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Breathing life into the right of access to environmental information: comparing aims and practice

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The resurgence of public interest in environmental matters – plastics and other waste, biodiversity loss, climate change – is placing new emphasis on the public's right of access to environmental information. Under the provisions of the Aarhus Convention,¹ given force through EU and national legislation,² public authorities provide access to environmental information through proactive publication ('the active right') or by disclosing the information on request ('the passive right'). The primary aim in both cases is to promote public participation in environmental decision-making processes in order to reach the 'optimal result': one that balances the needs of the population with the needs of the natural environment.³

While the aims of the right are clear, it is much less clear that the right is being used to achieve those goals. Individuals and NGOs have used the right in a variety of ways for a variety of reasons, breathing life into the right in order to reflect their experiences.⁴ As a consequence of this, however, how the right is used does not entirely reflect the aspirational aims of the right enshrined in the Aarhus Convention. This departure has caused public authorities to complain about how the right is being used in practice, with complaints focusing on the 'misuse' of the right and

the cost of maintaining an information regime.⁵ Arguments over the use and value of the right are exacerbated by the fact that there is little empirical research on how the right is used in practice, in particular the motives of those using the right and the impact of proactively disclosing environmental information.

However, while the use of the right may not directly match its aspirational aims, the complaints levelled by some public authorities also do not match the reality in which the right is used. Public authorities presume, in line with the Aarhus Convention, that the only legitimate users of the right are those motivated by environmental concerns. This presumption is used to justify casting users who are motivated by other considerations as 'misusing' the right. Further, while it is understandable that public authorities focus more on the demands created by having to respond to many individual requests under the passive right, they underestimate the potential value of the routine work of proactively disclosing environmental information. While these benefits are currently undetermined, it is clear that proactive disclosure does confer benefits which are currently underutilised.

It is within this context that this paper, utilising the emerging findings of the 'Uncovering the Environment: The Use of Public Access to Environmental Information' project, explores these misconceptions of the right of access to environmental information. The project is examining the actual use of the right in Scotland, to determine who is seeking access to environmental information and why and how the information is being used.⁶ It has surveyed over 50 users who sought to access environmental information in Scotland on their views and use of the right, and

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1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters Adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

2 For example, the Environmental Information (Scotland) Regulations 2004 SSI 2004/520.

3 J Ebbesson, H Gaugitsch, J Jendroška, F Marshall and S Stec, *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations, 2014) at 119. This is also evidenced in the 'three-pillar' structure of the Convention itself, with right to access environmental information acting as a precursor to public participation.

4 For another example of a right created with one vision being used for more varied goals by those utilising the right see P Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press, 1991) at 163.

5 In the context of the Freedom of Information (Scotland) Act 2002, see the submission of SOLAR (The Society of Local Authority Lawyers and Administrators in Scotland) and SOLACE Scotland (The Society of Local Authority Chief Executives and Senior Managers) to the Public Audit and Post-Legislative Scrutiny Committee on the Freedom of Information (Scotland) Act 2002, <https://www.parliament.scot/S5_Public_Audit/General%20Documents/24_Solar_-_Solace.pdf> (accessed 9 December 2019).

6 See, generally, University of Dundee 'Uncovering the Environment: The Use of Public Access to Environmental Information' <<https://sites.dundee.ac.uk/envinfo/>> (accessed 24 July 2019).

interviews with both users of the right and Scottish public authorities are ongoing.⁷ In conducting this research, the project has sought to provide an empirical foundation to identify how the right is being used in practice and whether this use has enabled the right to move beyond the assumptions which underpin the right and its use.

This paper first discusses the motives of those using the right of access to environmental information. Utilising empirical evidence, the paper identifies the motives driving use of the right and how they depart from the preconceived views of motives held by public authorities. The paper then moves on to examining how users utilise proactively disclosed environmental information and the relationship between proactive disclosure and disclosing environmental information on request. The paper concludes by identifying how a lack of understanding of how the right operates in practice undermines how the right can be effectively guaranteed and how it promotes public participation in environmental decision-making procedures.

