



Oifig an Choimisinéara um Faisnéise Comhshaoil
Office of the Commissioner for Environmental Information

**Part II - Commissioner for
Environmental Information**

Chapter I

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Chapter I: Introduction

My role, which is additional to those roles I have as Ombudsman and Information Commissioner, is to decide on appeals by members of the public who are not satisfied with the outcome of their requests to public authorities for environmental information. My functions are defined in the Access to Information on the Environment Regulations 2007 (S.I. No. 133 of 2007).

The Directive and the Regulations

The regime of access to environmental information is based on Directive 2003/4/EC. The Directive has, as its key provision, the establishment of a right of access to environmental information held by public authorities. Implementation of the Directive in Ireland was brought about on 1st May 2007 when the Regulations, made by the Minister for the Environment, Heritage and Local Government, came into effect.

What is Environmental Information?

The definition of “environmental information” in the Directive and in the Regulations is broad. It covers information “in written, visual, aural, electronic or any other material form”. It identifies six separate categories:

- 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, and
- the state of human health and safety, the food chain, cultural sites and built structures in as much as they may be affected by the elements of the environment.

Promoting Access to Information

The expectation is that access requests will generally be granted. 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”. The outcome of the independent, external review - which under the 2007 Regulations is carried out by my Office - is binding on the public authority.

Public Authorities

Unlike the situation under the FOI Act, the Regulations do not identify the specific public authorities which are subject to the Access to Information on the Environment (AIE) regime. Rather, the Regulations provide a broad definition of what constitutes a public authority; they refer 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.

Some commercial State bodies not already subject to either the FOI Act or to the Ombudsman Act are potentially covered by these Regulations. Where there is a dispute as to whether a body is a public authority, the person seeking the information has a right of appeal to my Office.

Charges

Unlike access under FOI, there is no upfront fee required to make a request. Neither is there any charge for the internal review application. However, there is a fee for appeal to my Office. This is set at €150 with a reduced fee of €50 for medical card holders and their dependants and third parties affected by the disclosure of the environmental information concerned.

A public authority may charge a fee where it makes information available. However, any such fee must be “reasonable having regard to the Directive”. Where a public authority proposes to charge fees, it is obliged to make a list of fees chargeable available to the public. There is a right of appeal (internal and external) on the

grounds that the fee charged is excessive. - see my decision in Sligo County Council Case [CEI/07/06](#) on www.ocei.gov.ie.

Refusal Grounds

The Regulations provide that a request may be refused in order to protect:

- 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.

There is also provision for a public authority to notify an applicant that it does not hold the information sought. All of the exemption grounds are subject to restrictions under Article 10 of the Regulations. For instance, requests relating to emissions into the environment cannot, in most cases, be refused. In all cases, a potential exemption is subject to a public interest test and grounds for refusal must be “interpreted on a restrictive basis”.

Where no decision is notified by the public authority, there is provision for a right of appeal based on a deemed refusal.

Guidance

The Department of the Environment, Heritage and Local Government (the Department) has published a set of Guidance Notes, which includes the text of the Regulations and Directive. These are available on the Department’s website at www.environ.ie and on my Office’s website www.ocei.gov.ie. The guidance gives useful detail to which public authorities are obliged to have regard; it does not purport to be a legal interpretation of the Regulations.

Appeals received

During 2009, 18 appeals were received by my Office (12 in 2008). Two formal decisions were issued - summaries of these can be found at the end of this chapter. Two cases were deemed to have been withdrawn as settled once the records were released following my Office’s intervention. One case was withdrawn and a further 6 appeals were deemed invalid on the grounds that internal review had

not been requested or the statutory appeal fee was not paid. Thirteen cases were on hands at the end of the year. My staff recorded 23 general enquiries about the Regulations.

While most of the appeals arose from requests to local authorities and Government Departments, An Bord Pleanála, the Environmental Protection Agency, the Attorney General's Office and RTÉ were among the public authorities whose decisions were appealed. It is fair to say that most of the appeals arose from disputes as to whether any or further environmental information within the scope of a request was held, the format in which it was available or whether the body was a public authority for the purposes of the Regulations as opposed to cases where my Office had to decide whether or not the exceptions provided for in the Regulations had been properly applied.

Issues arising in 2009

As discussed in my report for 2008, the level of activity in appeals and in applications under the Regulations has been low. I identified two main reasons for this - the level of the fee for making of an appeal to my Office is discouraging appellants and there is a lack of awareness generally regarding the rights of members of the public under the Regulations. There have been some recent indications that the level of appeals is on the rise.

High Court case

My decision in case [CEI/07/0005](#) - Mr Gary Fitzgerald and the Department of the Taoiseach - was appealed to the High Court in December 2008. The appeal was heard in July 2009 and, at the time of writing, judgment is still awaited.

