

LANDSCAPE SAFETY
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ENERGY
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PART TWO

COMMISSIONER FOR ENVIRONMENTAL INFORMATION

CHAPTER 1



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

Chapter 1: Introduction

The Access to Information on the Environment (AIE) regime 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. The Directive was transposed into Irish law by the European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007), which came into effect on 1 May 2007. In December 2011, the Regulations were amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (S.I. No. 662 of 2011).

The Office of the Commissioner for Environmental Information (OCEI) was established under Article 12 of the Regulations. I became the office-holder, as the Commissioner for Environmental Information, because Article 12(2) assigns this position to the person holding the Office of the Information Commissioner under the FOI Act. My role as Commissioner for Environmental Information, which is additional to and legally independent of the roles I have as Ombudsman and Information Commissioner, is to review decisions of public authorities on appeal by members of the public who are not satisfied with the outcome of their requests for environmental information. My decisions on appeal are final and binding on the affected parties, unless a further appeal is made to the High Court within two months of the decision concerned.

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 on*” the following six 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, emissions),

- measures (e.g., policies, legislation, plans, programmes, environmental agreements) and activities affecting or likely to affect the elements and factors referred to above as well as measures or activities designed to protect those elements,
- reports on the implementation of environmental legislation,
- cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to above, and
- the state of human health and safety, conditions of human life, cultural sites and built structures inasmuch as they are, or may be, affected by the state of the elements of the environment.

What is a public authority?

Unlike FOI legislation, the Regulations do not prescribe a list of individual public authorities that are subject to the AIE regime. Rather, the Regulations broadly define the term “public authority” to mean –

- government or other public administration (including public advisory bodies) at national, regional or local level,
- any natural or legal person performing public administrative functions under national law, including in relation to the environment, and
- any natural or legal person having public administrative 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.

The definition in the Regulations states that it includes certain types of entities. The Regulations, as amended, require the Minister to “*ensure that an indicative list of public authorities is publicly available in electronic format*”.

Where there is a dispute as to whether a body is a public authority, the person making the request has a right of appeal to my Office. I issued two decisions in 2011 dealing with the scope of the public authority definition; these decisions are summarised in [Chapter 2](#).

Facilitating access to environmental information

The expectation in the scheme of the Directive and the Regulations is that requests for environmental information will generally be granted. In order to facilitate access to environmental information, the Regulations require public authorities to inform the public of their rights and to provide information and guidance on the exercise of those rights. Public authorities are also required to “*make all reasonable efforts*

to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means”.

Additional requirements on public authorities have been introduced by the Amendment Regulations in order to comply with certain obligations under the Directive. Public authorities must now *“ensure that environmental information compiled by or for it, is up-to-date, accurate and comparable”*. Public authorities must also *“maintain registers or lists of the environmental information held by the authority and designate an information officer for such purposes or provide an information point to give clear indications of where such information can be found”*. In line with Article 7(4) of the Directive, a public authority is required, in the event of an imminent threat to human health or the environment, to *“ensure that all information held by or for it, which could enable the public likely to be affected to take measures to prevent or mitigate harm, is disseminated immediately and without delay”*.

Charges

Under the AIE regime, no upfront fee applies for making a request or for applying for an internal review of a decision to refuse a request. However, as a general rule, a fee of €150 must be charged for making an appeal to my Office. A reduced fee of €50 applies in respect of an appeal to my Office by a medical holder, a dependent of a medical card holder, or a relevant third party. The Regulations, as amended, now provide that I may waive all or part of the appeal fee where the original decision was untimely.

A public authority may charge a fee when it makes environmental information available, but 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 the chargeable fees available to the public. There is a right of appeal (internal and external) on the grounds that the fee charged is excessive.

Refusal grounds

The Regulations set out certain mandatory and discretionary grounds for refusal that are designed, where appropriate, to protect:

- the confidentiality of personal information,
- the interests of a person who voluntarily supplied the information,
- the environment to which the information relates,
- the confidentiality of the proceedings of public authorities,
- Cabinet discussions,
- international relations, national defence or public safety,

- the course of justice,
- commercial or industrial confidentiality and intellectual property rights,
- material in the course of completion, and
- internal communications of public authorities.

However, requests relating to emissions into the environment cannot, in most cases, be refused. All requests are subject to consideration of the public interest under Article 10(3) of the Regulations. Moreover, Article 10(4) provides that the grounds for refusal of a request shall be interpreted on a restrictive basis having regard to the public interest.

Where no decision is notified by the public authority, the Regulations provide for a right of appeal on the basis of a deemed refusal.