Motivations and the right of access to environmental information

Key to the Aarhus Convention's understanding of the right of access to environmental information is its role in promoting public participation in environmental decision-making procedures. This can be identified in the structure of the Aarhus Convention itself, with the right of access to environmental information acting as the first of three interlocking 'pillars' preceding the right to participate in environmental decision-making procedures and the right to have access to justice in environmental matters.⁸ Such an understanding of the right does make sense: without knowledge provided by the ability to access environmental information, individuals and NGOs would be unable to effectively participate in environmental decision-making procedures.⁹

Yet as clear as this understanding of the right may seem, it is underpinned by largely un evidenced assumptions. The first of these assumptions is that users of the right are expected to make use of the disclosed environmental information to participate in environmental decision-making processes. Explicitly referenced in recitals 7 and 8 of the Convention,¹⁰ this assumption emphasises the perceived role of the right as a precursor to public

participation efforts. This is not to suggest that the Convention does not envision other uses for environmental information:¹¹ rather, it indicates that greater importance is placed on using the right as a means of engaging with decision-making processes to reach the 'optimal decision'.

The second assumption is that users who do use the environmental information to participate do so in order to help protect and improve the environment. This assumption originates from the moral responsibility imposed by the Convention on individuals to 'protect and improve the environment for present and future generations',¹² which requires individuals and NGOs to actively participate in environmental decisions. Again, this is not to suggest that the Aarhus Convention does not recognise that other motives for participation in environmental decision-making procedures exist. However, implicit within the Convention is that meeting this moral responsibility to protect and improve the environment should be among the driving motivations of any participative efforts.

These assumptions are significant because they influence how users of the right are perceived by public authorities. Users who do not use the right to access environmental information for the sole purpose of participating in environmental decision-making procedures to help protect the environment run the risk of being characterised as 'misusing' the right. How 'misuse' is defined differs depending on the public authority,¹³ based on the particular issues and priorities of the authority itself. Some users who were interviewed believe that these attitudes negatively influenced the treatment of their request by the public authority, with public statements of public authorities entrenching these beliefs.¹⁴

Such an understanding of the right is problematic for several reasons. First, it does not adhere to how the right is actually used in practice. The project has found that the majority of users seek to access environmental information for either for personal¹⁵ or professional¹⁶ reasons. While some users may be altruistic in their personal reasons for seeking access to environmental information, the vast

7 Currently, the project has conducted in-depth interviews with 15 users of the right and 13 Scottish public authorities.

8 Aarhus Convention Implementation Guide (Note 3 above) at 19.

9 *ibid.*, at 75.

10 Which refers to the duty '... to protect and improve the environment for the benefit of present and future generations', Aarhus Convention (Note 1 above).

11 Aarhus Convention Implementation Guide (Note. 3 above) at 19.

12 Aarhus Convention (Note 1 above) recital 7.

13 For example, in the SOLACE and SOLAR submission public authorities felt that commercial entities making use of the right for financial gain was a misuse of the right. Yet in some of the project's interviews other authorities did not feel this way at all, instead viewing journalists 'fishing' for a story as misusing the right.

14 *ibid.*

15 Examples of personal reasons include information relating to a land ownership dispute the user is embroiled in and information on a flood which damaged the user's property.

16 Examples of professional reasons include journalists seeking environmental information for a news story or lawyers advising their clients.

majority of users utilise their right in order to oppose the action or proposed action of an authority that directly impacts them. Consequently how public authorities view users of the right, which is informed by the assumptions enshrined in the Aarhus Convention, may not be a good match to how users actually behave.

Second, users of the right may have more than one motive for accessing environmental information. Many users who responded to the project's survey and interview indicated that their motivations were multifaceted: that a multitude of personal and altruistic motivations drove them to use their right of access to environmental information. Indeed, those employed by public authorities also respond to requests for environmental information for various reasons: while they may be motivated to respond by a desire to contribute to environmental discussions and enhance transparency, the fact that this is part of their job is likely the dominant element of their motivation. While these findings are preliminary, they fit well with work in other fields; for example, while those attending science festivals are often interested in engagement with and understanding of science, the reason why the festivals are held, they are also attracted by other aspects of the event.¹⁷

This highlights an inherent contradiction in this idea of users holding a single motivation: if employees of public authorities are able to hold multiple motives in responding to requests, it is not reasonable for public authorities to expect users of the right to only have altruistic environmental motives. It also raises practical questions on whether public authorities can accurately determine the motives of individuals using the right.¹⁸ Consequently, it is possible that public authorities are unfairly attributing 'misuses' of the right to individuals who are actually using the right to protect and improve the environment, even if this motivation sits alongside other motivations.

