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### Back to Square One

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## **BACK TO SQUARE ONE: REVISITING HOW WE ANALYSE THE RIGHT OF ACCESS TO ENVIRONMENTAL INFORMATION**

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### **ABSTRACT**

The right of access to environmental information has become a key aspect of contemporary efforts to promote environmental governance in the United Kingdom (UK). The right is enshrined in international law through the Aarhus Convention which, alongside other legal developments, has influenced how academics analyse the right in the UK. How research into the right has been conducted is significant because it has led to gaps in how we understand the right and undermines environmental protection efforts.

This article identifies and critiques the common analytical trends used to analyse the right of access to environmental information in the UK. The article considers two of these trends, examining their negative impact and the role of the Aarhus Convention in creating these trends. The article concludes by discussing the need to critically engage with these knowledge gaps to improve how the right is guaranteed and, ultimately, the implementation of environmental protection efforts.

**Keywords:** Access to Environmental Information, Aarhus Convention, Environmental Governance, United Kingdom

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## 1. Introduction<sup>1</sup>

Within the United Kingdom (UK) the right of access to environmental information has undergone continual significant development since its introduction through planning registers.<sup>2</sup> Responding to developments at the international<sup>3</sup> and EU level,<sup>4</sup> the UK guaranteed the right of access to environmental information through the promulgation of the Environmental Information Regulations 1992.<sup>5</sup> This development continued throughout the 1990s with the ratification of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention),<sup>6</sup> which in turn led to the implementation of a new EU Directive<sup>7</sup> and domestic

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<sup>2</sup> See Anne-Michelle Sanders and Julie Rothnie, ‘Planning Registers – Their Role in Promoting Public Participation’ [1996] *Journal of Planning and Environment Law* 539, 539. See also the Environmental Protection Act 1990, which implemented various public registers such as the Integrated Pollution Control and Air Pollution Control Register (s.20) and came after the introduction of planning registers.

<sup>3</sup> UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc.A/CONF.151/26 (Vol I).

<sup>4</sup> Council Directive 90/313/EEC of 7 June 1990 on the Freedom of Access to Information on the Environment [1990] OJ L158/56.

<sup>5</sup> SI 1992/3240.

<sup>6</sup> Adopted 25 June 1998, entered into force 30 October 2001, 2161 UNTS 447.

<sup>7</sup> Council Directive 2003/4/EC of 28 January 2003 on Public Access to Environmental Information and repealing Directive 90/313/EEC [2003] OJ L 41/26.

legislation<sup>8</sup> on the right of access to environmental information. This is significant because these developments represent the right's elevation to being considered a core aspect of environmental regulation.<sup>9</sup>

This increased recognition of the right has been accompanied by an extensive body of literature.<sup>10</sup> However, contemporary analysis has been restricted by the dominance of particular research trends which embody how the Aarhus Convention conceptualises the right. The first of these trends is the dominance of research focusing on the disclosure of environmental information through requests over the proactive disclosure of environmental information. The second trend is the focus on the holders of environmental information over the users of the right and the motivations of these users. These trends are important because they do not challenge the unspoken assumption that individuals and NGOs making use of the right are doing so in order to protect and enhance the environment by engaging with environmental decision-making processes. As a result there are gaps in how the division

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<sup>8</sup> Environmental Information Regulations 2004 SI 2004/3391. In Scotland, the passive right is guaranteed by the parallel but not identical Environmental Information (Scotland) Regulations 2004 SSI 2004/520, hereafter referred to as EI(S)R.

<sup>9</sup> David Case, 'The Role of Information in Environmental Justice' (2011-2012) 81 *Mississippi Law Journal* 701, 704-5. See also Anthony Heyes, 'Implementing Environmental Regulation: Enforcement and Compliance' (2000) 17(2) *Journal of Regulatory Economics* 107, 120.

<sup>10</sup> Examples of this include Mark Stephan, 'Environmental Information Disclosure Programs: They Work, But Why?' (2002) 83(1) *Social Science Quarterly* 190, Elizabeth Fisher, 'Transparency and Administrative Law – A Critical Evaluation' (2010) 63(1) *Current Legal Problems* 272, Paul Gibbons, 'Down the Rabbit Hole: The EIRs: Part I' (2017) 13(4) *Freedom of Information* 4 and Maria Cucciniello, Gregory Porumbescu and Stephen Grimmelikhuijsen '25 Years of Transparency Research: Evidence and Future Directions' (2017) 77(1) *Public Administration Review* 32.

between the active and passive rights and in how users engage with the right are understood, undermining how the right is implemented in practice.

This article identifies and critically evaluates how the right of access to environmental information has been researched in the UK, exploring the role of the Aarhus Convention in creating the current gaps in how the right is understood. This is accomplished through a literature review of the various works analysing the right from the 1980s to the current day and comparing the distinct approaches adopted by contemporary and past works. In conducting this analysis, the article provides an overview of the current literature on the right and indicates potential avenues for future research in this area.

The article begins by summarising the development of the right and its key aspects, before highlighting the importance of reflecting on how the right is analysed. The article then moves to scrutinise the division within the literature between the right to request access to environmental information and the right to have environmental information disseminated, and the dominance of works considering the formal requesting of environmental information. The article then examines the focus placed on those holding environmental information and the relative paucity of works examining those accessing environmental information. Finally, it concludes by briefly setting out a new research agenda that takes into account the methodological lessons derived from previous works to develop a more robust understanding of the value of the right and how it is used in practice.

## **2. An Overview of the Right of Access to Environmental Information in the UK**

While the UK did provide limited access to environmental information relatively early through the use of planning registers,<sup>11</sup> the development and implementation of the specific

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<sup>11</sup> Sanders and Rothnie (n 2), 539.

right of access to environmental information cannot be viewed without reference to the parallel developments at the supranational and international levels. During the 1970s and 1980s both the European Commission<sup>12</sup> and the UK<sup>13</sup> were exploring the possibility of further guaranteeing the right of access to environmental information in light of the environmental degradation caused by human activity. This culminated in the promulgation of Council Directive 90/313/EEC,<sup>14</sup> which was implemented in the UK through the Environmental Information Regulations 1992.<sup>15</sup> Separate from these developments, the right of access to environmental information was recognised at the international level through the Rio Declaration on Environment and Development<sup>16</sup> This, in turn, led to the signing of the Aarhus Convention in 1998. Both the European Union and the UK ratified the Aarhus Convention in February 2005<sup>17</sup> and, in order to meet their international obligations, revised the existing environmental information regimes through the implementation of Council Directive 2003/4/EC<sup>18</sup> and the Environmental Information Regulations 2004 (EIR)<sup>19</sup> respectively.

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<sup>12</sup> Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting Within the Council of 19 October 1987 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1987-1992) OJ 87/C 328/01.

<sup>13</sup> Royal Commission on Environmental Pollution, *Second Report: Three Issues in Environmental Pollution* (Her Majesty's Stationery Office, 1972).

<sup>14</sup> EU Directive 90/313 (n 4).

<sup>15</sup> Environmental Information Regulations 1992 (n 5).

<sup>16</sup> Rio Declaration (n 3).

<sup>17</sup> UNTS, Chapter XXVII 13. Environment, 1.

<<https://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XXVII/XXVII-13.en.pdf>> accessed 26/11/18.

<sup>18</sup> Directive 2003/4/EC (n 7).