Guidance

Guidance Notes relating to the implementation of the Regulations have been published by the Department of the Environment, Heritage and Local Government (the Department). The Notes, which include the text of the Regulations and Directive, are available on the Department's website at www.environ.ie and on my Office's website at www.ocei.gov.ie. Although public authorities are required to have regard to the guidelines published by the Department in performing their functions under the Regulations, the guidelines do not purport to be a legal interpretation of the Regulations.

Appeals received in 2011

During 2011, thirteen appeals were received by my Office. Fourteen appeals were closed during the year. Seven formal decisions were issued; relevant summaries are set out in the chapter following. One case was deemed to have been withdrawn as settled once the records were released following my Office's intervention. One other case was also withdrawn following contacts with my Office. A further five appeals were deemed to be invalid, primarily because no internal review request had been made or because the appeal fee had not been paid. Fourteen cases were on hand at the end of the year. My staff recorded 22 general enquiries about the Regulations.

While most of the appeals arose from requests to local authorities and government departments, other public authorities whose decisions were appealed were the Central Bank of Ireland and the Health Service Executive. Among the issues still under consideration is the scope of the definition of "environmental information" in the context of a request for a full copy of the contract for the construction and operation of the Poolbeg incinerator.

As a general rule, appeal decisions are published in full on my Office's website at www.ocei.gov.ie. In two unpublished cases, however, no further issue remained to be determined by my Office; formal decisions were issued purely as an administrative measure in order to bring the cases to closure.

Issues arising in 2011

Level of activity during 2011

I have previously observed that the level of activity under the Regulations has been low. In 2011, the level of appeals showed a decrease of 43.5% from the high of 23 appeals received in 2010 and is comparable to the number of appeals received in 2008, when my Office was newly established. Of the 13 appeals received in 2011, four were from persons who had previously made appeals to this Office. These four appellants accounted for seven of the appeals in 2011.

I consider that the level of the fee for making an appeal to my Office (normally €150) is discouraging potential appellants. Moreover, despite the general duties placed on public authorities to facilitate access to environmental information, a general lack of awareness seems to persist among the public regarding their rights under the Regulations. My staff continue to be in communication with the Department in relation to the operation of the Regulations and have noted in particular that it is of some considerable concern to me that the level of awareness both by the public and public authorities remains very low.

Notice under Article 12(6) of the Regulations

Article 12(6) gives me certain powers in dealing with an appeal. I may:

- require a public authority to make environmental information available to me,
- examine and take copies of environmental information held by a public authority, and
- enter any premises occupied by a public authority so as to obtain environmental information.

I invoked this provision on one occasion in 2011. The case, CEI/10/0023, which is currently under investigation, involves a request made to Dublin City Council (the Council) for a full copy of the contract for the construction and operation of the Poolbeg incinerator. My Office made two requests for a full copy of the record concerned for the purposes of the review; however, the Council had concerns relating to a confidentiality agreement. Ultimately, I considered it necessary to issue an Article 12(6) notice in the case. The Council complied with the notice by providing a full copy of the contract to my Office before the deadline expired.

Practical difficulties relating to the operation of the Regulations

Since its inception, my Office has encountered practical difficulties arising from the operation of the AIE regime. One problem is the matter of resources. Although the OCEI is a legally independent Office, to date, it has not received any funding allocation from the State and must rely entirely on the resources that can be made available from the very limited resources available to the Office of the Information Commissioner. Related to the problem of resources, until 19th December 2011, had been the absence in the Regulations of any explicit provision allowing for the settlement or discontinuance of reviews, which meant that certain cases required a formal decision even where no further issue between the parties remained to be determined by my Office. Two such cases are referred to above.

Another matter of concern to me, which I have commented on previously, is the lack of training and awareness among the staff of public authorities. A particular difficulty is the regular failure of public authorities to adhere to the relevant time limits set out in the Regulations for issuing decisions and to advise applicants properly of their rights of appeal. Other issues of concern relating to the handling of AIE requests by public authorities include:

- confusion as to who is responsible for coordinating requests in public authorities,
- failure to designate Internal Reviewers,
- failure of decision makers to have regard to the provisions of Article 10 of the Regulations, including the public interest considerations,
- confusion between the exemption and timeframe provisions of the FOI Act and the AIE Regulations, and
- the absence of a standard schedule of fees applicable to AIE and clarity as to what public authorities may charge applicants for under AIE.

My Office has been in communication with the Department about these and other matters of concern to me relating to the operation of the Regulations. Some of my concerns have been addressed in the Amendment Regulations that were signed by the Minister on 19 December 2011. For instance, I may now deem an appeal to be withdrawn in the event of the full or partial release of the requested information by the public authority prior to a formal decision. In such circumstances, I may waive or refund all or part of the appeal fee.

