IRISH ENVIRONMENTAL LAW ASSOCIATION

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Access to Information on the Environment Regulations 2007

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Thank you for the invitation to speak to your Association this evening on your first meeting of 2008. What I would like to do this evening is to outline, in fairly broad terms, the access to environmental information regime provided for in the 2007 Regulations, to describe my role as Commissioner for Environmental Information and, finally, to comment on how the new access regime might be made more effective.

To start with, I would like you to consider this. In the three weeks since Christmas stories on the following issues appeared in the national newspapers:

- the fact that patients can be waiting up to eight years to be seen by a consultant in certain public hospital out-patient departments (*Irish Times*, 31/12/07);
- the fact that compliance with seat belt use on school buses is low (*Irish Examiner*, 4/1/08);
- the fact that the incidence of MRSA detected at Cork University Hospital increased by 40% as between 2005 and 2006 (*Irish Independent*, 3/1/08);
- the fact that the Secretary General of the Department of Health & Children effectively criticised the Road Safety Authority for its failure to recommend a specific reduction in the legal alcohol limit for drivers (*Irish Times*, 8/1/08);
- the fact that the Health Service Executive (HSE) and the Department of Finance are in dispute as to whether or not capital expenditure is allocated to the HSE in the knowledge that some at least will be used to meet shortfalls in current expenditure (*Sunday Times*, 13/1/08).

What these newspapers stories have in common is that they are based in each case on information acquired under the Freedom of Information Act. To a greater or lesser extent, these stories bring relevant issues into the public domain and facilitate informed discussion on them. While the Freedom of Information Act has been the subject of considerable criticism since its amendment in 2003 (including by myself), it is clear that it continues to be an important source of information for the public and that FOI-released information helps promote public debate on key issues.

We have had an access to environmental information (AIE) regime in Ireland, in one shape or form, since 1993; and we have had the new access regime since 1 May 2007. I cannot recall ever reading a newspaper or other media story based on information acquired under

the AIE regime, whether the old regime or the new. Even if my recollection on this is not completely correct, I think it is an indisputable fact that AIE has not, and is not, making any significant impact in terms of making environmental information available to the public. This, I feel, is a great pity and something we should be concerned about. After all, the purpose of the AIE regime, and this is set out in the first recital to the relevant EU Directive (Directive 2003/4/EC), is to promote "*greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually ... [a] better environment*".

While it is important to engage with the technicalities of the AIE regime - and I will do so shortly - it is more important that we see the bigger picture. Whether or not the AIE legislation is technically sound and coherent is mostly academic if the overall regime is not achieving the purpose of promoting environmental awareness, public discussion and participation in environmental decision-making. Of course public discussion on environmental issues, and the inevitable controversies and disputes that ensue, can be uncomfortable, disruptive and even divisive. We need only look at some current environmental controversies - for example, the proposed Poolbeg incinerator, the Bellanaboy gas terminal, the proposed Wind Farm in East Clare, problems with the quality of drinking water in many areas - to appreciate that this is the case. The re-emergence of discussion on the option of using nuclear power, and the possibility of a carbon tax, are further cases in point. Nevertheless, it is of the essence of our democracy that these difficult issues be debated openly and on the basis of relevant information. The AIE regime should promote and support such debate; at present, unfortunately, this is not happening to any significant extent.

Later I will make some suggestions as to how the AIE regime might achieve what it is intended to achieve. First, though, I would like to sketch out, fairly briefly, the background to the present AIE regime, how it is intended to operate, and my role in that regime.

CURRENT AIE REGIME

The present regime of access to environmental information is based on Directive 2003/4/EC which was intended to be implemented in EU member states by 14 February 2005. The 2003 Directive replaced an earlier 1990 Directive (90/313/EEC) which also provided for access to environmental information. The 1990 Directive had been implemented in Ireland by means of various statutory instruments made in 1993, 1996 and 1998. It is generally accepted that the regime put in place by these regulations had many shortcomings, not least the fact that it did not have any proper appeal mechanism for those cases in which requests were refused, delayed or only part-granted. Implementation in Ireland of the 2003 Directive did not happen until 1 May 2007 when the Access to Information on the Environment Regulations (SI No. 133 of 2007), made by the Minister for the Environment, Heritage & Local Government, came into effect.

