

*Free Access to environmental information*  
**Report on Portugal**

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**1) *Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?***

In Portugal, the Constitution does not have an express rule on the right of citizens to have access to environmental information.

Nevertheless, freedom of expression and information are general fundamental freedoms. More specifically, according to article 37 no. 1 of the Constitution, the rights comprised in the freedom of information are threefold: the citizens have the right:

- to inform (i.e. provide information),
- to inform themselves (i.e. to obtain information) and
- to be informed (to receive information).

These citizenship rights to information can be relied upon both for the environment and for any other field of information. They are not limited to environmental matters.

Besides, the citizens have the right to be objectively clarified on the acts practiced by the State and other public entities as well as to be informed by the Government and other authorities on the management of public affairs (article 48, on participation in civic life).

On the contrary, consumers do have the constitutional right to information (article 60).

The closest reference to access to information in the context of environmental policy is the duty of the State to promote, through its organs and with the involvement and participation of citizens, environmental education and respect for the values of the environment (article 66 no.2 g).

In the context of the rights of the citizens towards the public administration, citizens can have access to procedural and non-procedural information. The first one concerns ongoing administrative processes (citizens have the right to be informed by the public administration, when they so require, on the progress of proceedings in which they are directly concerned, as well as to know the final decisions that are taken about them. Article 268 no.1) The second one concerns information held by the administration and not related with ongoing administrative processes (citizens have the right of access to administrative records and files except in matters relating to internal and external security, criminal investigation and personal privacy. Article 268 no.2).

Finally, for purposes of access to justice, the citizens have the right of access to legal and judicial information (article 20 no.2).

**2) *Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information***

**2.1. *Basic Law on the environment***

The *Basic Law on the environment* is the most important piece of legislation in this field. It was approved by the Parliament in April 2014<sup>1</sup> and establishes the normative framework and legal principles applicable to the environmental regulation to be adopted by the Government.

In the Basic law, the “principle of information” determines the monitoring of policy actions, the adoption of a culture of transparency and accountability in the search for a high degree of respect for environmental values by the community” (article 4 e)). More clearly, article 6 proclaims the duty of every citizen to have access to environmental information held by public entities, which have the duty to disclose and make information

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<sup>1</sup> Replacing the old Basic Law, in force since 1987.

available to the public through appropriate mechanisms, including the use of telematics technologies (article 6 no2 b)).

Subsequently the Government is allowed to adopt development laws to implement the Basic Laws.

Furthermore, environmental policy shall be based on the best knowledge and information available (article 15 no.1). The state is responsible for the collection, processing and analysis of environmental data in order to obtain objective, reliable and comparable information (article 15 no.2). For this purpose the means for collecting, processing and analyzing shall be created in order to support decision making and environmental inspection (article 15 no.4).

The environmental data bases thus created shall be widely publicized and made freely available to the public through accessible media using information and communication applications that enable search, displaying and distribution (article 15 no.5 and 8),

Nevertheless there is the possibility of charging fees, in cases where significant processing of data is required to make information available (article 15 no.6).

These provisions do not affect the protection of confidentiality of data, or other rights worth protecting, including commercial and industrial confidentiality, or intellectual property rights, if properly justified.

Public and private entities are responsible for complying with the duties to actively display environmental information. Fault shall be presumed in case of failure of compliance (article 15 no. 3).

## ***2.2. Laws on access to administrative information***

Between 1993 and 2006 there was only one law on access to all information (relating and not relating to the environment). Although the Law no. 65/93, was adopted for the purpose of transposing the 313/1990 Directive, it would apply to every other area. 13 years later, in 2006, this state of affairs changed with the publication of a separate Law only for environmental information (Law 9/2006), followed by the publication of a Law on access to the rest of the administrative information, in 2007 (Law 46/2007).

Despite being separate pieces of legislation, the first part of the Law on administrative information still keeps more or less the same structure and contents, similar to the directive on environmental information: objectives, definitions, public authorities, access upon request, exceptions, dissemination, modes of access, charges, right to complain and access to justice. The second part of the law is on the conditions for reuse of information, thus transposing Directive 2003/98.