Third, and perhaps most critically, such a narrow view prevents recognition of the possibility of users with mixed or even selfish motivations having a positive impact on the environment. This narrow view can be traced back to the Aarhus Convention, which implicitly requires individuals to meet their moral responsibility in order to participate in order to reach the 'optimal decision'. Yet the link between 'pure' altruistic motives and positive environmental impacts is unclear. While some users aim to participate in decision-

making processes for their own personal benefit,¹⁹ it is possible that their participation may have an incidental positive environmental impact.²⁰ In these ways, users of the right are breathing life into and reshaping the right by using it in a way that reflects their own experiences and concerns. If public authorities restrict themselves to viewing only users who hold purely environmental motives as those who can have a positive impact on the environment, they limit the ability of other users to have a similar positive impact.

In considering the key participative aims of the right of access to environmental information it is also important to consider the nature of how users are able to participate. The provisions of the Aarhus Convention explicitly cover governmental decision-making processes, such as environmental impact assessments and planning decisions.²¹ Further, and perhaps most importantly, allowing the public to participate in such processes is only of value if public authorities genuinely listen and are open 'to the possibility of being influenced by [the public]'.²² These elements are important because if the authority does not adhere to them, users of the right will be unable to assist in reaching the 'optimal decision' for the environment²³ and may hinder the implementation of the decision that was taken.²⁴

However, despite this emphasis in the Aarhus Convention, many users of the right in Scotland that were interviewed do not perceive many opportunities to participate in environmental decision-making procedures. Further, even where individuals were able to participate, they believed that the public authority had no intention of allowing them to influence the decision-making process. To quote one interviewee: '... your answers will get listened to but they'll do what they want anyway'. This perception is significant because it suggests that users believe that public authorities are departing from the key

19 Although, as previously discussed, many such users may also have additional, more altruistic and community-minded motivations.

20 One potential example of this is an individual seeking information in order to prohibit a business from releasing unpleasant emissions near their house that reduce the value of their property. While such an action can be driven by economic considerations, it can also serve to protect the wider environment from harm and incentivise further consideration of local planning.

21 Aarhus Convention Implementation Guide (Note 3 above) at 120.
22 *ibid*, 119–120.

23 See, for example, the efforts in response to post-Chernobyl fallout to regulate Cumbrian sheep farmers, where the input of the farmers was ignored and the imposed regulations labelled as 'impractical' and 'unrealistic': see M Aitken, 'Wind Power Planning Controversies and the Construction of "Expert" and "Lay" Knowledge' (2009) 18(1) *Science as Culture* 47, 50.

24 For example, challenging the necessity of an action taken by a local authority due to a lack of trust: see M Fairbrother, 'Environmental Attitudes and the Politics of Distrust' (2017) 11(5) *Sociology Compass* 1, 2.

17 For example, the social elements of attending science festivals: see E Jensen and N Buckley, 'Why People Attend Science Festivals: Interests, Motivations and Self-Reported Benefits of Public Engagement with Research' (2014) 23(5) *Public Understanding of Science* 557.

18 This is particularly true since the process is designed to be applicant- and motive-blind, with the user not required to provide any details about themselves or their motivations.

participative principles of the right itself. In turn, this may make individuals less likely to utilise their right to environmental information and withhold any insights they may have from those taking environmental decisions.

Yet it is important to note that many users of the right seek to participate in order to oppose a decision made by a public authority, and would only be satisfied when the authority makes a decision which aligns with their opinions. However, in making such decisions public authorities have to take into account the broader public interest, which may not always align with the opinion of the individual user.²⁵ In such a scenario the user may feel that the participative aims of the right have not been met, despite the fact that the broader public interest has been safeguarded.

Consequently, the way users utilise their right of access to environmental information is interesting because it has been predominantly used for opposing decisions. The Aarhus Convention does not privilege the use of the right as a means for opposing decisions, despite that being the most common use of the right. Rather, the Convention perceives the right as a means of enhancing ‘the quality and implementation of decisions’.²⁶ In some instances this may necessitate the authority deviating from the initially proposed decision. However, the Convention does not suggest that every instance of opposition from individuals affected by the decision will result in such a substantial rethink of the proposed decision.

