Participation Requirements

Aarhus Convention
Passive information requirements,
exceptions to the rule

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Public authorities to make information available upon request

- ✓ No interest to be stated
- ✓ In form requested (with two exceptions)

Time limits for public authorities to respond and supply the requested information

- ✓ As soon as possible
- ✓ General time limit, at the latest one month
- ✓ If voluminous and complex, possible extension, giving reasons, to two months

Optional grounds for refusing disclosure

- ✓ Requested information not held by public authority
- ✓ Request "manifestly unreasonable" or "too general"
- ✓ or...

Access to information upon request/ grounds for refusing

Optional grounds for refusing disclosure if disclosure would **adversely affect** the listed interests. Such grounds to be interpreted in a restrictive way, taking into account public interest in disclosure and whether information relates to emissions into the environment:

- ✓ Proceedings of public authorities, where confidential under national law
- ✓ International relations, national defence or public security
- ✓ The course of justice
- ✓ Commercial and industrial confidentiality, where protected under National law
- ✓ Intellectual property rights
- ✓ Personal data, where confidential under national law
- ✓ The interests of a third party which provided the information requested voluntarily
- ✓ Protection of the environment to which the information relates

Access to information upon request/ grounds for refusing

Before one of the exceptions can be applied in a particular case, the relevant public authority must make a determination that **disclosure will adversely affect the stated interest.**

Adversely affect means that the disclosure **would** have a **negative impact** on the relevant interest.

The use of the word **"would"** instead of **"may"** requires a greater degree of certainty that the request will have an adverse effect than applies in other provisions of the Convention

Access to information upon request/ grounds for refusing

Confidentiality of proceedings:

- ❑ The Convention does not define “proceedings of public authorities” but one interpretation is that these may be proceedings concerning the internal operations of a public authority and not substantive proceedings conducted by the public authority in its area of competence.
- ❑ The confidentiality must be provided for under national law. This means that public authorities may not unilaterally declare a particular proceeding confidential and stamp documents “confidential” in order to withhold them from the public.
- ❑ National law must provide the basis for the confidentiality.

International relations, national defence or public security:

- ❑ The definition of such terms should be determined by the Parties in accordance with their generally accepted meaning in international law.
- ❑ There is room for narrow interpretation.

Access to information upon request/ grounds for refusing

The course of justice:

- ❑ Active proceedings within the courts. This exception does not apply to material simply because at one time it was part of a court case. Public authorities can also refuse to release information if it would adversely affect the ability of a person to receive a fair trial. This provision should be interpreted in the context of the law pertaining to the rights of the accused.
- ❑ Public authorities also can refuse to release information if it would adversely affect the ability of a public authority to conduct a criminal or disciplinary investigation. In some countries, public prosecutors are not allowed to reveal information to the public pertaining to their cases.
- ❑ The Convention clearly does not include all investigations in this exception, but limits it to criminal or disciplinary ones only. Thus, information about a civil or administrative investigation would not necessarily be covered.

Access to information upon request/ grounds for refusing

Commercial and industrial confidentiality, where protected under:

- ❑ National law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets.
- ❑ The confidentiality must protect a “legitimate economic interest”. (Establish a process, Determine confidentiality, Determine harm).
- ❑ As an exception to the exception, the Convention holds that information concerning pollutant emissions which is relevant for the protection of the environment may not be claimed as confidential commercial information.

Access to information upon request/ grounds for refusing

Intellectual property rights:

- ❑ The primary forms of intellectual property rights are copyright, patent, trademark (including geographical indications) and trade secret.
- ❑ Sui generis forms include, inter alia, plant breeders' rights, database protection and industrial designs.
- ❑ Intellectual property laws do not, as a general matter, protect "generic" ideas and concepts, principles of nature or science.

Personal data, where confidential under national law:

- ❑ Public authorities may withhold information that will adversely affect the privacy of individuals.
- ❑ The confidentiality must be protected in national law. The individual whose personal data is in question can waive his or her right to confidentiality.
- ❑ The exception does not apply to legal persons, such as companies or organizations. It is meant to protect documents such as employee records, salary history and health records.

Access to information upon request/ grounds for refusing

The interests of a third party which provided the information requested voluntarily:

- ❑ The information in question must qualify as voluntarily supplied information.
- ❑ The person that provided it must have denied consent to have it released to the public.
- ❑ Information provided to public authorities that the public authority has not specifically requested is not necessarily “voluntary”.

The environment to which the information relates, such as the breeding sites of rare species:

- ❑ Public authorities may refuse to release information to the public that would adversely affect the environment. This exception allows the government to protect certain sites, such as the breeding sites of rare species, from exploitation—even to the extent of keeping their location a secret.

ACCC/C/2008/30 - Republic of Moldova

Background

On 9 January 2008, Eco-TIRAS submitted a request to Moldsilva State Forestry Agency (hereinafter Moldsilva), the Moldovan agency responsible for the management of the state forestry fund pursuant to the 1997 Forestry Code, to receive copies of all contracts, valid as of 1 January 2008, for the rent of lands administered by the State Forestry Fund ...

...(a series of communications and actions followed)....

.....the communicant's requests for access to information were refused by Moldsilva on the grounds that the requested information was of very large volume or of a confidential character or, in some instances, without specifying any grounds for refusal.

The final decision of the Civil Chamber of Chisinau Court of Appeal of 23 June 2008 confirmed the failure of Moldsilva to comply with Moldovan law and respect the communicant's right to access environmental information.