Within the context of the right of access to environmental information, the Aarhus Convention obliges Parties to the Convention to follow procedural obligations in proactively disclosing<sup>20</sup> and responding to requests for environmental information.<sup>21</sup> These obligations are significant because they play a critical role in setting the normative benchmark against which domestic environmental information regimes are measured.<sup>22</sup> In particular, the Aarhus Convention entrenches three aspects of the right; the division between the “passive”<sup>23</sup> and “active”<sup>24</sup> right of access to environmental information; the scope of the right and both the aims and underpinning theory behind the right. This entrenchment of these aspects by the Convention is critical because it acts to delineate the scope of the right and influence how contemporary research into the right is conducted. Consequently, before exploring and reflecting on how the right is analysed in the UK it is important to set out these key aspects of the right.

The first aspect that needs to be set out is the two distinct elements of the right: the “passive” right of access to environmental information and the “active” right of access to environmental information.<sup>25</sup> This terminology is adopted from the perspective of the public

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<sup>19</sup> EIR (n 8) and EI(S)R (n 8).

<sup>20</sup> Aarhus Convention (n 6), art 5.

<sup>21</sup> *ibid.*, art 4.

<sup>22</sup> Uzuazo Etemire, ‘Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights’ (2016) 28 *Journal of Environmental Law* 393, 399-402 and Sean Whittaker, ‘The Right of Access to Environmental Information and Legal Transplant Theory: Lessons From London and Beijing’ (2017) 6(3) *Transnational Environmental Law* 509, 510.

<sup>23</sup> Aarhus Convention (n 6), art 4.

<sup>24</sup> *ibid.*, art 5.

<sup>25</sup> The presence of these two elements raises questions over whether it would be better to conceptualise access to environmental information as being based on two distinct rights, but that is beyond the scope of this article.

authority in discharging their obligations.<sup>26</sup> The passive right encapsulates the authorities' obligations to respond to requests to environmental information submitted by members of the public.<sup>27</sup> This element of the right is guaranteed through environmental information regimes such as the EIR, which set out the procedures by which users of the right can submit requests for environmental information<sup>28</sup> and the standards that public authorities must meet in responding to such requests.<sup>29</sup> In contrast, the active right encapsulates the authorities' obligations to proactively disclose environmental information without receiving a request from the public.<sup>30</sup> Due to the broader nature of the active right, this right is not guaranteed through a singular legal instrument like the EIR. Rather, the active right is guaranteed through a wide range of dissemination mechanisms, including environmental registers,<sup>31</sup> reports, publication schemes<sup>32</sup> and obligations to make accessible the data on which policy decisions are taken.<sup>33</sup>

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<sup>26</sup> UNECE, 'Access to Information' <<https://www.unece.org/env/pp/contentai.html>> accessed 26/11/18.

<sup>27</sup> The passive right also encapsulates the obligations imposed on public authorities to respond to such requests in the appropriate manner: see Jonas Ebbesson, Helmut Gaugitsch, Jerzy Jendroska, Fiona Marshall and Stephan Stec, *The Aarhus Convention: An Implementation Guide* (2<sup>nd</sup> edn, United Nations, 2013), 19.

<sup>28</sup> EIR (n 8), reg 5.

<sup>29</sup> *ibid.*, Part 2 and Part 3.

<sup>30</sup> The active right also encapsulates the obligations imposed in public authorities to collect and disseminate environmental information: see Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 19.

<sup>31</sup> See, for example, the Environmental Permitting (England and Wales) Regulations 2016 reg 46.

<sup>32</sup> EIR (n 8) reg 4, Freedom of Information Act 2000 (FOIA), s.19 and Freedom of Information (Scotland) Act 2002 (FOI(S)A), s 23.

<sup>33</sup> See, for example, the Local Government Transparency Code 2015, which is legally binding under the Local Government (Transparency Requirements) (England) Regulations 2015 SI 2015/480. Similar examples apply in Scotland, Wales and Northern Ireland.



The scope of the right of access to environmental information acts as the second key aspect of the right, which is delineated by the Aarhus Convention. Under the Aarhus Convention the obligations extend only to *environmental information* held by *public authorities*, reflecting the origins of the Convention as a means of promoting environmental governance<sup>34</sup> within the public sphere.<sup>35</sup> The definition of what constitutes environmental information is broad, encapsulating: information on the state of elements of the environment and their interactions; factors, activities and measures which affect or are likely to affect the elements of the environment; economic analysis used in environment decision-making procedures and information on the human environment insofar as they may be affected by the previous two aspects of the environment.<sup>36</sup> Equally broad is the definition of public authority, which covers not only Government bodies at the national, local and regional level but also private entities which perform public functions or have public responsibilities relating to the environment and are under the control of a public authority.<sup>37</sup> While these terms are defined broadly by the Aarhus Convention, they are not unlimited: the Convention does not cover non-environmental information nor does it cover purely private entities regardless of the extent of their environmental activities.<sup>38</sup>

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<sup>34</sup> Rio Declaration (n 3).

<sup>35</sup> Michael Mason, 'Information Disclosure and Environmental Rights: The Aarhus Convention' (2010) 10(3) *Global Environmental Politics* 10, 13. It is important to note that the obligations enshrined in the Aarhus Convention do not apply to purely private bodies.

<sup>36</sup> Aarhus Convention (n 6), art 2(3), EIR (n 8) reg 2(1) and EI(S)R (n 8) reg 2(1). See also *The Department for Business, Energy And Industrial Strategy v The Information Commissioner & Anor* [2017] EWCA Civ 844.

<sup>37</sup> *ibid.*, art 2(2). See also *Case C-279/12 Fish Legal and Emily Shirley v Information Commissioner and Others* [2013] ECLI:EU:C:2013:853.

<sup>38</sup> Mason (n 35), 13.

These definitions, and their limits, are important not only because they act to delineate the boundaries of the right of access to environmental information. Their importance also stems from how they reflect the aims of the right which constitute the third key aspect of the right. At its core, the right is concerned with promoting participatory environmental governance in order to improve the quality of decisions relating to the environment.<sup>39</sup> This is hoped to occur through the creation of an informed society, which aims to empower individuals and NGOs to scrutinise the environmental action/inaction of public authorities and hold them to account.<sup>40</sup> Critically, environmental governance is also promoted through empowering the public to actively and critically participate in environmental decision-making procedures through the provision of information relating to these procedures.<sup>41</sup> The underlying assumption of the right is that by empowering a wide range of members of the public to participate in environmental decision-making procedures and environmental regulation, the quality of the decisions or regulatory effort will be improved,<sup>42</sup> thereby creating a healthy environment.<sup>43</sup>

This is further reinforced by the right being conceptualised within the Aarhus Convention as one of three interconnected pillars: the other two pillars relating to public

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<sup>39</sup> Maria Lee and Carolyn Abbot, 'The Usual Suspects? Public Participation Under the Aarhus Convention' (2003) 66(1) *Modern Law Review* 80, 82.

<sup>40</sup> Patrick Birkenshaw, 'Freedom of Information and Openness: Fundamental Human Rights' (2006) 58 *Administrative Law Review* 177, 197.

<sup>41</sup> Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision Making,' in Benjamin Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006), 181.

<sup>42</sup> Lee and Abbot (n 39), 82.

