



Federale Beroepscommissie voor de toegang tot milieu-informatie

1 februari 2010

ADVIES nr. 2010-1

**Application of Directive 2003/4/EC on public access to
environmental information on the federal level in Belgium**

(FBC/2009/3)

1. Charging

Article 5 Directive 2003/4/EC: “1. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination *in situ* of the information requested shall be free of charge.

2. Public authorities may make a charge for supplying any environmental information but such charge shall not exceed a reasonable amount.

3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived.”

In the federal law on access of the public to environmental information this article of the Directive is implemented in article 19:

“§ 1. Examination in situ of environmental information and explanation thereof are free of charges.

§ 2. The reception of a copy of environmental information can be subjected to the payment of a charge. The King determines the amount and this amount shall not be higher than the cost price.”

- a. How is “the information requested” interpreted? Does this relate to public registers and lists only or to any information requested?*

According to Belgian federal legislation “the information requested” is related to public registers and lists but also to any other information requested.

- b. How is “supplying information” interpreted?*

According to Belgian federal legislation “supplying information” is interpreted as “giving a copy” of the document (in the most largest meaning of the word) where the requested information can be found.

c. What is understood by ‘examination in situ’?

According to Belgian federal legislation “examination in situ” means that the applicant has the right to consult a document in the office of the administration where the environmental information can be found. If the information is not on paper, the public authority has to give also the instruments needed to look at the information.

d. What is regarded as a “reasonable amount” and have applicants challenged actual charges made?

According to Belgian law, a charge can be asked for what concerns the direct costs linked to the copying of a document where the environmental information can be found. Cost for searching for the document cannot be charged. On the federal level a royal decree fixes the different costs that can be asked by public authorities (Royal Decree of 17 August 2007 relating to the determination of the charge for the reception of a copy of an administrative document or a document containing environmental information, Official Journal of 14 September 2007). The amount differs according to the volume of the information:

- If the bearer is paper, the cost will depend on the format of the copy of the document:
 - o Black/white and A4: the first 50 pages for each document are free, from page 51 to 100: 0,05 euro/page and from page 101 and following: 0.02 euro/page
 - o Black/white, different than A4 but not A 3: double the price for an A4 copy
 - o Colour and different other formats: actual cost of reproducing are applicable
- If the bearer is electronic: nothing can be charged

2. Definition of public authorities

Article 2.2 Directive 2003/4/EC: ‘Public authority’ shall mean:
 (a) government or other public administration, including public advisory bodies, at national, regional or local

level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(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).

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.

a. How is it determined whether a natural or legal person is “under the control” of another body or person? What is “control”?

The word “control” has not been explained in the explanatory statements of the federal law, but the Appeal Commission has the meaning that it has to be interpreted very large. Every form of “control” is, e.g. financial control, is considered as “control” in the sense of the law. “Under control” means that government or an other public administration or a natural or legal person performing public administrative functions has a certain amount of power on the functioning of a natural or legal person having public responsibilities or functions, or providing public services, relating to the environment.

b. Are utilities (electricity, gas, water and sewerage) regarded as public authorities for the purpose of the Directive? If so, is it because they are under the control of the state, or some other reason?

Utilities in Belgium are either private or public entities. In so far this difference of legal status has no impact on the application of the directive 2003/4/EC as there is no doubt they both fall under its scope . Private utilities having public responsibilities or functions, or providing public services relating to the environment and which are under the control of a public body should be considered according to the Federal law as public authorities for the purpose of the Directive. At the moment of

writing, it has nevertheless to be noted that the appeal commission has never been confronted with the question.

3. Manifestly unreasonable

Article 4(1)(b) Directive 2003/4/EC: “Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable;”

- a. How is it judged what is “manifestly unreasonable”, e.g. time-consuming requests, persistent applicants, multiple requests from campaigners, aggressive wording?*

The exception “manifestly unreasonable” can only be evaluated in a case-by-case approach as the interpretation of “manifestly unreasonable” depends on each different and concrete situation.

According to Belgian law and according to the jurisprudence of the Court of Justice of the European Union all exceptions on the right of access should narrowly be interpreted. Only extremely time-consuming requests and requests for an enormous volume of documents are considered to be unreasonable. Persistent applicants, multiple requests from campaigners, aggressive wording are no reason for qualifying a request as unreasonable.

Multiple requests can only be refused when there is an intention to harm the administration in doing its job and this malicious intention should be proven. At such multiple request cannot be invoked as “manifestly unreasonable” but well misuse of a right, what is general principle of the law.

- b. Has the phrase caused any problems, e.g. is it interpreted as judging the applicant’s motives?*

No, there is always an evaluation and motivation in concreto. In principle the applicants motives can’t be taken into consideration unless there is a clear indication that the applicant wants to harm the functioning of the administration.

4. Proactive dissemination of information

Article 7: 1 Directive 2003/4/EC: “Member States shall take the necessary measures to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form.

Member States shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks.

2. The information to be made available and disseminated shall be updated as appropriate and shall include at least:

- (a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it;
- (b) policies, plans and programmes relating to the environment;
- (c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;
- (d) the reports on the state of the environment referred to in paragraph 3;
- (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- (f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3;
- (g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found in the framework of Article 3.

3. Without prejudice to any specific reporting obligations laid down by Community legislation, Member States shall take the necessary measures to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not

exceeding four years; such reports shall include information on the quality of, and pressures on, the environment.

4. Without prejudice to any specific obligation laid down by Community legislation, Member States shall take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay.

5. The exceptions in Article 4(1) and (2) may apply in relation to the duties imposed by this Article.

6. Member States may satisfy the requirements of this Article by creating links to Internet sites where the information can be found.”

a. Is this requirement being met in your country?