Since the transposition of the 2003 Directive, through Law 9/2006, for the first time the access to environmental information is more strongly protected in Portugal than the access to information in general. Clearly it was difficult to keep up with the decision of harmonizing both regimes, namely in what concerns the active dissemination of information.

The Code of Administrative procedure, recently adopted (Decree Law 4/2015) regulates the access to procedural information: interested parties have the right to be informed, when they so require, on the progress of procedures affecting them directly, and the right to know the final decisions taken about them (article 82).

More noteworthy, article 14 establishes the principles applicable to electronic administration:

“1. The bodies and services of the public administration shall use electronic means in carrying out their activity, so as to promote the efficiency and administrative transparency and proximity with stakeholders.

2 - The electronic means used must ensure the availability, access, integrity, authenticity, confidentiality, conservation and information security.

3 - The use of electronic means, within the limits established in the Constitution and the law, is subject to the safeguards provided for in this Code and the general principles of administrative activity.

4 - The administrative services must provide relationship of electronic means in the public sector and disseminate them appropriately, so that stakeholders can use them in exercising their legally protected rights and interests, namely to formulate their claims, obtain and provide information, consult, present claims, make payments and challenge administrative acts.

5 - Stakeholders have the right to equal access to the services of the Public Administration. The use of electronic means cannot, under any circumstances, imply restrictions or discrimination to those using non-electronic means to relate to the administration.

6 - The preceding paragraph shall not prejudice the adoption of positive discrimination measures in favour of those Stakeholders using electronic means in the relationship with the Public Administration”.

### **2.3. Other environmental Laws**

#### *Water Law*

Law 58/2005 creates a system for access information on water resources: quantity and quality of superficial, underground and coastal waters (including bathing water), flooding, etc. are displayed in the web portal <http://snirh.apambiente.pt/>.

#### *Air quality Law*

Decree law 102/2010 lists all the information that shall be made public namely through the Internet: the information produced to be sent the European Commission, information on air quality, alert when thresholds (namely for ozone levels) are surpassed.

#### *GMO Law*

The public shall be informed about the decisions to authorise the release of GMOs into the environment, the place where the releases will be performed, the monitoring results, or non authorised releases. If so required, some informations may be classified as confidential to safeguard competition (Decree Law 72/2003).

Decree Law 160/2005, on co-existence, provides that the responsible entities shall disseminate information on the name of the farms, the type of GMOs, the planting date and the coexistence measures adopted.

#### *Environmental impact assessment Law and Strategic environmental assessment Law*

These Laws (Decree law 151-B/2013 for EIA and Decree law 232/2007 for SEA) require that all information available on ongoing environmental impact assessment procedures for projects, plans and programs is displayed online.

### **2.4. Other Laws**

#### *Law on geographic information*

Decree law 180/2009 creates the National System of Geographic Information and a «geoportal» transposing the Inspire Directive.

#### *Law on responsible industries*

Relevant data from all the industries (submitted to EIA regime, to the Seveso regime, to the industrial emissions regime, to the ETS), is included in an *industrial installations information system* (Decree law 73/2015 creating the so called *Responsible Industry System*).

#### *Code of public procurement*

Since 2009 the Code of public procurement (Decree-Law 278/2009) regulates publicity through electronic platforms and requires that every public contract is displayed in a single web portal (<http://www.base.gov.pt/>).

#### *Law on State secret*

In 2014 a new law on State secret was approved (Law 2/2014), repelling the previous one from 1994. The classification of any information as a state secret shall be grounded on the interests to be protected and on the reasons or circumstances justifying the application of the state secrets regime.

#### *Law on personal data*

Law 67/98 determines that ‘personal data’ and ‘sensitive personal data’ shall be protected in order to ensure respect for private life.

### **3) National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?**

Directive 90/313 had a huge impact on the national law. As explained before, the Portuguese Parliament decided at the time that the new legal regime adopted to transpose the Directive was to be applicable to all the information held by the Administration and not just to environmental information.