<sup>43</sup> The right of individuals to live in an environment adequate to their health is a critical underlying aspect of the right: see Aarhus Convention (n 6), Preamble paragraphs 6 and 7 and art 1.

participation in decision-making processes and to access to justice in environmental matters.<sup>44</sup> Within these pillars, the right of access to environmental information is crucial because without such information individuals would be unable to effectively make use of their right to participate in environmental decision-making procedures or effectively enforce their right to obtain access to justice in environmental matters. The interconnected nature of these pillars further reinforces the Convention's reliance on enhanced environmental governance as a means of safeguarding and enhancing the environment. Critically, due to the UK's Party status to the Convention and its (current) obligation to implement Directive 2003/4/EC, this core aim also lies at the heart of the UK's various efforts to guarantee the right at the national level.

While the Aarhus Convention does have a substantial impact on how the right is guaranteed in the UK, its impact is broader than merely initiating legislative change. The normative provisions of the Aarhus Convention, in particular the Convention's treatment of the active and passive rights to access environmental information and its unspoken assumption regarding the motives of those using the right, have shaped how research into the right is conducted.<sup>45</sup> The extent to which contemporary literature on the right uncritically adopts and reflects the ideas underpinning the Aarhus Convention is analysed in greater detail in sections 3 and 4 of this article. Nevertheless, the possibility that the literature has failed to critically engage with these underpinning ideas is problematic as it leads to contemporary research overlooking "live" questions relating to the Convention's conceptualisation of the right and the practical questions of the right's use.

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<sup>44</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 19.

<sup>45</sup> Elizabeth Fisher, 'Exploring the Legal Architecture of Transparency' in Padideh Ala'i and Robert Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar Publishing, 2014), 63-64.

### **3. The Active and Passive Rights of Access to Environmental Information**

In conducting research on the right of access to environmental information, the dual nature of the active and passive dimensions of the right of access to environmental information provides a unique challenge due to the differences between how both rights regulate the flow of environmental information between public authorities and society generally. However, it is important to recognise that the active and passive elements of the right play different roles in achieving the participatory aims of the right and in environmental democracy more generally. Consequently, there is a need for the literature to reflect on and analyse both the active and passive rights of access to environmental information.

However, contemporary literature on the right of access to environmental information does not reflect this need. Instead, the literature focuses only on the passive right of access to environmental information. This imbalance creates numerous problems for how the right of access to environmental information is both conceptualised and implemented in practice. Critically, while this imbalance has a negative effect on how the right is guaranteed and meets the overarching aims set by the Aarhus Convention, the Convention itself contributes to the shape of the contemporary literature.

As set out in the previous section, the active right relates to the right to have environmental information proactively disclosed by public authorities. This contrasts with the passive right, which is concerned with how public authorities respond to requests for the disclosure of environmental information.<sup>46</sup> A critical aspect of the active and passive rights is that they are not mere extensions of the right of access to environmental information. Rather, they each play different and distinct roles in the achievement of the right's participative aims.

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<sup>46</sup> EIR (n 8), Part 2 and Part 3.

At the fundamental level, the active right is concerned with ensuring that the public has access to certain categories of environmental information at any time without having to request access to it.<sup>47</sup> Conversely, the passive right is concerned with responding to specific requests for environmental information that are submitted at a discrete point in time. While the need for a request to respond to under the passive right may be obvious, it has various implications for how public authorities seek to achieve the right's participatory aims.

First, this division of responsibilities directly connects with the tension between what environmental information individuals and NGOs might find useful and what information they request access to under the passive right.<sup>48</sup> While individuals and NGOs may have a right to access environmental information, this does not necessarily correlate to knowledge of what environmental information is held by public authorities or what information is of interest to them. The active right, through its proactive nature, circumvents this issue by disclosing large amounts of environmental information whether or not it has been made the subject of a disclosure request.<sup>49</sup> In this way, the active right invites individuals and NGOs to engage with the environmental information that meets their particular interests without requiring prior knowledge in a way that the passive right cannot replicate.<sup>50</sup>

Second, there is a clear distinction between the respective target audiences of the active and passive rights. By its nature of being triggered by the submission of a request for

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<sup>47</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 95.

<sup>48</sup> Michael Herz, 'Law Lags Behind: FOIA and Affirmative Disclosure of Information' (2009) 7 *Cardozo Public Law, Policy and Ethics Journal* 577, 597.

<sup>49</sup> See for example DEFRA's Air Pollution Forecast <<https://uk-air.defra.gov.uk/>> accessed 26/11/18.

<sup>50</sup> An example of this is a visitor to a beach reading a sign on the cleanliness of the water. While this visitor may not have any prior knowledge on how to find out the cleanliness of the water, they are likely to be interested in this information.

environmental information, the passive right requires the initial effort to be made by a specific member of the public. Consequently, only individuals and NGOs with a pre-existing interest in environmental matters will engage with the passive right.<sup>51</sup> This contrasts with the active right, where the initial efforts are made by the public authority proactively disclosing the environmental information that it holds. The distinction between the two rights is important: because the initial efforts are made by the public authority under the active right, it is likely that there is a greater chance that a previously unengaged individual will become engaged with the environmental issue in question. This is not to suggest that those with a pre-existing interest in environmental matters cannot use the active right to access proactively disclosed environmental information. Rather, the implication is that the audience for the active right is inherently wider than that for the passive right due to the nature of the obligations imposed on public authorities by the active right.

Third, the nature of the disclosed environmental information also differs between the active and passive rights. Environmental information disclosed under the passive right can only act as a “snapshot” of the information held by the public authority the moment the request was submitted. This is because public authorities are not obliged to update those submitting a request for environmental information when new information has been generated. The active right however does not have this problem, as public authorities can update proactively disclosed information without needing to wait for a request by the

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<sup>51</sup> It is important to note that this pre-existing interest may not necessarily be altruistic. The user may be submitting a request for personal reasons and not be interested in protecting the environment.

individual using the right.<sup>52</sup> This is unique to the active right and the proactive nature of the duties enshrined within it, further distinguishing it from the passive right.

Finally, the ability to tailor the environmental information disclosed for the specific needs of the individual using the right also differs between the active and passive rights. Under the mechanisms used to guarantee the active right there is a limited ability to personalise proactively disseminated environmental information.<sup>53</sup> This is due to the active right being targeted at broad sections of the public in contrast with the passive right, which is based on a greater degree of personalisation due to the one-to-one engagement between the user and the public authority. Under the passive right users can tailor requests for environmental information to meet their particular needs.<sup>54</sup> Further, public authorities can provide individualised advice and assistance to users in response to their request.<sup>55</sup> Such advice and assistance encapsulates, but is not restricted to, outlining further environmental information held by the public authority which may be of interest, assisting the requester to refine their request and indicating what other public authorities may hold further relevant information.<sup>56</sup> Critically, these interactions between the user of the right and the public authority are only possible because of the one-to-one nature of interactions under the passive

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<sup>52</sup> In certain instances environmental information can be proactively disclosed and updated numerous times within the same day. See for example DEFRA's Air Pollution Forecast, which allows members of the public to identify areas of high air pollution: <<https://uk-air.defra.gov.uk/>> accessed 26/11/18.

<sup>53</sup> An example of this is users inputting their postcode to obtain information on a general area.

<sup>54</sup> For example, by requesting environmental information relating to a specific address.

<sup>55</sup> Indeed, under the EIR they are obliged to: see EIR (n 8), reg 9.

