

# THE ROMANIAN LEGAL REGIME OF ACCESS TO INFORMATION IN ENVIRONMENTAL MATTERS

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## **Abstract**

*The paper will analyze the national regulations on access to information of public interest in matters of environmental protection according to Romanian Law no.544/2001 on access to public interest information.*

*In order to compare the Romanian standard to international reference, the author will analyze the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, alongside The European Regulation (EC) no.1367/2006.*

*Basically, the author concluded that the three normative acts contain some common provisions, but their use may lead to different effects depending on the type of information requested, or the institution to which the request is addressed.*

**Keywords:** *access to information, Aarhus Convention, environmental information, information of public interest*

**JEL Classification:** [K15], [K32], [K33]

## **1. Introduction**

Given the certainty of technological evolution in the past two century, along with the deepening of the gap between "the natural cyclical processes of the ecosphere and the linear processes of technological advance" (Marinescu & Petre, 2014, p. 9), an ecological crisis has been generated, and therefore, a growing need for protective measures regarding the integrity and sustainability of the environment emerged.

Environmental protection has become an important concern of states in contemporary society, being associated with a fundamental right. The Romanian Constitution regulates the right to a healthy environment in Article 35, paragraph 1, according to which "The State recognizes the right of every person to a healthy and ecologically balanced environment". Its importance has been emphasized in constitutional law literature (Deaconu, 2022, p. 218), where it was stipulated that the right to a healthy environment is the only fundamental right that requires a time frame, as it is ensured not only for present, but also for future generations.

Equally, in the contemporary informational society, access to information has the nature of a fundamental right, being recognized by art. 31 of the Constitution, with the marginal name "The right to information". The same right is granted by Article 10 of the European Convention on Human Rights and

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Article 11 of the Charter of Fundamental Rights of the European Union, as a passive component of the freedom of expression, namely the right to receive information of any kind.

Combining the two categories of rights, we note that free access to environmental information is essential for the protection of the environment, as resulting from the exercise of two fundamental rights. Equally, access to information on environmental issues is of public interest (Lupan, 2009, p. 157), being subjected to special regulations, that apply with priority over general regulations.

Next, from the perspective of access to environmental information, three fundamental normative acts, applicable in the national legislation, will be analyzed: 1. Law no. 544/2001 on free access to information of public interest<sup>1</sup>; 2. The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and 3. Regulation (EC) No.1367/2006 of the European Parliament and of the Council from 6 September 2006 on the application, for the Community institutions and bodies, of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

## **2. Access to environmental information under the conditions of Romanian Law no. 544/2001**

In Romanian legislation, the main regulation of the access to information of public interest is represented by Law no. 544/2001. Environmental information, as a species of information of public interest, can be requested based on this normative act.

In order to determine *the categories of institutions* from which information may be requested, we will depart from the provisions of art.2, letter a of Law no. 544/2001, according to which “by public authority or institution we understand any authority or public institution that uses or manages public financial resources, any autonomous company, a company regulated by the Companies Law no.31/1990, republished, with subsequent amendments and completions, under the authority or, as the case may be, under the coordination or subordination of a central or local public authority and in which the Romanian state or an administrative-territorial unit is sole or majority shareholder, as well as any operator or regional operator, as they are defined in the Law on Community Services of Public Utilities no. 51/2006, republished, with subsequent amendments. Also, the political parties, the sports federations and the non-governmental organizations of public utility, which benefit from financing from public money, are subject to the provisions of this law”.

As the obligation to provide information, according to the law referred to above, is stipulated only for public authorities and institutions, we consider that

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<sup>1</sup> Published in the Official Gazette, Part I, no.663/23.10.2001.

any matter relating to environmental protection, or which concerns an environmental issue, is liable to be communicated only to the extent that it is in possession of public authorities or institutions, as previously defined, namely state bodies or private entities that use or administrate public funds or that are subordinated or financed by national authorities.

We consider that a European organization or an international governmental organization, even financed, in part, from the funds of the Member States (including the Romanian State), cannot be included in the category of institutions for which obligations have been established by this law, because they are not stipulated among the categories provided in art. 2, letter a of Law no. 544/2001. Moreover, an independent international organization does not fall under the regulation of the text in question, even if it had a headquarters in Romania.

Information on environmental issues is usually found in the registers of national authorities carrying out potentially polluting activity or authorities aimed at preventing pollution. The same information can be found in the records of non-governmental organizations involved in monitoring environmental factors.