Therefore, in 1993, only the concept of “administrative document” and not the concept of “information relating to the environment” was upheld by the Law (Law no. 65/93, of the 26th August).

The reasons for this move are not stated in the law (unlike Governmental laws, Parliamentary laws don’t have any preamble) but, considering that in the beginning of the nineties, neither the law nor the administration, were too concerned with access to information, ultimately this option represented a big step towards a more transparent and democratic State.

The legal appeal entity, created to supervise compliance with the Law (called Commission on Access to Administrative Documents or CADA) is still in operation today.

**4) *Statistical information about the use of the access-right including types of users if known (eg NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.***

Official statistic information is hard to find.

In the annual reports on the state of the environment produced by the National Statistical Institute, only physical and economical information is provided<sup>2</sup>.

In the annual report on the State of the Environment<sup>3</sup> produced by the Portuguese Environmental Agency only some topics are reported: energy, transport, air, climate, water, soil, biodiversity, waste, risks and economy (raw materials consumption, taxes, management instruments and green patents).

The national report on access to information<sup>4</sup> produced by the Portuguese Environmental Agency in 2010as required by the Directive 2003/4<sup>5</sup> does not include statistical information.

The statistical information produced by the CADA<sup>6</sup> is organized according to the public sectors against which complaints were presented. The environment is dealt with together with urbanistic questions and is not one of the most important sectors. In 2013 there were 15 complaints concerning information held by entities responsible for the environment and urban matters, compared with 142 against health entities, 95 against municipalities, and 39 against education and science. However, this information can be misleading since very often the municipalities, agriculture, public works and transports, and even health departments are holders of environmental information.

Browsing all the opinions issued between 2011 and 2015, 40 opinions directly relating to the environment can be found. 15 were against municipalities, 11 against the Portuguese Environmental Agency, 9 against other ministries, and 6 against other entities. In what concerns the complainant, 17 (out of the 40) are complaints by citizens, 7 by firms, 7 by NGOs, 3 by politicians, and 2 by journalists.

In 27 cases the opinion was completely favourable to the applicant and in 13 cases it was only partially favourable. There were no cases of unfavourable opinion.

The reasons for the complaints were: information covered by secrecy (3 cases), information impossible to obtain (3 cases), excessive delay (3 cases), doubts by the required entity as to the duty to inform (9 cases), total lack of response (19 cases). This is by far the most frequent situation also in the court cases. This may reflect, in part, some difficulties in managing the number and/or the scope of applications, but also a certain culture of secrecy, and disregard of the importance of transparency. Access to information is still regarded as a sign of distrust and suspicion against the public services. In 25, out of 40 opinions, the CADA makes a general statement on the duty to respect the right of access to information.

As for the success of CADA in contributing to more transparency, according to the last data available (2013), 393 opinions (including both environmental and non environmental information) were issued following complaints, 348 of which were favourable (88,5% yes), recognising the complainant's right to have access to the required information and 45 were not favourable (11,4% no).

Regarding the follow up of the opinions, only in 279 cases did the CADA receive confirmation about the final decision taken by the public authority (80%) in spite of having required it in all cases. From these 279 cases, in 17 cases the authorities decided to maintain the inicial decision despite the CADA opinion (6%), in 4 cases the information was partialy displayed (1,4%), and in 5 cases the administration informed that after all, it did not have the information required (1,8%). The final rate is 90% of full demonstrated success.

Besides, the complaint procedure before the CADA is totally free of charge. Nevertheless, a week point in the system is the fact that the CADA is not very well known or is distrusted by the citizens. In the end of the day, very often the citizens and NGOs go directly to Court to get a judicial condemnation of the administration to provide information, to allow for document consultation or to issue certificates<sup>7</sup>. Despite the fact that the law

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<sup>2</sup>[https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine\\_publicacoes&PUBLICACOESTipo=ea&PUBLICACOEScoleccion=107664&selTab=tab0](https://www.ine.pt/xportal/xmain?xpid=INE&xpgid=ine_publicacoes&PUBLICACOESTipo=ea&PUBLICACOEScoleccion=107664&selTab=tab0)

<sup>3</sup><http://www.apambiente.pt/index.php?ref=19&subref=139&sub2ref=460>

<sup>4</sup>[http://www.apambiente.pt/\\_cms/view/page\\_doc.php?id=579](http://www.apambiente.pt/_cms/view/page_doc.php?id=579)

<sup>5</sup> In fact article 9 of the directive required the report to be completed by 2009.

