

# ACCESS TO FACILITY-SPECIFIC ENVIRONMENTAL INFORMATION



## FRANCE

This memo describes the European framework that applies to France as an EU Member State and in the final section discusses and links the country specific implementation of these requirements as well as national variations.

### Environmental Information Directive

France is a Member of the European Union and has transposed the [Environmental Information Directive, Directive 2003/4/EC](#). This is a broad-based disclosure requirement that requires transparency for information about the environment.

*“The directive defines “information relating to the environment” in a very broad manner, covering “any available information in written, visual, aural or data-base form on the state of water, air, soil, fauna, flora, land and natural sites and on activities or measures adversely affecting, or likely to affect these, and on activities or measures designed to protect these, including administrative measures and environmental management programmes.”<sup>1</sup>*

The exceptions where disclosure may be denied are actually fairly limited.<sup>2</sup> The exceptions include, however, criminal and disciplinary proceedings and proceedings by public authorities which are confidential under national law.<sup>3</sup> This particular exception

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<sup>1</sup> Resources for the Future, “Public Access to Environmental Information and Data,” 2001, p. 23.

<sup>2</sup> [Article 4](#): “2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; (b) international relations, public security or national defence; (c) the course of justice, the ability of any 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 or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy; (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 by national or Community law; (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; (h) the protection of the environment to which such information relates, such as the location of rare species.” (emphasis added).

<sup>3</sup> There is no explicit authority to include administrative enforcement measures within this definition of exceptions. However, the European Court has ruled that proceedings with possible penalties may come

varies widely by Member State in its implementation. Preliminary investigations can also be excluded. However, the Court of Justice for the European Union has indicated that the reason for confidentiality of certain public proceedings – even where set by national law – may not apply after the proceedings are resolved. See [Flachglas Torgau GmbH v Germany](#), C-204-09, February 14, 2012. Actions related to imminent threats to public health or the environment are also mandated for disclosure. See Article 7(4). The Aarhus Convention<sup>4</sup> requires that the interest of disclosure of public proceedings must be balanced against the need for confidentiality in each case, so that a blanket exemption is not the intent of the EU Directive implementing the Convention.<sup>5</sup> All restrictions on disclosure are discretionary with each Member State and national authorities are not necessarily compelled to have the same exemptions in their individual country's laws. See "National Law" section below.

### **European-Pollutant Release & Transfer Registry**

In line with the Aarhus Convention and the EU EID, all emissions data must be publicly available. The EU also maintains the online European Pollutant Release and Transfer Registry or E-PRTR which requires by regulation ([Regulation EC No. 166/2006](#)) the reporting of releases – both accidental and deliberate – to the air, water or soil. E-PRTR searches can be done [online](#). The data base is about two years out of date, but it can be useful to identify past problems at facilities. Reports of discharges or releases from facilities are themselves not confidential under EU law and can also be readily obtained from each Member State.

### **National Law**

The right access to information on the environment is exercised under the conditions defined by the older law on the right of access to administrative documents 78-753 of 17 July 1978 and the subsequent [Decree No. 2005-1755](#) of December 30, 2005, subject to the specific provisions of Chapter IV of Title II of Book I of the Environment Code ([Art. L. 124](#)) that provide for certain special rules imposed by the Aarhus Convention and EU law. Article L-124-1 implements environmental information access through the

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within the exemption as to "secret" information involving internal preparation of a proceeding or decision. See [Mecklenburg v. Pinneberg](#),, C-321-96, 1998 ECRI 3809, 3835. After the matter is resolved by officials, the reason for the exemption is arguably no longer valid. See [Flachglas Torgau](#), supra.

<sup>4</sup> The [Aarhus Convention](#) on access to justice in environmental matters also has relevant disclosure requirements. The objective is the right to participate in environmental decision-making and the information covered includes administrative measures by public authorities affecting the environment. See Article 2 (definitions). Most of this convention has been incorporated into the Environmental Information Directive at this point.

<sup>5</sup> See Dirk Bunker, DEFICITS IN US AND EU MANDATORY ENVIRONMENTAL DISCLOSURE, (Springer 2011), p. 141.

older administrative information law. Article 124-3 seems to exclude judicial matters entirely: “Organizations or institutions acting in the exercise of judicial or legislative capacity are not subject to the provisions of this chapter.” However, this is apparently inconsistent with both the Aarhus Convention provisions and the EU Directive. Article 124-4(ii) excludes “documents under development.” Article 124-5 excludes court proceedings and other proceedings that may result in a criminal penalty.

The French law has been criticized by the OECD as being too complex (the multiple interactive references back and forth) and it also has been successfully attacked in court. See [l'Université Virtuelle Environnement et Développement](#) [Virtual University Environment and Sustainable Development] comments:

*“The procedure for access to administrative documents under Act No. 78-753 of 17 July 1978 was ... deemed inadequate in the light of Directive 90/313 / EEC of 7 June 1990<sup>6</sup> by the Court of Justice of the European Communities in a judgment of 26 June 2003 (ECJ 26 June 2003, Commission v / France, aff. C 233 / 00). The Council of State went in the same direction with its judgment of 7 August 2007, considering that Article L. 124-1 of the Environment Code which excludes the right to communication preparatory documents to an administrative decision as an it is being developed is not compatible with the objectives of Article 3 paragraph 3.3 of the Directive of 7 June 1990 above which limits the possibility of refusing a request for information communication (EC August 7, 2007, No. 266668, Morbihan Littoral Residents Association).*

*“...the obligation to disclose is information and not on the document; it is sufficient that the information is held by the administrative authority which receives a request, will prepare a document containing information considered (CADA opinion, prefect of Reunion, 20103947, 14 October 2010: in access to information relating to the environment ... the Environmental Code imposes no formalized requirement. Once the administration has such information, that they are listed or not on an existing document, it is up to him to prepare a document containing the requested information, if communicated under Articles L. 124-4 and following of the same code. ). Similarly, once the preparatory documents for an administrative decision are communicated: according to the CADA (opinions, departmental director of the protection of the Rhone populations, 2010-4269, November 04, 2010) ... no provision [of the Environment Code] provides for the possibility to refuse access to documents that are part of a preparatory process for the adoption of an act that has not yet occurred, since the documents themselves are completed .)”<sup>7</sup>*

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<sup>6</sup> This is the pre-Aarhus EU Directive on Environmental Information.

<sup>7</sup> l'Université Virtuelle Environnement et Développement (the Virtual University Environment and Sustainable Development) [website](#).

So the legal situation in France is complicated by several judicial decisions that have successfully broadened the disclosure provided for in the French statute.

The access to past environmental violations and notifications is clearly covered, as the reason for confidentiality has ended. The fact that there are pending violations being contested or negotiated would seem to come under the court ruling in the Rhone case described above. Even if some of the documents themselves may be confidential due to fairness considerations in L-124, but the existence of the pending enforcement action seems to be public information.

The French law on access to environmental information is unclear in some regards, but nothing precludes disclosure of past administrative violations and the existence of pending cases.

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