We note that national public authorities or institutions are essentially required to provide information of public interest, but national non-governmental organizations may be required to provide such information only if they have received the status of "public utility organizations" under Article 38-45 of Government Ordinance no. 26/2000 regarding associations and foundations<sup>2</sup>.

Regarding the categories of information of public interest susceptible to communication under the conditions of national law, we note that art.2, letter b of Law no.544/2001 provides: "information of public interest means any information regarding the activities or that results from the activities of a public authority or public institution, regardless of the support, form or manner in which the information is expressed".

We note, therefore, that any information regarding the activity carried out by an authority or institution from those provided by art.2, letter a of the Law, or any information resulting from the development of its activity, has the nature of information of public interest.

As we have shown on another occasion, (Vernea, 2021, p.86), the communication of information of public interest, under the conditions of Law no. 544/2001, has as a premise the possession of the respective information by the institution to which the request was addressed. The law does not stipulate an obligation for any institution to process the data held in order to obtain information, either statistical, or of a synthetic nature. In these circumstances, the opinion of the management of an institution regarding a factual situation, that may prove dangerous for the environment, or even regarding an environmental damage, does not constitute information of public interest, because the requested

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<sup>2</sup> Published in the Official Gazette, Part I, no.39/31.01.2000.

information, does not exist prior to the request, and it does not result from the actual activity of the institution.

Starting from the provisions of art. 3 of Law no. 544/2001, we note that the information of public interest can be communicated upon request or made available to the public *ex officio*. The latter situation is of little relevance to the subject matter of this paper, since, in general, the information subject to *ex officio* communication, listed in Article 5, paragraph 1 of the Law refer to the contact details of public authorities and institutions or the normative acts by which their activity is regulated. The only typology of information subjected to regular dissemination relevant for access to environmental information is found in Article 5, paragraph 1, letter f of the Law and concerns the programs and strategies of each institution or authority with responsibilities in the field of environmental protection.

Upon request, any interested person can obtain information of public interest<sup>3</sup>, as previously defined, to which two special categories of information<sup>4</sup> are added, respectively the privatization contracts concluded after the date of entry into force of Law no. 544/2001, and the public procurement contracts concluded by the contracting authorities. We appreciate that in the body of some privatization contracts there may be useful information regarding the environmental obligations of the companies or the expected impact of their activities on the environment. Public procurement contracts may be relevant depending on the goods or services contracted, in so far as they require special treatment from the perspective of environmental obligations.

National legislation also provides for a number of *exceptions to the obligation to provide information of public interest*, found in art.12, paragraph 1 of Law no.544/2001<sup>5</sup>. Regarding the object of this paper, we note that the environmental information classified according to Law no.182/2002 on the

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<sup>3</sup> According to art.6, paragraph 1 of Law no.544/2001.

<sup>4</sup> As it results from art.5, paragraph 5 and art.11<sup>1</sup> of Law no.544/2001.

<sup>5</sup> Art.12, paragraph 1 of Law no.544/2001 stipulates that the following information is exempted from the free access of citizens: „a) information in the field of national defence, security and public order, if they are part of the categories of classified information, according to the law; b) information on the deliberations of the authorities, as well as those concerning the economic and political interests of Romania, if they are part of the category of classified information, according to the law; c) information on commercial or financial activities, if their publicity infringes the intellectual or industrial property right, as well as the principle of fair competition, according to the law; d) information on personal data, according to the law; e) information on the procedure during the criminal or disciplinary investigation, if the result of the investigation is endangered, confidential sources are revealed or the life, bodily integrity, health of a person is endangered as a result of the investigation carried out or in progress; f) information on judicial proceedings, if their publicity is prejudicial to ensuring a fair trial or the legitimate interest of any of the parties involved in the proceedings; g) information which prejudices the measures for the protection of young people”.

protection of classified information cannot be communicated<sup>6</sup>. Equally exempt from the obligation to disclose is the information on commercial or financial activities, if their publicity infringes the intellectual or industrial property rights or the principle of fair competition. In this purpose they are protected by a secret of a technological or commercial nature, which obviously seeks a legitimate goal. In addition, environmental information found in materials related to a criminal or disciplinary investigation or resulting from a judicial activity will not be communicated to the extent that it prejudices the conduct of proceedings, the right to a fair trial or the legitimate interests of individuals.

### **3. Access to environmental information under the terms of the Aarhus Convention**

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark, on June 25, 1998, is the main international landmark on access to environmental information.