This use of the right as a tool for opposing decisions acts as another way in which users of the right have breathed life into the right of access to environmental information. The Aarhus Convention envisioned the right as a means of creating a shared enterprise between public authorities and society, where the common goal was reaching the ‘optimal result’ in environmental decision-making procedures. Instead, the use of the right as a tool for opposition has created an ‘us and them’ mentality contrary to the Convention’s aims. While the Convention envisioned such opposition as a means of bringing additional scrutiny to the decision-making process, this scrutiny was not intended to entrench a community against a particular decision. Rather, this scrutiny was intended to ensure that the local needs of the community were reflected in the final decision taken.

By predominantly treating the right as a means for opposing decisions, users have adopted the right in a way that was not entirely envisioned by the Aarhus Convention.

While this act of using the right has allowed users to shape the right in their own interests, there is the potential for this mentality to create a divide between users and the public authorities which strictly adhere to the Aarhus Convention’s understanding of the right. Such a divide could become significant, as it has the potential to prevent a shared understanding from developing between users and public authorities. In turn, this divide could inhibit a deeper understanding and recognition of the needs of users and public authorities from developing.

The active and passive right of access to environmental information

A second key aspect of the Aarhus Convention is the explicit recognition of the active and passive rights of access to environmental information. Under the Aarhus Convention, the active right encapsulates the authorities’ obligations to proactively disclose environmental information without receiving a request from the public. This contrasts with the passive right, which is triggered only when an individual submits a request to the authority.

This distinction between the active and passive rights is important because there is a greater focus on the passive right of access to environmental information than the active right.²⁷ More crucially, this focus has also shaped how public authorities meet their obligations to guarantee the active and passive rights. The duty to respond to requests under the passive right is generally managed centrally by a specialist member of staff. This contrasts with the active right, where the responsibility to proactively disseminate environmental information is usually spread throughout the authority’s departments.

How the active and passive rights are treated is significant because the framework provided by the Aarhus Convention places greater emphasis on users of the passive right rather than the active right. As a consequence of this emphasis the right is understood as predominantly request-driven,²⁸ echoing the focus on requests under more general freedom of information regimes.²⁹ However, this view of the right is not reflected in practice. Both the survey and the interviews conducted under the ‘Uncovering the Environment’ project identify that the majority of users will actually seek proactively disclosed environmental

25 This may be because the user is seeking to influence the authority for their personal goals, but it may also arise due to differences in opinion on what is the public interest or where two distinct elements of the public interest are incompatible.

26 Aarhus Convention (Note 1 above) recital 9.

27 For an in-depth discussion on this focus, see S Whittaker, J Mendel and CT Reid, ‘Back to Square One: Revisiting How We Analyse the Right of Access to Environmental Information’ (2019) 31(3) *Journal of Environmental Law* 465.

28 *ibid*, 12.

29 S Cullen, *Freedom of Information in the UK* (Thomson Reuters, 2019) at 189.

information before submitting a request for the same information. Indeed, users will generally only submit a request where they could not find the information themselves, or they want to ask an in-depth or personal question, or the information they did find generated additional questions.

A potential reason for this dissonance between how proactively disclosed environmental information is thought to be used and its use in practice is the rapid evolution of the right due to technological innovations. The Aarhus Convention was adopted in 1998, and was heavily based on the preceding EU Directive which was adopted in 1990.³⁰ During this period of time the infrastructure used to proactively disseminate environmental information was based on physical media, such as leaflets, or providing access to a paper-based register based in the authority's office. As a consequence, access to proactively disseminated environmental information was limited by factors such as the location of the information, the authority's opening and lunch hours and the design of the building itself.³¹

This history of the right and the legal instruments guaranteeing it is important because technology has taken significant leaps forward in accessibility and use since the Aarhus Convention was adopted. It has become increasingly easy to share and copy information online³² because the right of access to environmental information, and information more broadly, is no longer limited by the physical, paper-based infrastructure. In this way, the right of access to environmental information and its role in society has evolved with the expansion of technology.