Under these 2007 Regulations, I (as holder of the office of Information Commissioner) was assigned the legally separate role of Commissioner for Environmental Information. My role is to decide appeals taken by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information. It is, I think, worth setting the Regulations in context and taking a look at the somewhat tortuous route by which they eventually came to us. It is important to recognise that the Regulations do not stand alone; they cannot be interpreted outside of the underlying Directive to which they are intended to give effect. As you may know, Ireland was over two years late in implementing the Directive and proceedings taken by the European Commission were pending before the European Court of Justice (ECJ) by the time the Regulations were made.

The 2003 Directive is intended to give effect to the access to information provisions of the 1998 Åarhus Convention which is an environmental treaty negotiated among the countries of the United Nations Economic Commission for Europe (UNECE). The Åarhus Convention's full name effectively sets out its objectives - "*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice regarding Environmental Matters*". It requires that information and participation rights are 'effective' and enforceable. Kofi Annan described it as "*the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations*." Ireland has yet to ratify the Convention although, as part of the European Community legal framework, it seems likely that the ECJ would take the Åarhus provisions into account when interpreting the Directive in relation to access to environmental information.

Turning to Directive 2003/4/EC, its key provision is the establishment of a <u>right</u> of access to environmental information held by public authorities.

The definition of "environmental information" is particularly broad and wide ranging. As regards the form in which such information is held, the definition speaks of information "*in written, visual, aural, electronic or any other material form*". And as regards what comprises "environmental information", the definition identifies six separate categories of information dealing with:

- the state of the elements of the environment (e.g. air, water, soil, land, landscape, biological diversity)
- factors affecting, or likely to affect, the elements of the environment (e.g. energy, noise, radiation, waste, other releases into the environment)
- measures designed to protect the elements of the environment (e.g. policies, legislation, plans, programmes, environmental agreements)
- reports on the implementation of environmental legislation
- analyses and assumptions used within the framework of measures designed to protect the environment
- the state of human health and safety, the food chain, cultural sites and built structures inasmuch as they may be affected by the elements of the environment.

There are some exceptions to the right of access (and I'll deal with these shortly), but the Directive makes clear that these exceptions are to be interpreted in a restrictive way and are subject to a public interest test. Interestingly, there is also a requirement that public authorities should organise information on the environment which they hold "*with a view to its active and systematic dissemination to the public*". Clearly, this reflects a very strong view that public authorities should actively seek to create public interest in, and knowledge of, environmental matters; on this basis, public authorities should be developing mechanisms to make environmental information available to the public and, furthermore, they should be promoting the public's interest in this information. This quite clearly sets the tone for the approach public authorities should take when members of the public, or corporate bodies, make specific access requests. The expectation, very clearly, is that access requests will be granted.

As regards a remedy where information is not made available, the Directive requires Member States to put in place both internal and external review or appeal mechanisms. The outcome of the independent, external review - which under the 2007 Regulations will be carried out by my Office - is binding on the public authority.

Unlike the situation under the Freedom of Information Act, the Regulations do not identify the specific public authorities which are subject to the AIE regime. Rather, the Regulations provide a broad definition of what constitutes a public authority; it refers to:

- government or other public administration bodies (including public advisory bodies) at national, regional or local level;
- any natural or legal person performing public administrative functions under national law and in relation to the environment; and
- any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person encompassed by either of the first two categories.

Clearly, the term "public authority" includes Government Departments, local authorities, the Health Service Executive and many semi-state bodies - including commercial state bodies such as, for example, the ESB, Bord Gáis, BIM, Bord na Móna, Bus Éireann, Iarnród Éireann, Coillte, Port Companies (e.g. Dublin, Drogheda, Cork, Dún Laoghaire), Dublin Airport Authority and Dublin Docklands Development Authority. And it is worth mentioning that these commercial state bodies are not already subject to the Freedom of Information Act nor to the Ombudsman Act. It is probable also that North-South Bodies, and here one thinks particularly of Waterways Ireland, are also included within the definition. Where there is a dispute as to whether a body is a public authority, within the meaning of the Regulations, the person seeking the information has a right of appeal to my Office.

Article 6(1) sets out procedures for making access requests. A request must be made in writing or in electronic form, must give the applicant's contact details, state, as specifically as possible, the environmental information sought and the form of access preferred (if any). But it does seem that where access is given other than in the form sought - for example, by way of inspection rather than by way of copies of records - there is no right of appeal against that aspect of the decision.