<sup>6</sup><http://www.cada.pt/uploads/ac1a010c-1e1f-23ef.pdf>

<sup>7</sup> Code of Administrative Procedure (Law 15/2002, amended in 2011, article 2, L).

labels these processes as “urgent”<sup>8</sup> they can take years. Besides, the cases must always be brought to the central court in Lisbon, where most of the Public Authorities have their seat<sup>9</sup>. Time and money are real obstacles regarding access to information *via* the courts.

### *Environmental Jurisprudence: introduction*

On environmental jurisprudence it is important to realise first of all that most cases decided by the CADA are based on complaints relating with total inaction by the required entity. It is not at all unusual that the request for access to environmental information simply remains unanswered by the public authority for a long period. Quite often the authority does not answer the CADA also. In such cases, CADA's opinions, analysing unjustified omissions and total silence, are rather basic and dull. But there are exceptions, of course.

An interesting case decided by CADA in 2011 is related to the relationship between the law on access to environmental information and the law transposing Directive 2003/98 on re-use of public sector information. A citizen requested information on a plan of a Natural Park and on the tree cuts carried out, to the Director of the Department responsible for the management of protected natural areas. The application had been formulated as a request for “reuse of existing public information”. As he received no answer, he asked CADA for an opinion. The opinion was clear: this was not a case of reuse of information and therefore a specific authorisation for reuse was not necessary. According to CADA's opinion reuse is only applicable to the public use (commercial or non-commercial) of information. On the contrary, private use is free and does not require an authorisation.

Another case was an opinion, issued in 2011, on the request of information on green permeable areas in Lisbon. The information was required by an association («Green Lisbon») to the Municipality of Lisbon. Considering the silence of the municipal bodies, CADA's short opinion only discards all exceptions and reaffirms the environmental nature of the information requested and the right of access to information.

Other decisions were issued in 2013 on the information requested by the NGO Quercus to the Director General of Schools (ordan of the Ministry of Education) on presence of asbestos in schools and on the destination of the material containing asbestos when it is removed. The Director General did not answer and the opinion was again a short rejection of exceptions, a confirmation of environmental nature of the information and a conclusion on the right to information.

#### *5) Significant national law and jurisprudence on the definition of “environmental information” (Art. 1 para 1 Dir 2003/4/EC)*

In what concerns the definition of 'environmental information' the law on access to environmental information (in portuguese, LAIA) transcribes *verbatim* the European definition. The environmental character of the requested information is normally not contested.

#### *6) Significant national law and jurisprudence on determining the access right holder (“without having to state an interest”, Art. 3 para 1 Dir 2003/4/EC)*

The LAIA does not explain in further detail the 'access right holder' but being a country where *actio popularis* is a constitutional right, there is a long tradition of generous interpretation regarding the holders of environmental rights. In Lusophone countries, the environment is qualified as a *sui generis* good. This is the result of a "socialization" of interests. In Portugal (as in other Lusophone countries) there is a third category of interests, placed between the individual and the public interest: the trans-individual interests. The environment is the perfect example of trans-individual interests which are often held by groups of unorganized citizens deprived of social power to protest — weak majorities — and whose propensity for litigation increases in the direct proportion of the economic value of the case and of the economic benefits obtained from the action<sup>10</sup>.

Diffuse interests can be represented and protected by any individual (acting in the name of all), NGO or association.

In order to recognize standing to associations and foundations, three requirements are necessary<sup>11</sup>:

a) having legal personality;

<sup>8</sup> Article 36 of the Code of Administrative Procedure.

<sup>9</sup> Code of Administrative Procedure, article 20.