Website

My Office's website www.ocei.gov.ie was launched in April 2009. Appeal decisions are available there with links to the Regulations, Directive and Guidelines.

Report to The European Commission by the Department

During the year, the Department of the Environment, Heritage and Local Government made Ireland's first report to the European Commission on the operation of the Directive. This reporting is mandatory on Member States under Article 9 of the Directive. Review of Implementation of EU Directive 2003/4/EC on Public Access to the Information on the Environment. Report by Ireland. Monitoring period: 1 May 2007 - 31 December 2008 is available on the Department's website www.environ.ie.

I provided statistics and comments on my Office's experience of the Regulations and my staff met with officials of the Department. My comments included suggestions for improved awareness and I indicated my Office's willingness to provide, where possible, input into any awareness/training sessions organised by the Department for staff of public authorities. Among the issues discussed was the fact that the appeal fee is seen as a deterrent to applicants particularly in cases where responses to requests are so inadequate as to constitute "non-reply" or a deemed refusal under the Regulations where no decision is issued within the statutory timeframes.

Chapter 2

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Chapter 2: Decisions

What follows is a summary of the decisions made in 2009. The full text of these can be found on our website www.ocei.gov.ie

Councillor Tommy Cullen & the Department of Environment, Heritage and Local Government CEI/08/0012 Decision of 27 October 2009

- Whether the Department was justified in its refusal of access to environmental information concerning illegal dumping in Wicklow

Background

The applicant sought access to:

- correspondence, reports, minutes of meetings and memos and internal communications between the Department and Wicklow County Council, the Environmental Protection Agency (EPA) and all other parties on the issue of illegal dumping 2001 to 2008
- records, including those of the Local Government Audit Service (LGAS) on the issue of a waste licence at Ballybeg, Co. Wicklow, and
- communications concerning the making of the Baltinglass Town Plan.

The Department identified several files relating to the request and advised that it was granting access to them with the exception of some documents withheld on the grounds of exceptions provided for in the Regulations. It invited the applicant to inspect the files and mark those pages he wished to have copied. The applicant did this and then appealed the decision. Four additional records were released in the Department's internal review decision. The appellant appealed that decision to my Office on the basis that he believed further information was held.

The Department's handling of the matter

My staff engaged in much correspondence and met with officials of the Department in an effort to clarify the extent of information held and the Department's approach to identifying and providing that information. In response to queries from my Office, three further sets of relevant records came to light. This called into question the efforts made by the Department to fully identify all relevant information at the outset. Irrespective of whether a request to the Department fell to be processed under FOI legislation or under the Regulations on Access to Environmental Information, the systems it had in place to identify information held in various sections failed in this case.

The Department advised that one relevant audit file had not been found. It said that a search was not carried out at the time of the original request because it presumed that audit matters were exempt. Clearly, this presumption should not have been made without an examination of the information and a proper consideration of the public interest in releasing it. The file related to the LGAS examination of the issuing of a waste permit for lands at Ballybeg. My staff pointed out to the Department that the definition of "environmental information" includes electronic records and that, if any part of this file existed electronically, it would fall within the scope of the appeal. A draft version of the LGAS report was located and provided to my Office. The Department claimed that this draft report was exempt from release.

A further concern related to the level of consideration given by the Department's decision makers to the request under the Regulations. In particular, the original decision and the internal review decision failed to comply with the Regulations and with the Department's own published Guidelines on the Regulations because it omitted the mandatory consideration of the public interest when refusing access to information.

Findings

Was all information held released?

Article 7(5) of the Regulations requires a public body to notify an applicant if it does not hold the information sought. There is no requirement that records be created if they do not exist or cannot be found. I concluded after a lengthy appeal process that, on the balance of probabilities, adequate searches had been carried out across various sections of the Department and that officials had not given misleading information to my staff about the existence of additional records. While the applicant was clearly of the view that further information should exist, this did not necessarily mean that such records were actually held.

Legal Professional Privilege

I found that some of the records for which the Department claimed exemption would qualify for legal professional privilege. However, it was necessary to consider the public interest under Article 10 of the Regulations. The applicant argued that the public interest favoured release of the information. Against this I had to weigh the strong and long established public interest in upholding legal professional privilege as interpreted by the Courts. Public authorities need to be reasonably certain that they can seek and obtain full and frank legal advice in confidence. While I cannot describe in any detail the advice involved, I can say that the records were concerned primarily with legal powers of the Minister, advice from the Attorney General's Office and confidential communications between the Department and its legal advisers obtaining and/or giving legal advice. I did not consider that the public interest in release, though considerable, was of sufficient strength to justify the setting aside of legal professional privilege. I decided that the information in certain records was properly exempt from disclosure in accordance with Article 8(a)(iv) of the Regulations.