Unlike access under the FOI Act, there is no "upfront" fee when making a request. Under Article 7, the public authority must deal with the request at the latest within one month of receiving it except in cases of large volume or complexity where the time may be extended by up to two months from the date of the request.

A public authority may charge a fee where it makes information available. However, there is a provision that any such fee must be "*reasonable having regard to the Directive*". Where a public authority proposes to charges such fees, it is obliged to make a list of fees chargeable available to the public. There is provision for a right of appeal (internal and external) on the grounds that the fee charged is excessive.

The Regulations provide various grounds on which a request may be refused. These grounds include the protection of:

- the confidentiality of personal information
- the interests of a person who has voluntarily given information
- the environment to which the information relates
- the confidentiality of the proceedings of public authorities
- Cabinet discussions
- international relations, national defence or public security
- the course of justice
- commercial or industrial confidentiality and intellectual property rights.

While some of these grounds are described as "mandatory", this is misleading in that all of the exemption grounds are subject to certain restrictions, as set out in article 10. For instance, requests for environmental information relating to emissions into the environment cannot, in general, be refused. And in all cases, a potential exemption must be subjected to a public interest test. Put differently: any contemplated refusal of an access request must be considered in the light of what best serves the public interest; only where the public interest is best served by refusal may a request be refused.

Reasons for refusal must be given where access is being denied; and the applicant must also be advised of the right of internal review (within the public authority) and, subsequently, of appeal to my Office. Where no decision is notified by the public authority, there is provision for a right of appeal based on a deemed refusal. The fee for appeal to my Office is set at €150 with a reduced fee for medical card holders and their dependants.

Once notified of my decision on an appeal under the Regulations, public authorities are obliged to comply with it within three weeks. If a public authority fails to comply with my decision, I have the power to apply to the High Court for an order directing compliance. My decisions may be appealed to the High Court, but only on a point of law, within two months by parties to the appeal or other persons affected.

The Regulations have rather unusual, and perhaps questionable, provisions in regard to the rights of third parties who might be affected by the disclosure of information arising from an access request - for example, where it is proposed to release information which is commercially sensitive. The Regulations make no provision for allowing such potentially affected third parties to make submissions at the stage of first decision or at internal review; but they do provide for a right of appeal by such third parties to my Office. It is difficult to see how such third parties would become aware of the proposed release of information in that the Regulations do not provide for the notification by public bodies of those whose interests might be affected by the release of environmental information.

The Department has published a set of Guidance Notes, which includes the text of the Regulations, on the implementation of the Regulations. While these provide useful detail to which public authorities are obliged to have regard, they do not purport to be a legal interpretation of the Regulations. One very welcome feature of the Regulations is that they reproduce, in the form of a schedule to the Regulations, the complete text of the 2003 Directive.

As regards appeals made to my Office under the new regime, so far we have received only six cases. Of these, two were invalid and we could not take them on; in two more cases the records were released as a result of our involvement and it was not necessary to proceed to a formal decision. The remaining two cases are being dealt with at present and I expect we will give formal decisions on them. One of the two open cases, which arises from a request to a Government Department, includes records disclosing information relating to emissions into the environment. This case raises an issue as to whether certain provisions of Article 10 of the Regulations are consistent with the requirements of the Directive. The other case we're dealing with at present has to do with charges imposed on the requester, by a local authority, for the supply of environmental information.

Even allowing for the fact that appeals could not begin until July 2007, because of the need to go through internal review, the volume of appeals to my Office is very low indeed.

COMMENT

There are aspects of the Regulations which concern me. While some of these concerns involve technical and procedural issues, I am particularly concerned that the Regulations do not provide the kind of framework within which the overall purpose of the AIE regime is

likely to be fulfilled. Specifically, the imposition of a €150 external appeal fee is very likely to discourage appeals. In imposing such a relatively substantial appeal fee, I think it is the case that Ireland is very much out of line with the position in other EU member states. Certainly, in the case of the UK (including Northern Ireland) and Scotland (which has its own arrangements), the regimes with which I am most familiar, there are no fees for making an appeal under their Environmental Information Regulations.

I acknowledge that, from the public authorities' point of view, having few appeals may seem attractive. But there are real advantages in having an external, independent appeals system which is actually used. Such an appeal system ensures the integrity of the overall regime; appeal decisions help resolve difficult technical issues and promote better decision making at the level of individual public authorities. An active appeal system also serves to draw attention to public authorities whose practices are not up to scratch.