<sup>10</sup> Miguel Teixeira de Sousa analyzes in detail the economic justifications for collective procedures such as *actio popularis* (*A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa, 2003, p. 94 and ff.).

<sup>11</sup> Law 83/95, on *actio popularis*, article 3.

b) including expressly in their competences or statutory objectives the defense of the interests involved in the type of action concerned;

c) not exercising any kind of professional activity competing with companies or independent professionals.

Quite often the existing ENGOs decide to join creating new *ad hoc* associations with more specific goals, like fighting certain activities or projects namely by starting judicial litigation against the operator or the Administration. For this *ad hoc* ENGOs, having no assets can be an advantage in case they lose the trial.

### 7) *Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c 4/EC. (see ECJ 279/11 (Fish Legal))*

The national law adds to the European definition some references and examples for purposes of clarification.

- The government of the autonomous regions of Madeira and Azores are expressly mentioned,  
- Examples of natural or legal person performing public administrative functions, duties, activities or services in relation to the environment or under the control of such body or person are also provided: «namely public institutions, public associations, public companies, corporate public entities and participated companies, as well as concessionaires».

- Even though in a case involving the concession of a river for energy production, EDP maintained its private status and contested its obligation to disclose information.

The required entity, EDP, is still today, one of the main energy suppliers in Portugal. EDP used to be a public undertaking created in 1976, after the democratic revolution, with the monopoly of energy production. In the nineties the privatization of EDP began and the once public company turned into a private company (an anonymous society) owned mostly by public capitals. Gradually the state lost economic control over EDP and full privatization happened in 2011 when the large Chinese investor «Three Gorges» bought the last 21% public share held by the State.

Requested by the largest Portuguese NGO, Quercus, the Supreme Administrative Court had to decide whether EDP's activity as an energy producer intending to build a dam in the last savage river in Portugal (Sabor river) would fall under the scope of the law (concessionaire) or, on the contrary, as understood by EDP, they were a private company using the river for the private purpose of producing energy. Moreover, EDP claimed that they were not providing environmental services or services in relation with the environment but rather electricity services. In a straight forward decision, the court upheld Quercus' arguments.

### 8) *National law and jurisprudence on the public authorities to be addressed (“information held by or for them”) (Art. 3 para 1 Dir 2003/4/EC)*

The national legal definition does not use the possibility of excluding legislative or judicial authorities, acting in their legislative or judicial function, from the scope of the law.

During the term of the first directive there was a restrictive interpretation of «environmental information held». In fact, there were several refusals of access to environmental annual reports based on the purpose for which the information was produced. Actually, the authorities did not deny holding the information, nor did they deny its environmental character. Rather they claimed that the information **had not been produced** for the purpose of being accessed by the public. It had been produced merely for the purpose of complying with European obligations. Therefore, access to national reports on the implementation of EC law intended to be sent to Brussels was denied a few times. Mindfully, the CADA always rejected this line of argument and ordered the disclosure of the reports. Of course, the reports reflected breaches to EC environmental law and were contrary to the image the government intended to pass on: that the quality of the environment was improving every day.

### 9) *Significant national law and jurisprudence on practices on access conditions (terms, “practical arrangements”) (see Art. 3 paras 3 – 5 Dir 2003/4/EC)*

There are some minor differences between the directive and the Portuguese law in what concerns access conditions.

- Instead of one month, the national law establishes almost half the time. 10 working days is the maximum period to display information or to ask the applicant to reformulate the request (article 3 no.2 and 3 of the Directive). There is, however, the possibility of postponing for 1 or 2 months in the same conditions of the directive.