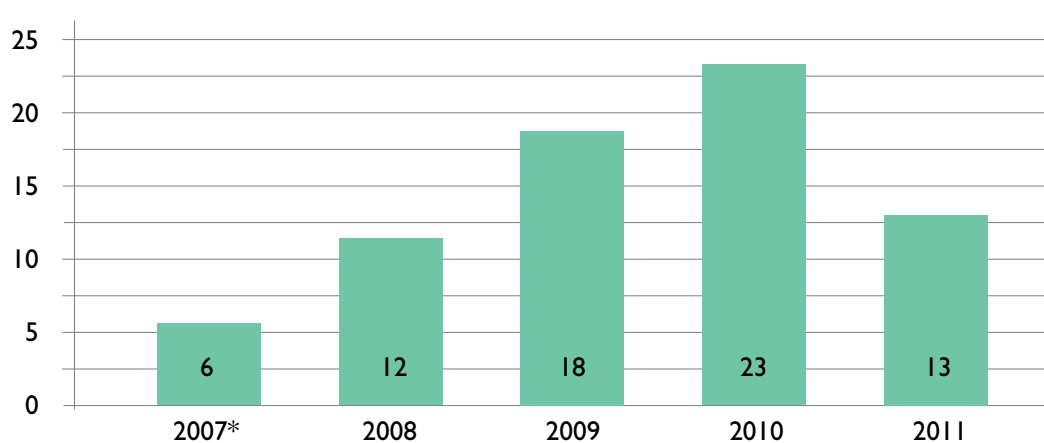
High Court and Supreme Court judgments

A party to an appeal to my Office or any other person affected by my decision may appeal to the High Court on a point of law from the decision. My decisions in two similar cases dealing with the scope of the public authority definition, CEI/10/0005 – Mr. Gavin Sheridan and National Asset Management Agency, and CEI/10/0007 – Mr. Gavin Sheridan and Anglo Irish Bank, were appealed to the High Court in November 2011. In order to reduce the potential costs involved, the proceedings brought by the Irish Bank Resolution Corporation Limited (IBRC) (formerly Anglo Irish Bank) have been stayed by agreement pending the outcome of the appeal by the National Asset Management Agency (NAMA). Meanwhile, the NAMA appeal has been listed for hearing on 17 May 2012, for two days.

There were no High Court judgments delivered in 2011 on cases taken against decisions of my Office. My Office's appeal to the Supreme Court against the judgment of Mr. Justice O'Neill in *An Taoiseach v. Commissioner for Environmental Information* (Case CEI/07/0005) is still pending.