<sup>56</sup> Code of Practice on the discharge of obligations of public authorities under the Environmental Information Regulations 2004 (SI 2004 No. 3391), 9-10 <[https://ico.org.uk/media/for-organisations/documents/1644/environmental\\_information\\_regulations\\_code\\_of\\_practice.pdf](https://ico.org.uk/media/for-organisations/documents/1644/environmental_information_regulations_code_of_practice.pdf)> accessed 26/11/18 and *ibid.*, reg 9(2).

right. Consequently, the passive right contributes to the empowerment aims of the right in a way that the active right cannot.

Viewing the active and passive rights in this way it is clear that they each interact with different users of the right of access to environmental information in different ways. In turn, this allows them to fulfil different aspects of the right of access to environmental information. The passive right is exclusively for individuals who have a pre-existing interest in environmental matters, as evidenced by the onus of formulating and submitting a request being placed on the requester. However, the onus to formulate and submit requests also enables requesters to request the disclosure of environmental information specific to their individual interests. Additionally the passive right also provides the opportunity for requesters to individually engage with public authorities and refine their request in light of the opinions of the public authority. In this way the passive right acts to create a deeper channel of communication with public authorities, empowering users of the right in a way that the active right cannot accomplish.

This is not to understate the role of the active right. With regard to individuals with a pre-existing interest in environmental matters, the active right provides a flow of environmental information that enables them to scrutinise the position of the public authority.<sup>57</sup> While this information is not necessarily tailored to their specific interests, it is still informative. Consequently, the active right plays an important role in providing access to environmental information for those with a pre-existing interest in environmental matters.

Perhaps more critical however is the active right's ability to capture the interest of those who are not already engaged with environmental matters. Academic studies have

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<sup>57</sup> Helen Darbshire, 'Proactive Transparency: The Future of the Right to Information?' (The World Bank Working Paper, 18 June 2009), 3.



indicated that the general public in the UK will not take initial steps to engage with environmental matters.<sup>58</sup> However, the same studies also indicate that if presented with environmental information members of the public are more likely to act and become engaged in participative processes. It is here that the active right can play its role in promoting the right's participative aims. By placing the onus for taking action squarely on public authorities by obliging them to disclose environmental information proactively, the active right can capture the public's interest in a way that the passive right cannot. This is further emphasised by the use of technology in modern information dissemination methods, which has revolutionised how public authorities proactively disseminate environmental information and made it easier for users to access environmental information.<sup>59</sup>

These respective roles of the active and passive rights also contribute to the complementary relationship between the rights. Under the passive right, repeated requests for environmental information can inform public authorities what information is of greater interest to the public, and they can actively disseminate this information in order to make it more easily accessible.<sup>60</sup> Conversely, actively disseminated environmental information can

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<sup>58</sup> Elizabeth Kirk and Kirsty Blackstock, 'Enhanced Decision Making: Balancing Public Participation Against Better Regulation' (2011) 23(1) *Journal of Environmental Law* 97, 108. See also Jeremy Rowan-Robinson, Andrea Ross, William Walton and Julie Rothnie, 'Public Access to Environmental Information: A Means to What End?' (1996) 8 *Journal of Environmental Law* 19, 38.

<sup>59</sup> European Commission, 'Report From the Commission to the Council and the European Parliament on the Experience Gained in the Application of Directive 2003/4/EC on Public Access to Environmental Information' COM (2012) 774, 12 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0774:FIN:EN:PDF>> accessed 26/11/18.

<sup>60</sup> This is not explicitly a legislative obligation in the UK, but an example of proactive disclosure being shaped by the requests for information a public authority receives can be identified in the US's Freedom of Information Act 1966 5 U.S.C § 552(a)(2)(D).

serve to enhance how individuals phrase requests for environmental information, providing more specific details which assist the public authority in processing the request. In this way, each right acts to enhance the operation and implementation of the other right.

However, just because this complementary relationship exists does not mean that both rights are of equal standing. With the broader nature of the active right and the ease of which individuals and NGOs can seek out proactively disseminated environmental information,<sup>61</sup> the active right is likely to play a greater role in disseminating environmental information to the public than the passive right. This is further reinforced by the fact that environmental information in areas such as planning was made available in the UK before the passive right was guaranteed.<sup>62</sup>

As a consequence of this difference of roles between the active and passive rights of access to environmental information, it could be expected that there would be at least as much material on the active right as the passive right. Indeed, the majority of the academic analysis in the UK before and up to the turn of the millennium does explicitly focus on the active right of access to environmental information. Best exemplified by Burton<sup>63</sup> and John,<sup>64</sup>

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<sup>61</sup> Rowan-Robinson, Ross, Walton and Rothnie (n 58), 31, which discusses the role of sending leaflets and other sources of information to members of the public.

<sup>62</sup> The earliest recognition of the passive right in the UK was through the Environmental Information Regulations 1992. Contrast this with the implementation of planning registers in 1947 or of registers on controlled waste carriers under the Control of Pollution (Amendment) Act 1989 s 2(2)(b), which guaranteed the active right of access to environmental information in these specific areas.

<sup>63</sup> T.P Burton, 'Access to Environmental Information: The UK Experience of Water Registers' (1989) 1(2) *Journal of Environmental Law* 192. It must be noted that Burton wrote this article before the passive right was recognised and implemented in the UK through Council Directive 90/313 and the Environmental Information Regulations 1992.

analysis of access to environmental information during this period was focused on the effectiveness of public registers as a means of guaranteeing the active right to access environmental information. The prominence of the active right can be further identified in the majority of the literature around this time period, which focuses on the use of public registers<sup>65</sup> and their benefits and limitations<sup>66</sup> in contributing to the sustainable development aims enshrined in the Brundtland Report.<sup>67</sup> Where the passive right was considered, this was often done in tandem with the active right with a view to considering the interplay between them in meeting the aim of enhancing environmental protection.<sup>68</sup> Admittedly this is not a universal trend; texts by Bakkenist<sup>69</sup> and Weber<sup>70</sup> focus more on the passive right than the active right. However, these are exceptions to the general analytical trend of focusing on the active right.

However, in the contemporary literature on the right of access to environmental information there is a greater emphasis placed on the passive right. This focus takes a variety

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<sup>64</sup> Edward John, 'Access to Environmental Information: Limitations of the UK Radioactive Substances Register' (1995) 7 *Journal of Environmental Law* 11.

<sup>65</sup> Andrea Ross and Jeremy Rowan-Robinson, 'Public Registers of Environmental Information: An Assessment of Their Role' (1994) 37 *Journal of Environmental Planning and Management* 349 and Rowan-Robinson, Ross, Walton and Rothnie (n 58).

<sup>66</sup> John (n 64).

<sup>67</sup> Brundtland Commission, *Report of the World Commission on Environment and Development: Our Common Future* (Oxford University Press, 1987).

<sup>68</sup> Colin Reid, Michael Gregory Lloyd, Barbara Illsley and Bill Lynch, 'Effective Public Access to Planning Information' [1998] *Journal of Planning & Environment Law* 1028.

<sup>69</sup> Gisele Bakkenist, 'Environmental Information: Law, Policy & Experience' (Cameron May Ltd, 1994).

<sup>70</sup> Stefan Weber, 'Environmental Information and the European Convention on Human Rights' (1991) 12(5) *Human Rights Law Journal* 177.

of forms, ranging from legislative analysis of the EIR, EI(S)R<sup>71</sup> and subsequent case law<sup>72</sup> to sector-specific studies on the impact of these pieces of legislation<sup>73</sup> and studies analysing the interactions between regimes guaranteeing the right to environmental information and regimes guaranteeing the general right to information.<sup>74</sup> Critically, this refocusing on the passive right in the 2000s has resulted in less academic literature analysing the active right: with the exception of a few academic papers which makes reference to both the passive and active aspects of the right,<sup>75</sup> modern scholarly analysis, in sharp contrast to past works, is almost exclusively focused on the passive right.