Art. 7.1 of the Directive is transposed in the federal law in article 12, second paragraph: “*All federal public authority mentioned in article 11 of the law take the necessary measures to ensure that environmental information which is relevant to its function and which is held by or for them to organize with a view to its active and systematic dissemination to the public in particular by means of electronic communication*” and in article 13: “*Environmental information available in electronic form and environmental information collected from 14 February 2003 is disseminated electronically under the public*”.

Art. 7.2 and 7.3 of the Directive are transposed in the federal law in article 14, § 1 of the federal law: “*The federal public authority mentioned in article 11 of the law take care that at least the follow environmental information, as so far as it is related to their competences be made available electronically:*

1° texts of international treaties, conventions or agreements on the environment or relating to it that are applicable on the federal public authorities;

2° texts of federal legislation on the environment or relating to it;

3° the governmental declarations and the governmental agreements of the federal government and the policy documents including the federal policy notes;

4° the federal plans and programmes relating to the environment;

5° progress reports on the implementation of the items referred to in (1) to (4) when prepared by environmental authorities as mentioned in article 4, § 1;

6° the reports on the state of the environment that are published at regular intervals not exceeding four years. Such reports shall include information on the quality of, and pressures on, the environment.

7° environmental measuring data that are collected by or for the environmental authorities or are held for the environmental authorities

8. authorisations with a significant impact on the environment and environmental agreements in so far they are related to federal competences on the environment

9° environmental impact studies, risk assessments and security rapports related to the federal competences on the environment.”

Art. 7.4 of the Directive is transposed in the federal law in article 15 of the federal law: *“Without prejudice to any specific obligation laid down by legislation, environmental authorities shall take the necessary measures to ensure that, in the event of an threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for the environmental authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated immediately.”* The federal law goes further than the directive because all kinds of threats to human health or the environment are covered and not only those that form an imminent threat.

Art. 7.5 of the Directive is transposed in the federal law in article 28 of the federal law: *“All exceptions mentioned in article 27 and are applicable on requests for environmental information are also applicable on the dissemination of environmental information.”*

Art. 7.6 of the Directive is transposed in the federal law in article 14, § 2 of the federal law: *“Environmental authorities can fulfill their obligation to disseminate the information mentioned in article 14, § 1 by creating links to websites where the environmental information can be found.”*

b. What is being done to encourage it?

The portal site of the FPS Health, Food Chain Safety and Environment <http://www.health.fgov.be>, which was created in 2005, is currently

undergoing a vast updating and development operation. The working method adopted is a “theme by theme” process: all the information available (such as law texts, studies, publications, frequently asked questions and answers, possible public consultations, etc.) is updated and added “theme by theme”. Furthermore, “news” is also regularly placed on the homepage of the portal site, such as the announcement of the publication of a new brochure or an event. In addition, various thematic websites have been developed (www.aarhus.be, www.climat.be, www.ecolabel.be, ...).

Databases have been set up as part of the Federal Public Service portal for matters under federal remit, i.e.:

- A guide to cars marketed in Belgium, which are classed according to their fuel consumption and CO₂ emissions:
<http://www.energivores.be/voiture>
- Biocides authorised for marketing in Belgium:
<http://www.biocide.be>
- Phytosanitary products authorised for marketing in Belgium:
<http://www.fytoweb.fgov.be>
- the website www.nehap.be contains reports of studies regarding environment and health, for example on persistent organic pollutants in human milk.

Furthermore, the dissemination of environmental information is ensured by the traditional means such as brochures and leaflets or press releases. In order to facilitate the dissemination of this type of material, the details of bodies that distribute information (such as general and specialised environmental press, NGOs, ...) were entered into databases. These bodies can be mobilised with the aim of making these publications and documents known to the public.

The DG also works on a federal metadata base on the Environment, within the framework of the federal report on the environment. This will also be made accessible to the public when the report on the environment is published.

5. Public interest

Article 4 requires Member States to weigh the public interest served by disclosure against the interest served by refusal.

- a. How is the public interest weighed in practice, including where more than one exception might apply?*

The balance of interests has to be done for each separate environmental information and in a concrete manner. It cannot be done on a general manner, using for example general criteria. Each public authority has to verify if one of several protected interest(s) can or should be invoked in relation with each environmental information that is requested. When one or more exceptions are applicable, the public authority has to evaluate if the general interest served by the public disclosure outweighs or not the protected interest(s). This method has to be done for each exception separately in the case several exceptions are applicable. If the public interest outweighs the protected interest(s), the exception cannot therefore be invoked for the case. For the cases brought before the appeal commission, the commission agreed that some commercial secrets are at stake (for example for pesticides), but it considered also that the public interest to make public that information was preponderant (the right for the public to be informed on the potential harm of pesticides on its health), and therefore ordered the divulgation of the information.

When more than one exception is involved, the balance exercise is done separately for each exception.

6. Definition of environmental information

Article 2(1) (c) Directive 2003/4/EC defines environmental information “as measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements”.

- a. *What types of information relating to policy might be regarded as environmental information, for example, in what circumstances would 'energy policy' be regarded as environmental information and why? Would this include financial information?*

Energy policy is considered as environmental information when that policy affects or is likely to affect the elements of the environment. Energy policy can either have positive influence on the environment (e.g. measures to deduct emissions of certain substances) or negative influence on the environment (e.g. the choice for eliminating nuclear power).

In this perspective financial information related to the energy sector are included. In a case brought before the appeal commission, it was considered that fees from the nuclear sector to manage the nuclear liabilities (passif nucléaire) has to be considered as an environmental information due to the link between that financial information and the situation of the environment. It has also considered to be linked to measures that have an influence on the environment.

Brussels, 1 February 2010.

The Commission was composed as follow:

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