As is clear from its preamble, the convention was adopted in compliance with the principle of accountability and transparency in decision-making and ensuring increased public support for environmental decisions. Clearly, access to information is a key element in ensuring decision-making transparency, both at national and international level.

With regard to the Aarhus Convention, the Romanian State expressed its consent by Law no. 86/2000 for the ratification of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed in Aarhus on June 25, 1998.<sup>7</sup> We note that after ratification, the text of the Convention is a component part of the ratification law, being applicable in the domestic legal order. In addition, a large part of the provisions of the convention have been taken over by Government Decision no.878/2005 on public access to environmental information<sup>8</sup>. In our analysis, we will refer strictly to the provisions of the Convention.

The Aarhus Convention is built around three pillars, the first of which, relevant to the purpose of this paper, is public access to environmental information held by the authorities.

With regard to *the categories of institutions to which information may be requested* under the Convention, we note that they are expressly limited to public authorities, as defined in Article 2, point no. 2 of the Convention as „(a) Government at national, regional and other level; (b) Natural or legal persons performing public administrative functions under national law, including specific

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<sup>6</sup> Published in the Official Gazette, Part I, no.248/12.04.2002.

<sup>7</sup> Published in the Official Gazette, Part I, no.224/22.05.2000.

<sup>8</sup> Published in the Official Gazette, Part I, no.760/22.08.2005.

duties, activities or services in relation to the environment; (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above; (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention. This definition does not include bodies or institutions acting in a judicial or legislative capacity”.

In these circumstances, unlike the national law on access to information of public interest, previously analyzed, the Convention stipulates the obligation to communicate the requested information for the governmental authorities of the member states and for the natural or legal persons performing administrative functions or providing public services relating to environmental protection. The inclusion of natural persons in the category of authorities who have the obligation to provide environmental information appears paradoxical, the request being usually addressed to the institution, not to the person exercising the management of that institution. Despite this, the obligation to communicate an answer, together with the responsibility for the non-fulfillment of the obligation, belongs to the natural person.

Equally, the obligation to provide information lies with the regional economic integration organizations made up of the sovereign member states of the Economic Commission for Europe, to which the Member States have transferred competence in matters covered by this Convention, including the power to conclude treaties on these problems. We consider that other international organizations cannot be bound by the Convention, even if the member states of those organizations are also parties to the Convention. An additional distinction needs to be made with regard to the institutions of the European Union, but the relevant normative acts will be analyzed in the third part of this paper.

The Convention explicitly exempts any judicial or legislative authority from the obligation to disclose information without additional reservations. In agreement with other authors (Mason, 2010, p.17), we note that the text of the Convention does not establish obligations for private entities not involved in providing a public service in relation to the environment. In this respect, Law no. 544/2001 offers additional possibilities, including obliging companies financed, in part, from public funds, to communicate information of public interest, and implicitly environmental information, stipulation that exceeds the category of institutions provided by the Convention.

We consider that the obligation to provide information rests with the requested institutions of the States Parties, whether the information is requested by a national of that State or by any other natural or legal person legally constituted under the national law of its State of origin.

With regard to the categories of environmental information that may be the subject of a communication request, we note that they are expressly stipulated by

Article 2, paragraph 3, of the Convention, as follows: „Environmental information” means any information in written, visual, aural, electronic or any other material form on: (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, and the interaction among these elements; (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making; (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, through these elements, by the factors, activities or measures referred to in subparagraph (b) above”.

Unlike national law which provides the obligation to communicate any information of general public interest, the Convention regulates only the obligations to communicate environmental information. The way of defining the notion is extremely comprehensive. In this category we can integrate all the data on the state of the environmental elements, regulatory acts, analyzes prior to environmental decision-making and the state of human health and safety in relation to pollution.

Essentially, we believe that any data on the protection of the natural and anthropic environment can be included in the category of environmental information. Despite this, the request should be limited to the defining elements for environmental protection and ecological balance, otherwise the requested information would no longer fall within the scope of the Convention, as set out in Article 1: „protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being”.

Under the terms of Article 4, paragraph 1, of the Convention, public authorities have the obligation to make available to the public the required environmental information, including copies of the original documentation containing such information, without the applicant having to invoke a specific interest. Furthermore, the information will be communicated in the required form, except for two alternative situations: (i) where the Authority considers that it is preferable to communicate the information in a different form, for example, an information found in written registers is requested in an audio format, and (ii) if the information is already available in another form, in which context the applicant will receive it in its existing form. Essentially, the content of the information should not be altered by its communication in a different form.