There are three likely interconnected reasons for the adoption of this passive-centric approach by modern scholars analysing the right of access to environmental information. The first reason is that the passive right of access to environmental information in the UK is

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<sup>71</sup> Damien Welfare, 'Are the EIRs too Broad and is it Time to Revisit the Concept of Remoteness?' (2012) 8(4) *Freedom of Information* 5. See also Philip Coppel, *Information Rights: Law and Practice* (4<sup>th</sup> edn, Hart Publishing, 2014) 191-240.

<sup>72</sup> Uzuazo Etemire, 'Public Access to Environmental Information Held by Private Companies' (2012) 14(1) *Environmental Law Review* 7 and Colin Reid, 'Case Comment: Information and Public Authorities' (2015) 169 *Scottish Planning and Environmental Law* 62.

<sup>73</sup> Michael James Bowes, 'Sustainability in the English Water Industry: Part II: An Evaluation of how the Introduction of the Environmental Information Regulations 2004 into the Water Industry May Improve Sustainable Water Provision' (2017) 25(4) *Water Law* 164.

<sup>74</sup> Allison Black, 'Freedom of Information and Access to Environmental Information: An Introduction' (2005) 107 *Scottish Planning and Environment Law* 4.

<sup>75</sup> See, for example, 'Access to Environmental Information and Environmental Justice' in David Hughes, Tim Jewell, Jason Lowther, Neil Parpworth and Paula de Prez, *Environmental Law* (4<sup>th</sup> edn, Butterworths LexisNexis, 2002).

guaranteed by a single instrument, the EIR,<sup>76</sup> which impose obligations on public authorities guaranteeing the right of access to environmental information. As a result, academics analysing the passive right have a single anchoring point for their analysis. This lies in stark contrast to the active right which, by its broader nature, is spread over a wider range of legislative instruments and policy documents and is thereby more difficult to analyse.<sup>77</sup>

The second reason for the dominance of the passive right in modern academic literature is its visibility, in particular the mechanisms for its enforcement. The EIR, pursuant to the obligations imposed by the Aarhus Convention and EU law, guarantee a set of specific procedural rights<sup>78</sup> and a means of enforcing those rights through judicial and non-judicial bodies.<sup>79</sup> These enforcement proceedings are used by a wide range of requesters, with some instances going to the Court of Justice of the European Union<sup>80</sup> or gaining national media

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<sup>76</sup> Or the Environmental Information (Scotland) Regulations 2004 in Scotland.

<sup>77</sup> Examples of this can be identified by referencing registers such as the pollution control register (Water Resources Act 1991, s 190), the planning register (Town and Country Planning Act 1990, s 69) as well as more specific registers, such as the register for brokers and dealers of controlled waste (The Waste (England and Wales) Regulations 2011 SI 2011/988, reg 28), the register for scrap dealer licences (Scrap Metal Dealers Act 2013, s 7) and environmental permits (Environmental Permitting (England and Wales) Regulations 2016 SI 2016/1154 reg 46). See generally Elizabeth Fisher, Bettina Lange, Eloise Scotford and Cinnamon Carlarne, “Maturity and Methodology: Starting a Debate About Environmental Law Scholarship” (2009) 21(2) *Journal of Environmental Law* 213, 240 on the “balkanisation” of environmental law.

<sup>78</sup> EIR (n 8), Part 2 and Part 3.

<sup>79</sup> *ibid.*, reg 18. See also the Aarhus Convention Compliance Committee, which will accept communications from members of the public regarding the potential non-compliance of a state Party to the Convention: UNECE, Report of the First Meeting of the Parties Addendum, Decision I/7 ECE/MP.PP/2/Add.8 2 April 2004 paras 18-24.

<sup>80</sup> Case C-279/12 *Fish Legal* (n 37).

attention.<sup>81</sup> This is in contrast to the proactive dissemination of information under the EIR, where public authorities are under broader, less specific legislative provisions<sup>82</sup> which do not give rise to any enforceable obligations. Commitments to proactively disclose environmental information are usually not legally enforceable, but even where there are specific enforceable obligations<sup>83</sup> any actions taken to enforce these obligations do not attract the public's interest.

The visibility of the passive right contrasted with the invisibility of the active right of access to environmental information is significant as it acts to shape how both academics and the general public conceptualise the rights: the passive right, and its associated mechanisms for submitting requests to public authorities, dominates the perception of how the public obtains information from public authorities.<sup>84</sup> This is particularly interesting because it is more likely that both academics and the general public will use the active right to access environmental information more often than the passive right. It may be that the actual submission of a request is more evocative of making use of their right to access environmental information, which acts to distort the public's view on how the right operates. It could also be suggested that the active right has become normalised in modern society. With information being routinely proactively disseminated by public authorities, getting access to information through the active right has become the norm that is only noticed when the flow of information is disrupted. Consequently, the passive right dominates the discussions surrounding the right, influencing how it is viewed and utilised in society.

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<sup>81</sup> The Guardian, 'Prince Charles's 'black spider memos' show lobbying at highest political level' (13 May 2015) <<https://www.theguardian.com/uk-news/2015/may/13/prince-charles-black-spider-memos-lobbying-ministers-tony-blair>> accessed 26/11/18.

<sup>82</sup> EIR (n 8), reg 4(1)(a) and (b).

<sup>83</sup> Such as a legislative duty to maintain registers

<sup>84</sup> Paul Gibbons, 'The Fall and Rise of the Publication Scheme' (2016) 13(2) Freedom of Information 4, 5.

This reason for the dominance of the passive right in the academic literature is also connected to the third reason: the overshadowing of the right of access to *environmental* information by the general right to information. In the UK this general right to information is guaranteed through the Freedom of Information Act 2000 (FOIA) and the Freedom of Information (Scotland) Act 2002 (FOI(S)A), which operates through individuals submitting requests for information to public authorities.<sup>85</sup> The obligation imposed under FOIA to disclose non-exempt information on request is significant because it encapsulates all information held by public authorities unless it is environmental information, in which case it comes within the provisions of the EIR.<sup>86</sup> This division of responsibilities between environmental information regimes and general information regimes is important, because the high profile of the general right of access to information eclipses the specific right of access to environmental information.<sup>87</sup> This is further reinforced by the fact that the EIR co-opt the enforcement mechanisms created by the FOIA<sup>88</sup> and the cultural shift catalysed by FOIA, which has created a greater expectation of transparency as the norm.<sup>89</sup> Consequently,

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<sup>85</sup> FOIA (n 32), s 1(1).

<sup>86</sup> *ibid.*, s 39. See also FOI(S)A (n 32), s 39.

<sup>87</sup> This is supported by public awareness research and the impact of scandals exposed through FOIA requests:

see Scottish Information Commissioner, ‘Public Awareness Research 2017’

<<http://www.itspublicknowledge.info/home/SICReports/OtherReports/PublicAwarenessResearch2017.aspx>>

accessed 26/11/18 and Charles Pattie and Ron Johnston, ‘The Electoral Impact of the UK 2009 MP’s Expenses Scandal’ (2012) 60(4) *Political Studies* 730.

<sup>88</sup> EIR (n 8), reg 18.