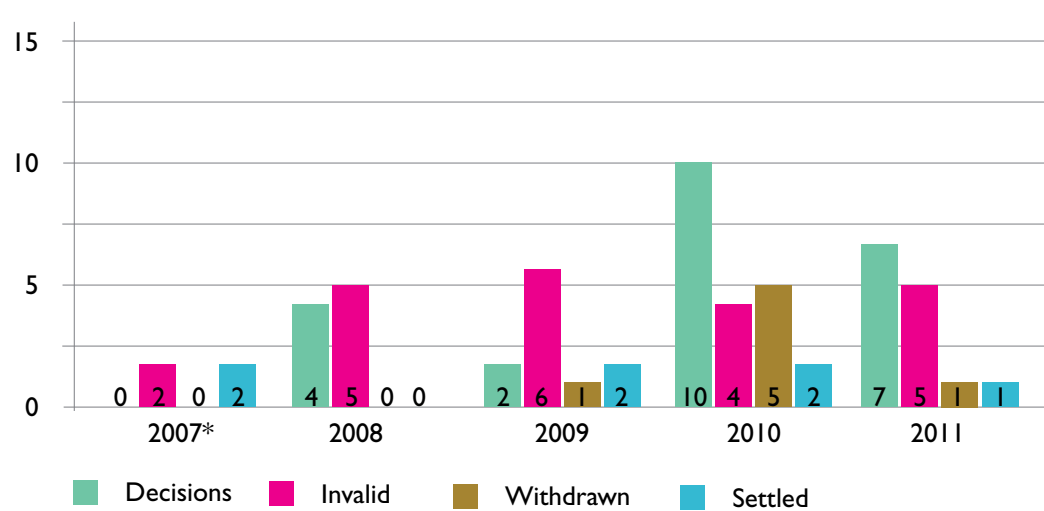
Statistics

Appeals received



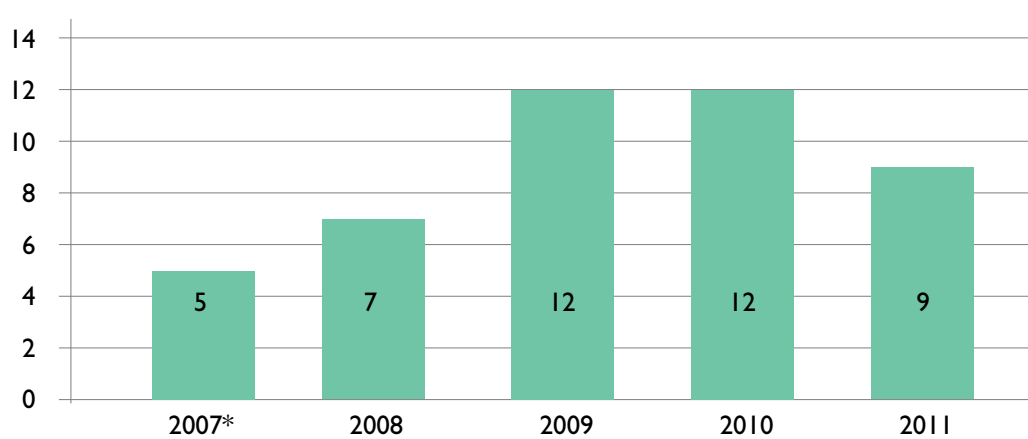
* This Office was established with effect from 1 May 2007

Outcome of CEI appeals by year



* This Office was established with effect from 1 May 2007

Appellants to CEI



* This Office was established with effect from 1 May 2007

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CHAPTER 2

Chapter 2: Decisions

In this chapter, I provide summaries of five decisions made in 2011. The full text of these decisions can be found on my website at www.ocei.gov.ie.

Case CEI/10/0018 – Mr. Cian Ginty and Irish Rail – Decision of 24 June 2011

Whether Irish Rail was justified in its refusal of access to environmental information sought by the applicant

In a request dated 11 June 2010, the applicant sought access to *“a list of all current speed restrictions in the Irish Rail network, and any reports directly related to these speed restrictions”*. Irish Rail refused the request in its original and internal review decisions on the basis that the requested information was not “environmental information” and therefore not subject to the Regulations. In its internal review decision, Irish Rail described the information as being *“purely of an operational nature, and by definition . . . of a transient nature”*.

During the course of the review, my Office took the view that the speed of a train is a “factor” which affects or is likely to affect the elements of the environment. My Office also considered that the impact of environmental factors could require the imposition of temporary speed restrictions, though it was acknowledged that this would be unusual. In my decision, I found that the information sought was environmental information in accordance with the Regulations. Moreover, I found no basis for withholding the information sought, particularly as information on train speeds could be said to relate to emissions into the environment.

I concluded that Irish Rail was not justified in refusing access to the information sought. I therefore annulled the decision of Irish Rail and directed the release of the information.

Case CEI/10/0016 – Mr. Pat Swords and Department of Environment, Heritage and Local Government (the Department) – Decision of 29 July 2011

Whether the Department was justified in its refusal of access to environmental information relating to foreshore licensing

In a request dated 27 June 2010, the applicant sought access to two items of information relating to a foreshore licence for the Dublin City Waste to Energy Project. The Department refused the request on 28 July 2010. The applicant made a request for internal review in relation to the second part of his original request, which was for *“the official position of the Department with regard to the processing of licences and permits, such as a foreshore application, within an appropriate timeframe and the Prevention of Corruption (Amendment) Act, 2001”*. The applicant later clarified that his request *“related to the timeframe for processing a foreshore licence”*. On 30 August 2010, the applicant appealed to my Office on the basis of the Department's failure to reply to his internal review request.

It was not in dispute that the information sought, if held, would come within the definition of environmental information. However, during the course of the review, the Department issued a statement to the applicant explaining, in relation to the time limits for processing an application for a foreshore licence, that *“the Foreshore Act 1933 does not specify time limits within which licence applications must be processed and accordingly there are no records available which address this issue”*.

Article 7(5) of the Regulations is the relevant provision that applies where a public authority does not hold the requested information. I found no reason to doubt the Department's assurances that it did not create or receive the information sought by the applicant in relation to the timeframe for processing licenses. In the circumstances, I found that the information sought was not held by the Department and that Article 7(5) of the Regulations applied. I affirmed the Department's decision accordingly.