This evolution affects how the active and passive rights to environmental information interact with one another, a question which has not been fully explored. There is an expectation that by proactively disclosing environmental information, public authorities will receive fewer requests for environmental information.³³ This supposed benefit is important, as the reduced number of requests, which leads

to less processing costs, adds a further incentive for public authorities to proactively disclose the environmental information that they hold. However, while anecdotal evidence suggests that proactive disclosure can reduce the number of requests submitted, this reduction is not guaranteed. Indeed, one public authority interviewed highlighted that they received substantially more requests after they began proactively disclosing certain environmental information. Further, many authorities were unable to identify whether any changes had occurred when they began proactively disclosing environmental information.

This is not to suggest that the proactive disclosure of environmental information is not valuable, as there are other benefits to proactively disclosing environmental information. One such benefit is that proactively disclosing environmental information allows individuals who would not submit an individual request to become informed on environmental matters.³⁴ Another benefit is that public authorities are able to reduce the time taken to respond to requests by directing users to where the requested information has been proactively disclosed. Further, while proactive disclosure may not necessarily reduce the number of requests received, the broad dissemination of the information may lead to the requests submitted being more specific. This is beneficial, as it is less likely that the authority will have to seek further clarification from the requester or waste time by gathering information which comes within the remit of the broad request but is not of interest to the user. In this way how users and public authorities have utilised proactively disclosed environmental information has reshaped and altered the active right from its expected role under the Aarhus Convention.

However, while the proactive disclosure of environmental information is clearly significant, there is a lack of understanding of its exact role in how the public accesses environmental information. In turn, this raises questions on whether and how public authorities should aim to improve how environmental information is proactively disclosed in order to reduce the burden of processing requests. The answers to these questions can have substantial impacts on how public authorities guarantee the right of access to environmental information. Yet they are expected to design and implement environmental information systems without a full understanding of the interactions between the active and passive rights to environmental information. This gap in our understanding of the right acts to undermine how

30 Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment [1990] OJ L158/56.

31 T P Burton, 'Access to Environmental Information: The UK Experience of Water Registers' (1989) 1(2) *Journal of Environmental Law* 192, 198–200. See also J Rowan-Robinson et al, 'Public Access to Environmental Information: A Means to What End?' (1996) 8(1) *Journal of Environmental Law* 19, 24.

32 C Doctorow, 'Happy Meal Toy versus Copyright: How America chose Wal-Mart and Hollywood, and why it's doomed us, and how we might survive anyway' in C Doctorow, *Content: Selected Essays on Technology, Creativity, Copyright and the Future of the Future* (Tachyon Publications, 2008) at 42.

33 Scottish Information Commissioner, 'Proactive Publication: Time for a Rethink? How fit for purpose are the publication and dissemination duties set out in Scottish freedom of information legislation?' (Scottish Information Commissioner, 2017) at 12.

34 This is discussed in more detail in S Whittaker, J Mendel and C T Reid (Note 27 above) at 475.

public authorities can effectively link their proactive disclosure efforts with their obligation to respond to requests for environmental information. In turn, this undermines how effectively the right can achieve its key aims of promoting public participation and improving the quality of environmental decisions.

Conclusion

The aspirational aims of the right of access to environmental information act as a blueprint for how the right can benefit society and enhance the natural environment. However, through its connection to the standard-setting provisions of the Aarhus Convention this understanding of the right is restricted to providing an idealised vision of the right. This is not to understate the value of such a vision. Rather, it is to highlight that such a vision would only ever be an ideal: a sanitised version of the right of access to environmental information.

It is in this context that users of the right, by departing from the strict form of the right of access to environmental information, breathe new life into the right and alter it to reflect their own interests. In doing so users of the right

do not alter the right so that it becomes unrecognisable: the core participative aim of the right is still identifiable in how users utilise the right. This is enabling users of the right to fill in the spaces left by the aspirational vision of the right, breathing life into and reshaping the right in order to reflect their 'real world' experiences.

However, this reshaping has the potential to create a disconnect between users and the public authorities guaranteeing the right where the authorities do not re-evaluate their views of the right in light of how it is used. Public authorities that hold onto this understanding of the right, and base their views on this understanding, run the risk of hindering how effectively they can engage with users of the right. In turn, this can hinder the effectiveness of the right of access to environmental information. Instead of looking for conformity to or deviation from the aspirational aims of the right, it may be more valuable to consider how these actual uses of the right could lead to deeper understanding of the relationship between society, politics and the natural environment. By doing so, it may be possible to utilise the resurgent interest in environmental information to open new possibilities for meaningful public participation.