I think it is important to bear in mind that dealing with access requests does create an additional burden for public authorities (who are already hard pressed in most cases); it is also the case that the AIE regime applies to many bodies who are not accustomed to external scrutiny and for which the public service ethos is not necessarily the predominant ethos. I'm thinking here, in particular, of bodies in the semi-state sector, including commercial state bodies. For the AIE regime to work satisfactorily across all public authorities, it is necessary not only that the legislation be technically coherent and comprehensive but also that the regime should provide for:

- promotion of awareness of the right of access (people need to know)
- promotion of good standards of practice among public authorities (including training, support and proper administrative structures)
- external monitoring of performance
- reporting to the Oireachtas on performance.

There is a particular importance, I believe, in ensuring that public authorities actually take on the pro-active role, as envisaged in the Directive, of making environmental information available as a matter of course and of encouraging the public to take an interest in environmental matters. For this to happen, it is essential that there be some external body which actually promotes this activity within public authorities and which can report on how well or badly this function is being fulfilled.

Again, here we can learn from our experience in the first few years of the operation of the FOI Act. Responsibility for the implementation of FOI across Government Departments, local authorities and the health boards (as they were then) was taken on by a specific unit (the Central Policy Unit) which was located initially within the Office of the Tánaiste and is now based in the Department of Finance. The Central Policy Unit, which was active for more than a year prior to the actual commencement of FOI, organised training for FOI decision-makers as well as familiarisation sessions for all staff in the bodies covered by the

FOI Act. This Unit also encouraged the creation of structures within the public bodies which facilitated the operation of the FOI Act. The Central Policy Unit established various networks which allowed FOI decision-makers to meet and share experiences and develop expertise. In very many ways, the Central Policy Unit's activities in those early years contributed very substantially to the successful establishment of Ireland's FOI regime.

Unfortunately, the present approach as represented in the 2007 Regulations does not provide for any of this. What we have instead are Regulations which, while broadly transposing the strict requirements of the Directive, take little account of the need to create a wider framework within which the access regime might actually be effective. As of now, I think it is fair to say that public awareness in Ireland of the AIE regime is very low indeed. Even amongst those who might be expected to be aware - including politicians, public servants and media people - I would suspect that actual knowledge is fairly minimal. I suspect - though it would be nice to be proven wrong on this - that actual knowledge of the AIE regime is confined to activists in environmental NGOs, to some professionals in the environmental field (including some lawyers and academics) and a handful of others.

On the question of good AIE practice, good decision making and public authorities' own efforts to make environmental information available as a matter of course, as matters stand there is no mechanism available for investigating what is actually happening. One key concern would be whether all public authorities, where a request is refused, actually inform the requester of the grounds for the refusal. Another, and perhaps deeper concern, is whether all public authorities, where a request is refused, inform the requester of his or her rights of appeal, both internally and externally. Both of these are required practices under the Regulations.

As regards the level of usage of AIE, we can only guess at the figures because there has not, hitherto, been any comprehensive attempt at collecting the figures. Referring again to our FOI experience, one of the contributions of the Central Policy Unit, in conjunction with the Information Commissioner's Office, was to ensure from the outset that accurate statistical data on FOI usage levels and outcomes were recorded at individual public body level and collated at national level.

The Guidance Notes issued in conjunction with the 2007 Regulations say that public authorities should put systems in place to compile statistical data regarding AIE usage and the outcome of requests; this data should then be provided to the Department of the Environment, Heritage & Local Government. I do not know at this stage if the Department has actually made direct contact with each of the public authorities concerned - which could be difficult to do where there is no definitive list of such bodies - and it remains to be seen whether reliable data on AIE usage and outcomes will become available.

There are many lessons to be learned from the experience of Freedom of Information (FOI) regimes both here in Ireland and, indeed, internationally. Within the FOI community internationally it is an accepted fact of life that cohabitation between FOI and government is always, at the very least, a little uneasy. For FOI to survive and thrive, ideally it needs to have a political champion whose lead will be followed by public bodies generally. In addition, there needs to be a single preferably independent body whose task it is to promote public awareness, to promote good practice, to monitor actual practice and to report on this to Parliament and to the public generally. In many cases this latter role is taken on by the Information Commissioner (or an equivalent office) who also has the role of adjudicating on appeals. These requirements, it seems to me, are directly applicable to any other regime of access to publicly held information, such as the AIE regime.