<sup>89</sup> On the topic of FOIA’s impact on promoting the expectation of transparency, see Robert Hazell, Ben Worthy and Mark Glover, *The Impact of the Freedom of Information Act on Central Government in the UK: Does FOI Work?* (Palgrave MacMillan, 2010) 111-112.

the required openness which was initially a distinguishing feature in relation to environmental information is now commonplace.

This relationship between the right to environmental information and the general right to information is significant because the general right, as guaranteed by FOIA, heavily emphasises the passive right of access to information. While there are provisions for the active dissemination of information within FOIA,<sup>90</sup> academics such as Gibbons do not believe that public authorities actively consider this obligation in discharging their duties.<sup>91</sup> The lack of attention to the provisions relating to the active right can be considered problematic, as the general focus on the passive right acts to distort the public's perception of the right to access environmental information as well. This, in turn, could lead users of environmental information to submit requests for environmental information when they could access the information faster and cheaper through searching active dissemination channels.

The above discussion highlights the current trend in how the active and passive rights of access to environmental information are analysed in contemporary literature and the reasons underlying this trend. However, while these reasons explain why there is little contemporary work that analyses the active right of access to environmental information, they do not explain the shift in academic analysis of the right. Instead, to explain why this shift in research objectives occurred it is necessary to consider the development of the right and identify what might have caused this shift.

In considering how the right of access to environmental information developed over this timeframe there is one key development which matches the shift in analytical perspective: the arrival of the passive right, which culminated in the ratification of the Aarhus

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<sup>90</sup> FOIA (n 32), s 19.

<sup>91</sup> Gibbons (n 84), 5.



Convention. While the Convention has to be viewed within the context of the recognition of the right at the international, supranational and domestic level,<sup>92</sup> it is clear that the Aarhus Convention has emerged as the normative instrument guaranteeing the right of access to environmental information.<sup>93</sup> Critically, the Aarhus Convention crystallised the divide between the active and passive rights to environmental information. In examining the previous legal instruments that explicitly guaranteed the right of access to environmental information in the UK,<sup>94</sup> it is notable that they did not portray the active and passive rights in contrast with one another. Rather, Directive 90/313 and the Environmental Information Regulations 1992 solely focused on the passive right of access to environmental information. Instruments which guaranteed the active right similarly did not reference the passive right. In this way, while both rights were connected they were not viewed in parallel.

This approach changed with the ratification of the Aarhus Convention. Through combining both the active and passive rights of access to environmental information under the Convention's "Access to Information" pillar,<sup>95</sup> the Convention introduced and entrenched the parallel approach to the active and passive rights to environmental information. This is further evidenced in Directive 2003/4/EC<sup>96</sup> and UK's environmental information legislation,<sup>97</sup> which introduced specific provisions on the active right within the legislation that implemented the passive right.

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<sup>92</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 16-17.

<sup>93</sup> Etemire (n 22).

<sup>94</sup> EU Directive 90/313 (n 4) and the Environmental Information Regulations 1992 (n 5).

<sup>95</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 19, and 75-77.

<sup>96</sup> Directive 2003/4/EC (n 7), art 7.

<sup>97</sup> EIR (n 8), reg 4, EI(S)R (n 8), reg 4.

Entrenching the active and passive rights to environmental information under a single legal regime is significant because it had the potential to highlight the interconnectivity between the rights. This interconnectivity would create the expectation of both rights being analysed in equal measure. While this was a possibility however, it is not what has occurred in practice. Instead, placing both rights within the same international legal regime has allowed the passive right to overshadow the active right and dominate discussions on the right of access to environmental information. In highlighting these issues it is important to recognise that the Convention's conceptualisation of the right is not wholly negative: through explicitly recognising the connections between the active and passive rights the Convention has successfully entrenched the right at various levels of governance. However, the dominant influence of the Aarhus Convention has channelled research into the passive right at the expense of the active right, to the detriment of research into the right.

#### **4. Holders and Users of Environmental Information: A Question of Motivation**

While research on the right of access to environmental information can be clearly delineated between works focusing on the active right and those focusing on the passive right, these divisions are not the only way of categorising such academic works. Another method of categorising research on the right is to consider who the subject of the research is: is it those holding the environmental information or those seeking to use the environmental information? Under the Aarhus Convention "holders" of environmental information are precisely defined as public authorities or bodies under the control of public authorities.<sup>98</sup>

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<sup>98</sup> Aarhus Convention (n 6), art 2(2). This definition is not always so restricted: in South Africa the Promotion of Access to Information Act 2000 allows for users to request access to information from private bodies. While the differences between the approaches adopted by the Aarhus Convention and South Africa are significant, they are not the focus of this article.

Conversely the Convention defines “users” of environmental information broadly, encapsulating individuals, private bodies or NGOs making use of the right.<sup>99</sup> There is a degree of overlap between these definitions, as public authorities can request access to environmental information from other public authorities, but this overlap is limited in practice.

How both holders and users of environmental information interact with the right is a critical factor in whether the right achieves its aims of enhancing environmental protection efforts and promoting participation in environmental decision-making processes. This is commonly addressed in considering the inherent power imbalance between public authorities holding environmental information and individuals (including NGOs and interest groups) who do not.<sup>100</sup> However, the right is also predicated on the assumption that those seeking access to environmental information intend to use the information to protect and improve the environment in line with the participative democratic aims of the Aarhus Convention.<sup>101</sup> Consequently, although there are no legal obligations imposed on users of environmental information, there is an implicit responsibility for users to use the right in the broad public interest.

This unspoken assumption regarding the motives of those using the right is entrenched into the fabric of the right as conceptualised by the Aarhus Convention. It shapes the distribution of obligations (or lack thereof) between holders and users of environmental information and the obligation to disclose specific types of environmental information under the active right. Further, this assumption acts as the foundation of the Convention’s “three

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<sup>99</sup> *ibid.*, Preamble paragraph 13.

<sup>100</sup> Case (n 9), 703.

<sup>101</sup> Aarhus Convention (n 6), Preamble.

pillar” structure: that the pillar guaranteeing access to environmental information is a precursor to the pillars guaranteeing the ability to participate in environmental decision-making procedures and to have access to justice in environmental matters.<sup>102</sup>

Perhaps more critically however, the assumption regarding the motivations of those seeking access to environmental information shapes how the Convention achieves its fundamental aim of protecting the environment. Under recitals 7 and 8 of the Aarhus Convention references are made to the “duty ... to protect and improve the environment for the benefit of present and future generations”.<sup>103</sup> While this duty is often referred to in international instruments such as the Stockholm Declaration<sup>104</sup> these legal instruments do not impose any specific legal duties that individuals and NGOs must comply with. This is further emphasised by the lack of legal obligations imposed by the Aarhus Convention itself: instead of containing obligations on how disclosed environmental information should be used, the Convention merely imposes procedural obligations on individuals and NGOs in relation to the process of seeking environmental information.<sup>105</sup> Notwithstanding this lack of specific legal duties on those using the right however, it is clear the assumed motive of environmental protection underpins the Convention’s environmental protection aims.

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<sup>102</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 19. See also Duncan Weaver, ‘The Aarhus Convention and Process Cosmopolitanism’ (2018) 18(2) *International Environmental Agreements: Politics, Law and Economics* 199, 204.

<sup>103</sup> Aarhus Convention (n 6).

<sup>104</sup> *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14 at 2 and Corr.1 (1972).