In addition to the information subject to communication upon request, under the terms of Article 5 of the Convention, the authorities also have an

obligation to collect and disseminate environmental information. The obligation in question is one of diligence and involves the periodic updating of registers containing environmental information, along with ensuring an adequate flow of information transfer both between public authorities and between authorities and the public in case of imminent danger to human health or the environment. In addition to the obligation to make systematic records and information available to the public, the Contracting Parties have undertaken to periodically disseminate, at intervals of 3, not more than 4 years, a report on the state of the environment<sup>9</sup>, and to allow progressive access for the public to centralized environmental information in electronic databases accessible via telecommunications networks<sup>10</sup>.

The obligation to provide information on request has been referred to in legal literature (Pocuca, Mladenov & Mirkovic, 2018, p.1618-1619) as "active right" of access to information, and the obligation to collect and disseminate information has been considered a "passive right", which does not require prior request.

As for *the category of information exempted from communication*, we note that these are provided for in Article 4, paragraphs 3 and 4 of the Convention. Thus, paragraph 3 stipulates that the request for information may be refused if: „(a) The public authority to which the request is addressed does not hold the environmental information requested; (b) The request is manifestly unreasonable or formulated in too general a manner; or (c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure”.

Analyzing the reasons provided by Article 4, paragraph 3 of the Convention, we note that they establish an objective limitation, independent of any margin of appreciation from the authority, regarding the lack of the requested information. However, the text implies a concrete analysis in order to establish the visible unreasonable nature of the request or its informal character. Equally, in case of a material developed by the institution, which would contain a response to the request made, it does not appear justified to disclose the information precisely in order not to prejudice that material.

In paragraph 4 of the same article eight grounds for rejecting the request for disclosure of environmental information are stipulated. The request can be denied if it would adversely affect: „ (a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law; (b) International relations, national defense or public security; (c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) The confidentiality of commercial and industrial information, where such

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<sup>9</sup> According to Article 5, paragraph 4 of the Convention.

<sup>10</sup> According to Article 5, paragraph 3 of the Convention.

confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed; (e) Intellectual property rights; (f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law; (g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or (h) The environment to which the information relates, such as the breeding sites of rare species”.

With regard to the grounds for refusing to disclose the information provided for in Article 4, paragraph 4, of the Convention, the public authority will not be required to examine the proportionality between (i) the benefits of disclosing the information and (ii) the damage caused to the administrative or judicial activity. In this regard, it is prohibited to communicate information that affects the confidentiality of data protected by national laws, or the legal interests of a person, national security, public order or even natural habitats.

#### **4. Access to environmental information held by the European institutions under Regulation (EC) No.1367/2006**

In addition to the national and international instruments for the communication of environmental information to the public, previously analyzed, a last important normative act is Regulation (EC) No.1367/2006 of the European Parliament and of the Council from 6 September 2006 on the application, for the Community institutions and bodies, of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

We note that European regulations are binding legislation, as stipulated in Article 288 T.F.E.U., with direct applicability in national law of the Member States (Gâlea, 2012, p.462), in this case, their effect in the internal legal order is recognized by art.148, paragraph 2 of the Romanian Constitution. Direct applicability, as opposed to direct effect, requires direct application (Dumitrașcu, 2021, p.148) of European rules by the national administration and courts of the Member States, in the internal legal order.

Referring to *categories of institutions* from which relations may be requested on the basis of the Regulation, Article 2 (1) (c) stipulates that the Community institution or body shall mean „any public institution, body, office or agency established by, or on the basis of T.F.E.U., except when acting in a judicial or legislative capacity”. The final sentence of the same article stipulates that Title II of the Regulation, entitled Access to environmental information, also applies to Community institutions or bodies acting in the exercise of their legislative power.

We observe, in these conditions, that in what concerns access to environmental information, the Regulation shall apply to all Community bodies except the bodies acting in judicial capacity. Thus, the provisions of the Regulation cannot be applied in relations between a national of a Member State that request information from a national institution of any Member State.

Referring to *categories of information* subjected to communication, we note that Article 2 letter „d” of the Regulation sets out in detail the category of environmental information, as any information, regardless of the medium, regarding the state of the environmental elements, the factors that may affect the environmental elements, of administrative measures, such as policies, regulations, plans, programs, environmental agreements and activities that affect or may affect the environmental elements or factors mentioned above. In addition, the same category includes reports on the application of environmental legislation, the documentation underlying administrative measures taken to protect the environment, the health and safety of people, or their quality of life, to the extent that they are affected by environmental elements.