Findings with regard to communication ACCC/C/2008/30 - Republic of Moldova

The **large volume** of the information to which the communicant requested access and the **confidential character attributed to this information, by a law that came into force after the submission of the request** by the communicant, are reasons for refusal of access to information that **go beyond the limits established by article 4, paragraphs 3 and 4, of the Convention**. By refusing access to the contracts, as requested by the communicant, Moldsilva did not take into account the public interest served by disclosure

The communicants request was refused twice and the two letters notifying the communicant of the refusal, **did not provide the communicant with the lawful grounds for refusal and information on access to a review procedure in line with article 9 of the Convention** (failure to comply with article 3, paragraph 2, and article 4, paragraph 7, of the Convention).

The third request of the communicant, **submitted in writing was not addressed** (failure to comply with article 4, paragraph 7)

Findings with regard to communication ACCC/C/2010/53- United Kingdom

The Committee considered whether public authorities may refuse a request for access to **raw environmental data** on the basis of an exception listed in article 4, paragraphs 3 and 4. The Convention does not provide a clear definition of the **“materials in the course of completion”**.

Domestic legislation may provide for specific guidance on how air quality data should be collected, ingested and processed before they are further considered and studied.

This guidance has been developed with a view to mitigating the effect of various factors that might impact on the values collected, and to allowing for the calculation of representative average values on the basis of the multiple values — collected at different times over a long period of time — which might have fluctuated significantly due to the presence of diverse conditions and factors (heat, pressure, etc.).

Findings with regard to communication ACCC/C/2010/53- United Kingdom

In respect to the requested data, the Committee finds that the Party concerned, by not disclosing the raw data at the request of the communicant, failed to comply with article 4, paragraph 1, of the Convention.

Should the authority have any concerns about disclosing the data, they should provide the **raw data** and advise that they were not processed according to the agreed and regulated system of processing raw environmental data.

The same applies for the **processed data**, in which case the authorities should also advise on how these data were processed and what they represent.

Findings with regard to communications ACCC/C/2004/3 and ACCC/S/2004/1 - Ukraine

The matter concerns approval by the government of Ukraine of construction of the deepwater navigation canal in the Bystre arm in the Ukrainian part of the Danube river delta.

The permitting process has been divided into three phases:

- feasibility study,
- approval of phase I and
- approval of phase II of the project.

Each stage undergoes an approval process on the basis of a comprehensive State expertisa that includes environmental expertisa (an evaluation and, where appropriate, approval of the EIA by an authorized public authority).

The Communication and the submission relate primarily to the decision-making on the project's feasibility study.

However, both the communicant and the submitting Party maintain that subsequent decision-making on the phases of the project, while having certain formal improvements in the procedure, continuously failed to ensure effective participation as required by article 6 of the Convention.

Findings with regard to communications ACCC/C/2004/3 and ACCC/S/2004/1 - Ukraine

14. In its letters to the Ministry of Environment dated 30 April 2003 and 3 June 2003, the communicant expressed its interest in the decision- making process in question. The communicant has been in regular contact with the Ministry with regard to the issue of the canal construction since then.

16. The Ministry of Environment, in its reply to a request for information from the communicant dated 18 June 2003, stated that materials developed in the course of an EIA were the property of the developer and therefore the Ministry was not in a position to provide access to such information.....

31. ...public authorities should possess information relevant to their functions, including that on which they base their decisions, in accordance with art. 5, par. 1, and should make it available to the public, subject to exemptions specified in article 4, paragraphs 3 and 4. **The issue of ownership is not of relevance** in this matter, as information is used in a decision- making by a public authority and should be provided to it for that purpose by the developer. ...

Findings with regard to communication ACCC/C/2007/21 – European Community

.....The Party concerned apparently bases this statement on article 4, paragraph 4 (d), of the Convention, which states that a request for information may be refused if the disclosure would adversely affect “the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest”.

The Committee wishes to point out that this exemption may not be read as meaning that public authorities are only required to release environmental information where no harm to the interests concerned is identified. Such a broad interpretation of the exemption would not be in compliance with article 4, par.4, of the Convention which requires interpreting exemptions in a restrictive way, taking into account the public interest served by disclosure.

Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.

Findings with regard to communication ACCC/C/2009/38 – United Kingdom

....Thus, if the exception in article 4, paragraph 4(h) is to be read restrictively to allow Mr.Hawkins to have access to the redacted information in order that he might exercise his right to participate under article 6, then other members of the public concerned would be entitled to the same right.

The problem is that while SNH does not question Mr. Hawkins' suitability to receive the redacted information, there may be others among the public concerned who would be less trustworthy.

However, disclosing the redacted information to Mr. Hawkins would mean that all members of the public concerned would be entitled to such disclosure. Recognizing **the possibility that disclosure to the wider public concerned may result in adverse effects on the breeding sites of the mussels**, the Committee finds that the Party concerned was not in non-compliance with article 4 by withholding the redacted information in the circumstances of this case.

Findings with regard to communication ACCC/C/2010/48 – Austria

...According to article 4, paragraph 7, of the Convention, a refusal in writing shall be made as soon as possible and at the latest within one month.

It should also state the reasons for the refusal and give information on access to the review procedure provided for in accordance with article 9.

It follows that one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an “effective” and “timely” basis, as required by article 9, paragraph 4.

Findings with regard to communication ACCC/C/2010/48 – Austria

The possibilities for a review procedure seem to be significantly delayed by the system envisaged under Austrian law, i.e., that a separate request is necessary to obtain an “official notification” that would enable the applicant to seek the remedies under article 9.

...if this request is not satisfied due to failure of authorities to provide an official notification, a further request (devolution request) has to be submitted.

The Committee finds that the Party concerned, by maintaining this system, where a specific form (“official notification”) must be requested in order to be used before the courts, and where authorities may fail to comply with such a request, is not in compliance with article 4, paragraph 7, of the Convention.