Speaking of FOI, there is inevitably going to be confusion arising from the fact that environmental information will, in very many instances, be accessible potentially both under the FOI and the AIE regimes. Where a body subject to FOI holds environmental information, and this is the case with perhaps the vast majority of such bodies, then in principle that information is accessible under the FOI Act as well as under the AIE Regulations. However, not all public authorities which are subject to AIE are also subject to FOI; though the overlap between the two sets is considerable. What this means is that, with some public authorities, environmental information may be accessed either under FOI or under AIE; whereas with some other public authorities environmental information may be accessed under AIE only. It might be argued that it is to requesters' advantage that they can have two bites of the cherry, as it were. On balance, it seems to me that the confusion and indeed the administrative burden resulting from two distinct access regimes is counter-productive and that a single access regime for environmental information is to everybody's advantage.

In the UK (including Northern Ireland) and in Scotland, the 2003 EU Directive has been implemented by way of integrating the AIE regime within the wider FOI regime. There are many advantages to this approach, including:

- a single access regime will be clearer and more user-friendly for the public
- AIE requesters, and the overall AIE regime, will benefit from the relatively developed FOI infrastructure already in place; otherwise, such infrastructure will have to be replicated to no net advantage.

In mentioning the existing FOI infrastructure, I would not wish to give the impression that there are no problems in the delivery of Freedom of Information. There are - but this is not the time to go into that! It is nevertheless the case that after almost ten years of operation of FOI there are certain structures, supports, reporting relationships and oversight arrangements in place; and it makes a lot of sense to absorb the new AIE regime within this infrastrucure.

I am sure most of you will have adverted to the fact that the 2003 Directive has been transposed into Irish law by way of secondary, rather than primary, legislation; and that the Regulations have been made by the Minister "*in exercise of the powers conferred on [him] by section 3 of the European Communities Act 1972*". I understand from the Department of the Environment, Heritage & Local Government that, while using secondary legislation as the implementation mechanism has advantages in terms of time, there are restrictions on what can be achieved when using that mechanism. Specifically, the Department says that in making a regulation under the 1972 Act, the Minister must be mindful of the requirement to stay strictly within the parameters of the Directive and not to act in a manner which is *ultra vires*. It is certainly the case that transposition of the Directive by way of secondary legislation does carry some restriction on what can be achieved. At the same time, I wonder whether in fact there is still greater scope within the secondary legislation mechanism as regards procedural and administrative matters.

Section 3 of the European Communities Act 1972, at sub-section (2) provides:

> "(2) *Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).*"

Clearly, there is a degree of flexibility provided for in the 1972 Act and I would suggest that this flexibility might be used to allow for the integration of AIE within the existing FOI structure.

CONCLUSION

Directive 2003/4/EC represents an important development in terms of encouraging and facilitating public involvement in decisions on environmental matters. Unfortunately, we in Ireland have not yet made the proper arrangements to ensure that the Directive actually achieves what it is meant to achieve. There has been much talk in recent years of a "democratic deficit" within the EU and of the need to make EU institutions and their procedures more transparent and comprehensible to the ordinary citizen. Full implementation of the 2003 Directive would go some way towards supporting the view that the EU can be about empowering individual citizens. And again I acknowledge that empowering citizens will not necessarily make for an easy life for politicians and public servants.

As matters stand, implementation of the 2003 Directive in Ireland is at a fairly minimalist level. The technical, legal arrangements have been made but the wider operational arrangements have not been made.

It does seem to me that the most efficient and effective way of ensuring that the complete Directive package is implemented is to merge the AIE regime with the existing FOI regime - as is the case with the United Kingdom and Scotland. Whether this would require primary legislation is something to be considered. Certainly, primary legislation is the better option notwithstanding the time investment required in drafting legislation and in finding Oireachtas time to debate it.

We will be celebrating ten years of FOI in practice this year and maybe the time has come to undertake a review of the FOI Act; in that context, merging the AIE regime with the FOI regime would be very desirable.

In the meantime, I will fulfil my role as Environmental Information Commissioner to the best of my ability. We will shortly have a dedicated EIC website and we will publish our decisions - or at least those that have precedent value -on that site. To the extent that it is possible, I hope to undertake some promotion of the AIE regime and I would hope that the AIE profile can be raised. Ultimately, though, I am convinced that the AIE regime can only be properly effective where the type of arrangements I've described are put in place.

Thank you for listening.