<sup>105</sup> See Aarhus Convention (n 6), art 4(3)(b), although even this is not phrased as an obligation to those submitting a request for environmental information.

A counterpoint to this view is that users of the right may not be seeking to access environmental information for participative purposes. Indeed, it is recognised that those seeking to use the right may do so for a number of different reasons<sup>106</sup> and users are not punished if they deviate from the Aarhus Convention's participative ideals.<sup>107</sup> However, this contrasts with the underpinning participative ideals of the Convention, which assumes those using the right do so in order to contribute to environmental decision-making processes. As will be discussed below, this assumption plays a significant role in exploring and identifying the gaps in how the academic literature analyses the right of access to environmental information.

A separate point on the topic of motivation and public participation is the categorisation and definition of "environmental information" under the active and passive rights to environmental information. Under the active right of access to environmental information, public authorities are obliged to proactively disclose specific categories of environmental information.<sup>108</sup> Of particular interest is the specification of facts and analyses which frame major environmental policy proposals.<sup>109</sup> This is in direct contrast with the passive right, which instead obliges public authorities to disclose "environmental information" without specifying particular categories.<sup>110</sup>

While the specification of environmental information under the active right can be justified as shaping the broad duty to proactively disclose environmental information, it can

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<sup>106</sup> Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 19.

<sup>107</sup> However, if the disclosure of the requested environmental information would harm the environment it relates to it may be withheld: see Aarhus Convention (n 6), art 4(4)(h).

<sup>108</sup> *ibid.*, art 5.

<sup>109</sup> *ibid.*, art 5(a).

<sup>110</sup> *ibid.*, art 4(1).

also be viewed on the basis of the right's target audience. The active right, due to its proactive nature, acts as the primary method of capturing the interest of unengaged members of the public through the proactive dissemination of environmental information. In this context, the specific categorisation of what environmental information should be proactively disclosed is important as it acts as an indicator of the active right's aims, which are to promote the active engagement of individuals in environmental decision-making processes.

This contrasts with the passive right because of the differences in the target audience. Under the passive right, individuals and NGOs submitting requests likely have a pre-existing interest in the environmental information and a greater awareness of what they are interested in. Consequently this is reflected in the obligations imposed on public authorities, which apply the broad definition of "environmental information"<sup>111</sup> instead of categorising the applicable environmental information.<sup>112</sup> This is important because it acts to recognise that the motives of those using the right can vary, depending on the personal interests of the user. In this way, the structuring of the active and passive rights of access to environmental information also acts to shape how the Convention reflects the motivations of both users and holders of environmental information.

With both holders and users of environmental information playing a critical role in the use of the right and the shape of the Aarhus Convention itself, there is an expectation that both groups' role would be subject to analysis. In terms of the users of environmental information, during the 1990s scholars focused on both the motivations of those accessing

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<sup>111</sup> *ibid.*, art 2(3).

<sup>112</sup> *ibid.*, art 4.

environmental information<sup>113</sup> and their capacity to comprehend the information given to them.<sup>114</sup> In particular, the levels of certain categories of users accessing environmental information, such as “academics” or “consultants”, were the focal point of numerous articles.<sup>115</sup> Another theme within the literature is the different levels of engagement noted between general environmental matters and matters relating to planning law.<sup>116</sup> This holistic approach, through considering how both holders and users engage with the right, provided an effective analysis of the right and its relationship with both holders and users of environmental information.

In contemporary literature analysing the right, there has been a shift from considering how holders and users engage with this right towards identifying how the right connects with other aspects of governance and whether it achieves its intended aims. This shift is valuable because it has enabled academics to critically analyse whether transparency, as promoted by the right, is an effective means of enhancing decision-making processes<sup>117</sup> and to explore how the procedures of public authorities adapt to the transparency provided by such information regimes.<sup>118</sup> Similar analysis has also taken place for private bodies that hold

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<sup>113</sup> John Moxen and Alistair McCulloch, ‘Organising the Dissemination of Environmental Information: Lessons from Scotland’ (1999) 1(2) *Journal of Environmental Policy and Planning* 155.

<sup>114</sup> John (n 64), 12-13.

<sup>115</sup> Rothnie and Sanders (n 2), 541 and Rowan-Robinson, Ross, Walton and Rothnie (n 58), 24.

<sup>116</sup> Reid, Lloyd, Illsley and Lynch (n 68).

<sup>117</sup> Fisher (n 45).

<sup>118</sup> Jenny de Fine Licht, ‘Policy Area as a Potential Moderator of Transparency Effects: An Experiment’ (2014) 74(3) *Public Administration Review* 361. On the specific right of access to environmental information, see Jean-Jacques Paradissis, *The Right to Access Environmental Information: An Analysis of UK Law in the Context of European, International and Human Rights Law* (VDM Verlag, 2010), Christopher Knight, ‘What to Charge For Under the EIR – Guidance at Last’ (2015) 12(2) *Freedom of Information* 6 and Bowes (n 59).

environmental information.<sup>119</sup> On the other side of the relationship, the role of the “ideal” user of environmental information in environmental decision-making procedures has led to interesting ideas on the nature of public participation<sup>120</sup> and how the public is involved in the generation of environmental information itself.<sup>121</sup> Further, literature focusing on users of environmental information has also acted as a lens for critiquing the transparency aims of the right. Such literature highlights the (potential) lack of capacity held by the general public to process environmental information<sup>122</sup> as a possible obstacle to the actualisation of the rights objectives.<sup>123</sup>

Through critically examining the right in this way, scholars have provided further insight into the rights and its relationship with society, which is of paramount importance in how the right achieves its aims. Notwithstanding this however, these examinations rest on the

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<sup>119</sup> See Stephanie Stray, ‘Environmental Reporting: The UK Water and Energy Industries: A Research Note’ (2008) 80 *Journal of Business Ethics* 697, Alex Martin and David Hadley, ‘Corporate Environmental Non-Reporting – A UK FTSE 350 Perspective’ (2008) 17 *Business Strategy and the Environment* 245 and Habiba Al-Shaer, Aly Salama and Steven Toms, ‘Audit Committees and Financial Reporting Quality: Evidence from UK Environmental Accounting Disclosures’ (2017) 18(1) *Journal of Applied Accounting Research* 2.

<sup>120</sup> Examples of this include Kirk and Blackstock (n 58) and Jenny Steele, ‘Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach’ (2001) 21(3) *Oxford Journal of Legal Studies* 415.

<sup>121</sup> Geoff Vigar, ‘The Four Knowledges of Transport Planning: Enacting a More Communicative, Trans-Disciplinary Policy and Decision Making’ (2017) 58 *Transport Policy* 39.

<sup>122</sup> Amitai Etzioni, ‘Is Transparency the Best Disinfectant?’ (2010) 18(4) *The Journal of Political Philosophy* 389.

<sup>123</sup> Jenny de Fine Licht, ‘Transparency Actually: How Transparency Affects Public Perception of Political Decision-Making’ (2014) 6(2) *European Political Science Review* 309.



underlying assumption that users of the right are engaging with it in order to protect and enhance the environment. As a consequence of this assumption the literature does not generally consider individual holders and users of environmental information or their respective motivations. This is not to say there are not exceptions to this,<sup>124</sup> but contemporary works analysing this aspect are limited in number.