Case CEI/11/0003 – Mr. Pat Swords and Department of Communications, Energy and Natural Resources (the Department) – Decision of 28 October 2011

Whether the Department was justified in its refusal of access to environmental information sought relating to Minister Ryan's appearance on RTÉ's *Prime Time* programme on 14 December 2010 and his remarks on wind energy

The request in this case, dated 23 December 2010, was for environmental information relating to comments on wind energy made by the then Minister for Communications, Energy and Natural Resources, Eamon Ryan T.D. during his appearance on RTÉ's *Prime Time* programme on 14 December 2010. The Department identified four reports and provided a copy of these to the applicant. The applicant made a request for internal review on the basis that he was not satisfied that the information provided supported the remarks made by the Minister with regard to the price of electricity for consumers. In its internal review decision, the Department affirmed its original decision, saying that it had provided the applicant with the relevant material and had no further relevant information available.

Again, it was not in dispute that the information sought, if held, would come within the definition of environmental information. However, I found no reason to doubt the Department's assertions that all information relevant to the request had been identified and made available to the applicant. I observed that, while the information provided may not have met with the requirements of the applicant, the Department could not be expected to create information for this purpose under the Regulations.

I found that the information sought by the applicant was not held by the Department and that Article 7(5) of the Regulations applied. I affirmed the Department's decision accordingly.

Cases CEI/10/0005 and CEI/10/0007 – Mr. Gavin Sheridan and National Asset Management Agency, and Mr. Gavin Sheridan and Anglo Irish Bank – Decisions of 13 September 2011 and 29 September 2011, respectively

Whether the bodies concerned are public authorities within the meaning of the Regulations

The applicant made certain requests to the National Asset Management Agency (NAMA) and Anglo Irish Bank (the Bank) that were refused on the ground that the body concerned did not consider itself to be a “public authority” within the meaning of the Regulations. As noted in Chapter 1, where there is a dispute as to whether a body is a public authority, the person making the request has a right of appeal to my Office. Accordingly, the applicant appealed to me against the respective decisions of NAMA and the Bank.

The term “public authority” is defined in Article 3(1) of the Regulations and Article 2(2) of the Directive. Paragraphs (a) to (c) of Article 3(1) correspond to the definition in the Directive, but unlike the Directive, Article 3(1) then adds: “*and includes*” certain entities listed at subparagraphs (i) to (vii). At subparagraph (vi) is “*a board or other body (but not including a company under the Companies Acts) established by or under statute*”. Subparagraph (vii), in turn, includes “*a company under the Companies Acts, in which all the shares are held-(l) by or on behalf of a Minister of the Government*”.

Neither NAMA nor the Bank considered itself as meeting the criteria under paragraphs (a) to (c). In this context, the primary argument presented by the bodies was, in essence, that paragraphs (a) to (c) must be treated as qualifying conditions for meeting the public authority definition notwithstanding the use of the phrase “and includes” in the Regulations.

I noted that “includes”, when used in a statutory definition, is ordinarily a word of expansion under Irish law. Thus, in light of the Irish case law on the matter, I found that the ordinary (or literal) meaning of “includes” has an extensive or expansive connotation requiring that what is governed by “includes” is to be added in or included. I also found that giving this meaning to “includes” results in the definition of public authority being entirely plain and unambiguous. I concluded that, in applying the Regulations, effect should be given to the plain meaning of “includes”. Accordingly, I found that I must necessarily interpret the term “public authority” as defined in the Regulations as extending to all of the types of entities included in the list at

subparagraphs (i) to (vii) regardless of whether such entities would also be captured by the categories at paragraphs (a) to (c).

Moreover, I was not persuaded by the arguments of NAMA and the Bank that reliance on the plain meaning of the word “includes”, as used in the public authority definition in the Regulations, would give rise to an outcome at odds with the Directive. I noted that it is very arguable that the Directive encourages and enables Member States to take an expansive approach to what constitutes a “public authority”. In the circumstances, I did not accept that paragraphs (a) to (c) of the public authority definition in the Regulations should be interpreted as restrictive criteria where a Member State has apparently chosen to take an expansive approach to the definition.

I found that NAMA is a public authority on the basis that it fits the criterion at subparagraph (vi) of the list of entities numbered (i) to (vii) which the definition of public authority “includes”. Similarly, I found the Bank is a public authority on the basis that it fits the criterion at subparagraph (vii)(l) in the list of entities numbered (i) to (vii) which the definition of public authority “includes”. I did not consider it necessary to determine whether NAMA or the Bank is captured also by any of the categories at paragraphs (a) to (c) of the definition. I annulled the respective decisions of NAMA and the Bank.

As noted in Chapter 1, my decisions have been appealed to the High Court.