- A report on the state of the environment shall be produced every year instead of at least every 4 years (article 7 no.3 of the Directive)

- The manifestly unreasonable nature of the request (article 4 b) of the Directive) was not transposed into the national law. The interpretation is that an unreasonable request will be dealt with as a “request is formulated in too general a manner” (article 3 no.3 of the Directive) and the applicant asked to reformulate.
- The obligation of the officials to “support the public in seeking access to information” (article 3 no.5 a) of the Directive) was not transposed into the national law but the duty of cooperation is present in the Code of Administrative procedure in general.
- The exception for the protection of “rare species” (article 4 no.2 h) of the Directive) was replaced by “protected species”.
- The reference to active dissemination of information by means of computer telecommunication and/or electronic technology, *where available* (article 1 b) *in fine* and 7 no.1 of the Directive) was suppressed. Active dissemination of information by means of computer telecommunication and electronic technology is always mandatory in accordance with the new Code of Administrative Procedure. Article 61 of the Code, on use of electronic means declares: “unless otherwise provided by law, the procedure shall preferably use electronic means, with a view:
  - a) to facilitate the exercise of rights and the fulfilment of duties through systems that are accessible to all stakeholders in a safe, easy, quick and understandable manner.
  - b) to ensure quick and easy access to the procedure and to information by interested parties;
  - c) to simplify and reduce the length of procedures, promoting rapid decisions, with the necessary legal guarantees”. In this context the interested parties are entitled:
    - a) to use electronic means to get information on the state of the proceedings affecting them directly;
    - b) to obtain the necessary tools to communicate electronically with the administration services, including user name and password for access to simple electronic platforms and, where legally prescribed, email account and certified digital signature.”

**10) *Law and practices/jurisprudence on charges for access (copying? administrative time?)***

The calculation criteria and the factors to take into account when determining the charges to access are not laid down in the law.

The concept of “reasonable amount” is not laid down in the LAIA but only in the Law on access to administrative information.

According to the LAIA non-governmental environmental organizations and similar associations benefit from a 50% discount on the fees due for access to environmental information.

Questions regarding price have been raised before the CADA but apparently not in environmental matters.

**11) *Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?***

No.

**12) *National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)***

In 2005 the Constitutional Court was called to give a ruling on the conflict between two constitutional values: the protection of trade and industrial secrets on one hand and access to environmental information on the other.

A NGO requested access to all the studies and technical annexes of a contract between the government and an industrial undertaking. The Prime Minister refused to disclose the information based on the protection of trade and industrial secrets and the Court confirmed this argument considering that the NGO had already had access to the contract and the secret information was contained in the technical annexes.

In 2010 the Supreme Administrative Court had to decide if the prevention of crimes was an acceptable justification to refuse access to information on GMOs. In fact, the information required to the Ministry of Agriculture was not just on the type of culture produced and approximate location. The applicant requested name and address of the producers of GMOs. The questions raised were:

1. Weather name and address were personal data likely to fall under the scope of the law on the protection of personal data
  2. Weather the risk of an attack of any nature against the agricultural property or even its owner should prevent the disclosure of information.
- The Court decided negatively in both cases. First, because not all documents containing names and addresses are “nominal documents”; second, because there was no solid evidence indicating an attack that would justify a restrictive measure to the general right of access.

### 13) Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC)

More specifically:

- a. Confidentiality of the proceedings of public authorities / internal communications /
- b. Approach to the disclosure of:
  - “raw data” (Aarhus Compliance Committee case ACC/53/ Uk – see AC Implementation Guide 2014 p 85)
  - “material in the course of completion” vs “unfinished documents” see AC Implementation Guide 2014 p 85
- c. “Information on emissions into the environment” (Art. 4 para 2 subpara 2 Dir 2003/4/EC, see T-545/11)
- d. International relations, public security, national defence (see T-301/10 Sophie t’ Veldt)
- e. Weighing of interests in every particular case (Art. 4 para 2 subpara 2 Dir 2003/4/EC)

Although Portugal has provided for exceptions, there is no “publicly accessible list of criteria” on the basis of which the authorities “may decide how to handle requests” (article 4 no. 3 of the Directive).

There are some interesting cases concerning exceptions decided by the CADA and by the Courts.

A holding company responsible for waste treatment requested information to the Portuguese Environmental Agency on the granting of a second licence, similar to the one assigned to Green Dot company. The Portuguese Environmental Agency asked CADA in 2011 for an opinion on the duty to display the information considering that the licence contained confidential information and simultaneously, that the request concerned proceedings in the course of completion (article 4 no.1 d). In the same year the CADA declared that the Agency should at least display the documents that had been produced more than one year ago and should indicate a reasonable deadline for completion. On a second opinion the in 2012 the CADA reaffirmed that secrecy is the exception and transparency the rule and established a set of criteria to decide on relevant “company secrets”.