We note a similarity between the categories of information found in the Aarhus Convention, this being the main source of inspiration for the European legislator.

Another element taken from the Aarhus Convention is the manner to disseminate environmental information. Thus, according to Article 4 of the Regulation, Community institutions and bodies have the obligation to organize the information they hold in order to disseminate it actively and systematically to the public. Institutions also have the task of inserting information into electronic databases, accessible through telecommunications services and equipped with search tools.

Specifically, the databases set up in this way will include texts on international and Community environmental law, environmental policies, plans and programs, intermediary reports on the implementation of the above-mentioned normative acts, reports on the state of the environment, published at regular intervals, not exceeding 4 years, data or summaries of data obtained from the monitoring of activities affecting the environment, environmental protection regulations, environmental impact assessments and environmental risk assessments<sup>11</sup>.

The Regulation offers the possibility to provide information on request, but unlike the previously analyzed normative acts, it does not contain its own provisions in this respect. For this purpose, it refers, in Article 3, to Regulation (EC) No.1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In the application of the latter normative act, any person

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<sup>11</sup> As it results from art.4, para.2 of Regulation (EC) no.1367 / 2006.

may request access to documents, in writing, including in electronic format, in a sufficiently precise manner to allow the institution to identify the document without the applicant being obliged to invoke an interest and motivate the request.

As for *information exempt from free access*, we note that art. Article 6 of Regulation (EC) No.1367/2006 makes direct reference to Article 4 of Regulation (EC) No.1049/2001. Under the conditions of art.4, paragraph 1 of the previously mentioned act, all requests to access a document will be rejected if its disclosure could harm the public interest relating to public safety, international relations, financial, monetary and economic policy, of the Community or a Member State or the privacy and integrity of the individual.

Art.4, paragraph 2 of Regulation (EC) No.1049/2001 excludes from open access documents that, by their disclosure, could jeopardize: (i) the commercial interests of a particular natural or legal person, including intellectual property; (ii) legal proceedings and legal advice, and (iii) the objectives of the inspection, investigation and audit activities, unless a higher public interest justifies the disclosure of the content of the document in question. A special derogatory rule can be found in Article 6 (1), sentence I of Regulation (EC) No.1367/2006, which stipulates that in interpreting the limitations of points (i) and (iii), with the exception of investigations into infringements of Community law, it will be presumed that there is a public interest in communication when the information requested relates to environmental emissions.

Equally, article 6 (2) of Regulation (EC) No.1367/2006 excludes from the communication environmental information that once disclosed could harm the protection of the environment, such as breeding areas of rare species or other categories of protected areas.

We note that the Regulation is an instrument for adapting the principles and provisions of the Aarhus Convention, by customization at the level of European institutions and bodies.

### **Conclusions**

Given the three normative acts analyzed, we consider that access to environmental information can be achieved under the conditions of freedom of access to information of public interest, according to national law no. 544/2001 only if the request is addressed to a Romanian public authority or institution.

To the extent that the applicant seeks to obtain environmental information found in the records of Romanian institutions or other States parties to the Aarhus Convention, it is preferable to use the procedural mechanisms stipulated by it, adopted in national law by the ratification act, and by the corresponding texts of G.D. no.878/2005 on public access to environmental information, which take over the relevant provisions of the Convention.

If the request is addressed to a European body, the main instrument of access to information is Regulation (EC) No.1367/2006 of the European

Parliament and of the Council from 6 September 2006, the provisions of which directly refer to Regulation (EC) No.1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

As Law no. 544/2001 on access to information of public interest is a general normative act, not limited to the specifics of environmental information, we could not identify special rules for the dissemination and collection of this type of information, but by the comprehensive manner in which the act has been drafted, it is an effective tool for accessing any environmental information, as a kind of information of public interest held by national public authorities or institutions.

With regard to the Aarhus Convention and Regulation (EC) No.1367/2006, we note that they contain multiple similarities, which is foreseeable given that the Regulation was drawn up in order to adapt the provisions of the Convention to the institutional construction of the European Union.

At present, access to environmental information is relatively easy, given that essential information is regularly updated and disseminated through electronic means of communication, in the form of navigable databases, which are accessible free of charge.

Unlike other areas of protection of the quality of human life, access to environmental information is relatively well regulated, being among the areas where decision-making transparency and public information have reached a high level, corresponding to the fundamental importance of preserving a healthy and ecologically balanced environment for future generations.

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