One underlying reason for this lack of analysis is the structure of the legal instruments implementing the right. Regardless of how public authorities view the right of access to environmental information, the impact of these views on how the right is guaranteed is limited due to the clear legal obligations imposed on them.<sup>125</sup> Conversely, there are no legal obligations imposed on the use of environmental information that is accessed through the right.<sup>126</sup> This lack of legal obligations imposed on requesters is further emphasised by the regime not taking the identity or motive of the applicant into account in determining whether the requested environmental information should be disclosed.<sup>127</sup> This is a consequence of the aspirational environmental rights and duties conferred upon those using the right,<sup>128</sup> and are core to the Convention's conceptualisation of the right.

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<sup>124</sup> Fisher (n 45).

<sup>125</sup> E.g. the obligation to respond to a request for environmental information within 20 days of receiving it EIR (n 8), reg 5(2).

<sup>126</sup> With regards to FOI, see Hazell, Worthy and Glover (n 89), 261. This was also highlighted in the early case of *Stirrat Park Hogg v. Dumbarton DC* 1996 SLT 1113 (OH), 1115 where the motive for seeking access to environmental information held on a public register was irrelevant.

<sup>127</sup> Information Commissioner, 'Consideration of the Identity or Motives of the Applicant' (2015), 3-4 <<https://ico.org.uk/media/for-organisations/documents/1043418/consideration-of-the-identity-or-motives-of-the-applicant.pdf>> accessed 26/11/18.

<sup>128</sup> Aarhus Convention (n 6), Preamble paragraph 7.

In light of the lack of literature exploring the motivations of those using the right of access to environmental information, there is a significant gap in how the right is analysed and conceptualised. Further, because of this lack of analysis the literature fails to engage with a critical element of the right's participative aims. This is problematic because this gap prevents analysis on whether the right, as it is currently implemented, is an effective means of promoting public participation in environmental decision-making processes.

Similar to the distribution of analysis on the active and passive rights to environmental information however, this gap is identified only in the contemporary literature. Literature written in the early 1990s does not contain these gaps: indeed, it expressly considers and engages with the issue surrounding the motivations of those using the right. This distinction between the contemporary and prior literature in this area reflects the pattern identified in the research trends relating to the active and passive rights of access to environmental information. In turn, this suggests that the Aarhus Convention, specifically the unspoken assumption regarding why users seek to access environmental information, has contributed to the creation of these gaps in the literature.

This unspoken assumption can be identified at numerous points throughout the Convention, ranging from the Convention's intertwining of basic human rights with basic civic responsibilities<sup>129</sup> to the motive-blind nature of the passive right.<sup>130</sup> This has significant ramifications for how contemporary literature analyses the right. It indicates that the Aarhus Convention has shaped how the right is conceptualised in such a way that it overlooks questions surrounding how environmental information is being used upon disclosure. In turn, this has helped shape the literature on the right in such a way that it overlooks the questions

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<sup>129</sup> *ibid.*, recital 8. See also Ebbesson, Gaugitsch, Jendroska, Marshall and Stec (n 27), 30.

<sup>130</sup> *ibid.*, art 4(1)(a).

relating to the motivations driving users to use the right. This is significant because how environmental information accessed through the right is used is critical to the success of the right's participative aims. Consequently, the current lack of literature analysing this aspect creates a gap in how policy-makers and academics implement and understand the right.

## **5. Conclusions**

To conclude, the trends that shape how the right of access to environmental information is analysed could be considered to arise from the nature of the Aarhus Convention's conceptualisation of the right. This is significant as these concentrations of research into specific aspects of the right exclude other aspects of the right from being more fully explored. Further, it is clear that these trends are a fairly modern occurrence, as previous studies on the right generally did not concentrate their research in the same way that contemporary studies do. It is likely that as a result of these trends that there are clear gaps in modern scholarly works on the right, gaps that serve to undermine how the right is both analysed and implemented in practice. This is particularly detrimental in light of the significant role the right is intended to play both in promoting public participation and in achieving the goals of sustainable development.

The gaps in research fall into two distinct categories: a lack of modern analysis on the active right of access to environmental information in comparison with analysis on the passive right of access to environmental information and the failure to adequately consider the users of environmental information. It is important to recognise that addressing these gaps does not necessarily mean reversing the literature's focus on the passive right and on the holders of environmental information. Indeed, contemporary literature on the right has provided a critical lens by which to analyse both the achievements and the theoretical

framework of the right. Works by scholars such as Worthy,<sup>131</sup> Vigar<sup>132</sup> and de Fine Licht<sup>133</sup> follow the natural evolution of the right and its role within society, and assist in contextualising the right within the multi-faceted society that it operates in. Notwithstanding this however, the failure to explore and challenge the unspoken assumptions which underpin such analysis create gaps in the knowledge of the right which, if left unaddressed, undermine our understanding of the right and its implementation in practice.

It is also important to recognise that while the trends identified in the article are the dominant trends in how modern studies analyse the right of access to environmental information, there are studies which eschew these trends and bridge the gaps in how the right is understood. The works of Gibbons<sup>134</sup> and Bowes<sup>135</sup> demonstrate that studies which deviate from these trends can provide novel evidence on these often overlooked aspects of the right and on the implementation of the right in practice. These studies indicate that there is a contemporary interest in these relatively unexplored areas of the right, linking these “novel” approaches to the older literature as a means of engaging with the issues surrounding the right of access to environmental information.

What then should the shape of future research into the right of access to environmental information look like? First, future research should seek to engage with these gaps and challenge the unspoken assumption that underpins much of the contemporary literature. Second, it should adopt a critical view of the Aarhus Convention’s

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<sup>131</sup> Ben Worthy, ‘‘Some Are More Open Than Others’’: Comparing the Impact of the Freedom of Information Act 2000 on Local and Central Government in the UK’ (2013) 15 *Journal of Comparative Policy Analysis* 395.

<sup>132</sup> Vigar (n 121).

<sup>133</sup> de Fine Licht (n 123).

<sup>134</sup> Gibbons (n 84).

<sup>135</sup> Bowes (n 73).

conceptualisation of the right of access to environmental information and its normative influence. Again, this is not to suggest that the Aarhus Convention has been detrimental in improving the implementation of the right, but there is a clear trend of contemporary literature wholly adopting the Convention's conceptualisation of the right without critique. Third, future research should be actively seeking out opportunities to analyse the right through empirical methodologies. There are unanswered questions regarding who uses the right, what environmental information do users seek to access and why do users seek access to this information. These questions are critical to understanding the practical impact of the right. Critically however, because these questions can only be explored by considering how the right has been implemented in practice such research requires gathering empirical data. Adopting such an empirical approach would enable academics and policy-makers to test the theoretical aspects of the right against the practical realities that the right operates in. The work of Bowes and the early work being conducted at the University of Dundee<sup>136</sup> indicate that such empirical research is feasible and can provide valuable insights into the implementation of the right and its participatory goals.

However, changing the current trends in how the right of access to environmental information is analysed will not be accomplished through a small number of studies. These gaps require a significant volume of research in order to effectively challenge the current trends in how the right is analysed and the dominant conceptualisation of the right. By challenging these views, legal research into the right of access to environmental information

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<sup>136</sup> See *Uncovering the Environment: The Use of Public Access to Environmental Information* (UK Research and Innovation, 2018), <<http://gtr.ukri.org/projects?ref=ES%2FP010067%2F1>> accessed 26/11/18. See also <<https://sites.dundee.ac.uk/envinfo/>> accessed 26/11/18

will better portray how the law operates in this important area and aid in ensuring that the right is effectively guaranteed in the UK.