In conclusion, it decided that the information at stake could be displayed, at least partially, removing the part that could be classified as confidential information according to the criteria established.

### 14) Judicial control of access-decisions

- a. Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?

Yes. The Commission on Access to Administrative Documents (CADA) was created in 1993, when transposing the 1993/313 directive. Its statute is presently established in the Law 46/2007 on access to administrative information. The CADA is an independent administrative authority, functioning at the premises of Parliament, and has the role of ensuring the compliance with the provisions of the law (article 25). Its members shall be rigorous, impartial and independent (article 29/2 a);

The CADA is composed by the following members (article 26):

- a) Chair: a judge of the Supreme Administrative Court, appointed by the Superior Council of Administrative and Fiscal Courts;
- b) Two members elected by the Parliament, proposed by the parliamentary group of the largest party supporting the Government and the other proposed by the main opposition party;
- c) A law professor appointed by the President of the Parliament;
- d) Two members appointed by the Government;
- e) Two members appointed by the governments of the two Autonomous Regions;
- f) A representative designated by the National Association of Portuguese Municipalities;
- g) A lawyer appointed by the Portuguese Bar Association;
- h) A member appointed by the National Commission for Data Protection among its members;

The term of office is two years, and it’s renewable.

Its competences are to (article 27):

- a) Approve its internal regulation;



- b) Decide on the complaints submitted to it;
- c) Issue opinions on access to official documents, at the request of public authorities and other entities covered by the law;
- d) Issue opinions on the exchange of documents between public administration departments at the request of the involved entities;
- e) Be heard on the system for registration and classification of documents (namely as confidential);
- f) Issue opinions on the application of the law on access to administrative information, as well as on the development and implementation of supplementary legislation, at the request of the Parliament, the Government and the public authorities or other entities covered by the law;
- g) Prepare an annual report on its activities aimed at the implementation of the law on access to administrative information, to be submitted to Parliament and the Prime Minister for publication and examination;
- h) Contribute to the clarification and dissemination of the different routes of access to official documents under the principle of open administration;
- i) Impose fines in administrative offense processes.

The legal strength of its acts is quite high (article 28): all officers, employees and agents of public authorities and other entities covered by the law have the duty to cooperate with the CADA, under penalty of (at least) disciplinary action. Duty to cooperate does not mean that the opinions issued by the CADA are enforceable. CADA decisions can be subject to court appeal. In practice there is a high rate of acceptance of CADA decisions although the final result (acceptance of the duty do display) is not always communicated to the CADA.

It is important to remember that the percentage of decisions favorable to the complainant is quite high.

#### 15) *Court review: “in-camera”-control? Standing of parties affected by decisions denying or granting access?*

Standing is not an issue in Portugal, considering that the environment is a diffuse interest which can be represented by everyone (persons or associations).

#### 16) *How do states fulfil the duty to make information actively available?*

Portugal has progressed a lot during the last years, in making public information available in the internet. E government is now a reality. A wide variety of services can be obtained online. Yet, the example of the access to official legal information is worth mentioning. Trying to have access to legal information in Portugal can be quite a negative experience.

##### *Access to the law*

In what concerns access to the laws, they are published in the official journal which is now available online (<https://dre.pt/>). However, the search function with *Boolean operators* (“and”, “or”, “near”, etc.) is only available for paying subscribers. For the average person, search by data or number of act is the only available. The service of delivering the table of contents by e-mail every day is free of charge.

The subscription of the access to the electronic official journal can be quite expensive for the simple citizen<sup>12</sup>: the price ranges from €196 per year (for 100 accesses) to €823 (unlimited access) for the first series. Adding the second series of the official journal (for some administrative acts, announcements and contracts) costs from €157 (100 accesses) to €659 (unlimited). For several points of access (several computers, option normally used for institutional subscribers) the price can raise up to €1515. The paper signature, only available for individuals, is condemned to extinction, and costs €460.