Some other records comprised internal memos, the authors of which were not professional legal advisers and not all of which disclosed legal advice. There was no indication that these were prepared with the dominant purpose of preparing for litigation and I found that some did not qualify for legal professional privilege. Further, the Department claimed privilege for correspondence with the EC Commission and, after a detailed examination of the circumstances of the creation of these and the ECJ cases cited by the Department, I was not satisfied that preparation for litigation was the dominant purpose in their creation.

Confidentiality of proceedings

Some of the withheld material contained information which the Department said had been given in confidence. I considered that the identities of the persons named in the records and the nature of their allegations were already in the public domain. The Department did not provide sufficient justification for its position to enable me to find that the providers of the information did so in the expectation of confidence or in circumstances imposing an obligation of confidence. Furthermore, Article 10(3) provides for a restrictive interpretation of the grounds for refusal to be applied. I concluded that making available the information would not adversely affect the confidentiality of the proceedings of public authorities where such confidentiality is otherwise protected by law nor would it adversely affect the interests of any persons who supplied the information. I found that the exceptions at Articles 8(a)(ii) and 8(a)(iv) did not apply.

Local Government Audit Service (LGAS)

I rejected the Department's claim that the audit report was not environmental information. I should not have had to remind the Department of the definition of "environmental information" set out in the Directive and the Regulations. There can be no doubt but that matters relating to a waste licence come within the definition. The LGAS claimed on behalf of the Department that its report was exempt from release under Articles 8(a)(iv) and 9(2)(c) of the Regulations.

The LGAS referred to provisions of the Local Government Act 2001 in relation to the independence of the audit function. However, I considered that the draft report disclosed nothing about the independence of the audit service or about its methodology in carrying out value for money audits or other investigative functions which would prejudice or interfere in any tangible way with the fundamental principle of "auditor independence". Similarly, the Department failed to convince me that the principle of the auditors having their own discretion in relation to how an audit is carried out would be undermined in any way by allowing access to the information.

The Department also claimed that the draft LGAS report was information still in the course of completion or an unfinished document. Given that the draft report was prepared in 2005, the file apparently lost and a letter sent to the Minister in 2005 setting out the opinion of the LGAS on the matter, I did not see how the draft report could be considered to be in the course of completion. There was no suggestion of any further activity on the part of the LGAS in this matter since 2005. I found that the Article 9(2)(c) exception did not apply.

I commented that there is a strong public interest in the public being aware of how allegations about waste management, the administration and regulation of permits and the overall issue of pollution and dumping of waste are handled. I considered that the fact that the LGAS file had, apparently, disappeared without explanation, strengthened the public interest in as much information as possible about this environmental controversy being released so that the public is aware of measures taken to investigate the allegations made.

Appeal Decision

I varied the decision of the Department and directed it to make specified items of environmental information available.

Mr P. Geoghegan & the Environmental Protection Agency (EPA) CEI/09/0004 Decision of 28 October 2009

- Whether the EPA was justified in its refusal of access to environmental information concerning complaints made about Aughinish Alumina

Background

The applicant sought access to a report carried out by an EPA inspector following a visit to his lands in March 2008 together with information on and assessment of various complaints made by him about emissions from Aughinish Alumina. The decision of the EPA was to part refuse the request under Article 4(1) of the Regulations on the basis that the Regulations do not apply to information already required to be made available to the public for inspection or otherwise under any statutory position. It advised the applicant to view the relevant public files and it also granted access to 21 records which were not on the public files. Following internal review, the applicant appealed to my Office in respect of the information refused.

EPA position

The EPA said that it was obliged to give access to its licensing files under the Environmental Protection Agency (Licensing) Regulations 1994 (S.I. No. 85 of 1994) as amended by S.I. 76 of 1995. My Investigator pointed out that the material specified in those Regulations related to licence applications only. The EPA accepted this and clarified that information on complaints was on the public file as an administrative arrangement rather than on foot of a statutory requirement.

My Office was satisfied that Article 4(1) of the Regulations did not apply. The EPA then submitted that the relevant provision was Article 7(3) which deals with the form of access to information. It identified and scheduled the information within the scope of the request which was available for inspection in the public files. It clarified that no records were held in relation to some parts of the request and that all information held about the complaints had been made available.

Findings

I found that Article 7(3)(a) of the Regulations allowed the EPA not to give the applicant access to copies of the information where it is already available in an easily accessible form. I further found that Article 7(5) applied to the information which the EPA did not hold. I commented that the handling of the request had caused confusion in that the EPA's published procedures for viewing of its files give

the impression that complaints relating to a facility, including all correspondence on enforcement of licences, are available. However, the 21 records released to the applicant in this case included correspondence and internal memoranda relating to a complaint and were not on the public file. I did not consider that this was evidence of any intent to conceal information but that it pointed to a need to clarify for the public the circumstances in which records relating to complaints are not always available on the EPA's public files.

Appeal Decision

I found that the EPA was justified in its part refusal of the request; I varied the basis for the decision to reflect the correct provisions of the Regulations.