In what concerns environmental laws, there used to be a searchable data base called “siddamb”<sup>13</sup>.

It would include legal acts, judicial decisions and doctrine, from national organs, EU institutions and international organizations. However, it was abandoned and the last update was in November 2008.

<sup>12</sup><https://dre.pt/tabela-de-precos>

<sup>13</sup><http://siddamb.apambiente.pt/>

It was replaced by two lists of legal acts (only numbers and titles) produced and updated by the Portuguese Environmental Agency and available through their website<sup>14</sup>. One is a PDF document listing up the European legislation adopted in 2015 and the other is a longer PDF document (45 pages long) for national legislation adopted since 2009. The lists are organised according to 10 topics (general issues, water, air, impact assessment, noise, waste, dangerous substances, health/environment, natural protected areas, and economy/industry).

Other aspects worth mentioning are the consolidated versions of the laws that have undergone an amendment procedure. In Portugal republication of the consolidated version is not mandatory. In the official website of the electronic official journal the option of showing the latest updated version of a law is a service only accessible for subscribers. Even for subscribers the service is presently not available due to the “high number and complexity of legal acts published in 2014 and 2015” according to a sign displayed in the webpage<sup>15</sup>. Therefore, the risk of applying outdated laws (in case of judges, liability for mistrial<sup>16</sup>) is real.

On its own initiative, one regional Public Prosecutor in Lisbon displays some law (2322 to be more exact) in consolidated version<sup>17</sup>, which is quite useful.

And of course, there are private companies providing this service for profit<sup>18</sup>.

For specific sectors like water and waste, some regulating authorities also display the relevant legal information.

### *Access to EIA and SEA documents*

In what concerns EIA there have been fluctuations in the access to information.

EIA was born in 1988 and at the time the documents were not produced digitally. When the first EIA were displayed online, in the late nineties, only the more recent assessments were made available. Later, the procedure to put the earliest EIAs online required scanning the paper typewritten documents. When all the documents were uploaded there were several black outs, which lasted months. During those periods, neither the old nor the new EIAs were available.

Presently, the list of all the EIAs performed in Portugal until now is online, the links to some documents (non-technical summaries, administrative opinions, final EIA decision, sometimes the full EIA report) are online but some of the links work and some don't. And the type of documents that is available is not uniform. In some cases it's just the summary, in others only the EIA report, in other both...

In what concerns SEA only the environmental declarations are online, but at least the links are working and the information is available.

### *Access to case law*

Access to judicial data is a real drama for lawyers in Portugal. First, it is difficult because only the upper courts decisions are available in databases. It is particularly the case of three supreme courts (the constitutional court, the supreme administrative court and the supreme court of justice), two administrative appeal courts (Northern and Southern Central Administrative Court) and five judicial appeal courts (Porto, Lisbon, Coimbra, Guimarães and Évora).

As for the decisions of lower courts (over 300) access is only possible by means of consultation on the spot. Lower courts decide definitively on cases up to €5000 (for appeal courts it's up to €30 000)

However, even here not all the judgements are available because it depends on the judge to decide whether he/she wants the decision to be displayed online. In some cases not even the full decision is available, but only a summary of it.

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<sup>14</sup><http://www.apambiente.pt/index.php?ref=19&subref=176>

<sup>15</sup> «Dear user: Given the volume and complexity of legislation published in the end of 2014 and early 2015 the daily update DIGESTO has some delay. We will settle this situation briefly» (<https://dre.pt/pesquisa-avancada/-/asearch/form/maximized?types=SERIEI>).

<sup>16</sup> Law 67/2007 on State liability, articles 12-14.

<sup>17</sup>[http://www.pgdlisboa.pt/leis/lei\\_main.php](http://www.pgdlisboa.pt/leis/lei_main.php).

<sup>18</sup><http://www.datajuris.pt/>, <http://jusnet.wolterskluwer.pt>, <http://bdjur.almedina.net>, etc.