



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

## **PROCEDURES MANUAL**

**APPEALS UNDER ARTICLE 12 OF THE EUROPEAN  
COMMUNITIES (ACCESS TO INFORMATION ON THE  
ENVIRONMENT) REGULATIONS 2007 TO 2014**

**June 2020**

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## Part 1 - Introduction

### 1. Introduction

- 1.1. This manual sets out the procedures of the Office of the Commissioner for Environmental Information for dealing with appeals under article 12 of the AIE Regulations. It has been published for the benefit of members of the public and public authorities alike who may be involved in appeals before the Office.
- 1.2. Article 12 is silent on the matter of procedure, but reflects the close connection between this Office and the Office of the Information Commissioner. Moreover, the review functions of both Offices are inquisitorial rather than adversarial in nature. Therefore, the Commissioner has adopted procedures that are largely consistent with the procedures for the conduct of a review under section 22 of the Freedom of Information (FOI) Act and is guided in his approach to these procedures by the experience of the Office of the Information Commissioner. The procedures are aimed at being as informal as possible while ensuring consistency and fairness in our approach to dealing with appeals. The procedures set out in this manual should, in the normal course of events, be adhered to insofar as practicable. In all cases, however, the Office will aim to ensure that the approach adopted for dealing with an appeal is fair, and is seen to be fair, to all parties concerned.

### 2. Making an appeal to the Office of the Commissioner for Environmental Information

- 2.1. The role of the Commissioner for Environmental Information is to carry out independent reviews of decisions of public authorities on requests for information under the AIE Regulations.
- 2.2. Under article 12(4)(a) of the Regulations, an appeal to the Commissioner must be initiated **not later than one month** after the decision of the public authority under article 11(3) (generally the internal review decision) has been received by, or was required to be notified to, the applicant/appellant. Under article 12(4)(b) of the Regulations, the Commissioner may extend the time limit for initiating an appeal where, in the circumstances of a particular case, it is reasonable to do so.
- 2.3. A person who wishes the Commissioner to review a decision of a public authority must give notice of the appeal in writing or electronic form and pay the appropriate fee by the applicable deadline. The use of the online facility for making an appeal is encouraged (see [www.ocei.ie](http://www.ocei.ie)), but notice of an appeal may also be given by email to [info@ocei.ie](mailto:info@ocei.ie),

provided that the appropriate fee is paid by the applicable deadline.<sup>1</sup> Alternatively, an appeal may be made by post or hand-delivery<sup>2</sup> to the Office at the following address:

Office of the Commissioner for Environmental Information  
6 Earlsfort Terrace  
Dublin 2  
DO2 W773

A standard appeal form is available on our website at <https://www.ocei.ie/making-an-appeal/how-to-appeal/> and at Appendix 1 of this manual.

2.4. It is necessary for the appellant to establish the validity of the appeal. An appeal is only valid insofar as it relates to information that was sought in the original request. In addition, compliance with the relevant time limits set out in the Regulations is required, and the applicable appeal fee must be paid.

2.5. Accordingly, the appeal should include the following:

- the appellant's name, telephone number, and any other contact details, including an email address (if available),
- the appropriate fee (see 3.1),
- the relevant supporting information if it is claimed that no fee or a reduced fee is applicable,
- the name of the public authority to which the AIE request was made,
- the reference number of the public authority's decision (if available), and
- a copy of the decision-making records (i.e. the original request, original decision, internal review request, and internal review decision, as well as any other relevant correspondence with the public authority, such as any clarification or extension sought) insofar as available.

2.6. In addition, the appeal should identify the particular aspect(s) of the public authority's decision that the appellant is unhappy with. If the appellant is a person other than the applicant, including a third party, who would be affected by the disclosure of the environmental information concerned, this should be specified. A standard appeal form is available online at [www.ocei.ie](http://www.ocei.ie) (see also Appendix 1).

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<sup>1</sup> Notice of appeal made by email must be in plain text format and be directed to [info@ocei.ie](mailto:info@ocei.ie). An appeal made by email to the address of an individual staff member is not valid.

<sup>2</sup> At present, however, the Office is closed to all personal callers due to Covid-19. Please visit our website for more information on future office reopening.

2.7. An appeal to the Commissioner, irrespective of the means by which notice is given, is deemed not to have been made until it is received by the Office and the appropriate payment has been made (see 3.3).

2.8. An appeal can be made either by the individual concerned or by another person acting on behalf of the individual (e.g., a solicitor<sup>3</sup>). In the latter case, written authorisation to act on the appellant's behalf will be requested. The person will be informed that failure to provide written authorisation may delay the acceptance of the appeal, or lead to the appeal being rejected as invalid.

### 3. Appeal fees

3.1. Under article 15(3) of the Regulations, a fee of €50 must be charged for making an appeal to the Commissioner unless the person concerned qualifies for a reduced fee of €15. A reduced fee of €15 applies where the person making an appeal is:

- a medical card holder,
- a dependant of the medical card holder,
- a person other than the applicant, including a third party, who would be affected by the disclosure of the environmental information concerned.

3.2. The required fee must be paid when the appeal is made. Where the original decision of the public authority was untimely (article 10(7) refers), the Commissioner may waive all or part of the appeal fee (article 15(6) of the Regulations refers). Otherwise the Regulations do not allow for the acceptance of an appeal where a fee has not been paid.<sup>4</sup>

3.3. Therefore, where the required fee is not paid by the applicable deadline, the Commissioner is obliged to reject the appeal as invalid. If the person wishing to make an appeal claims that a reduced fee applies, then evidence of eligibility for the reduced fee (e.g., a copy of the person's medical card) must be submitted by the applicable deadline. If the person wishing to make an appeal seeks a waiver of the appeal fee, then evidence of eligibility for the waiver (e.g., a copy of the decision-making documents showing that

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<sup>3</sup> Appeals made on behalf of a person other than an individual (e.g., appeals made on behalf of a body such as a newspaper, private company, etc.) will be regarded as being made by that body or organisation. If, for example, at the conclusion of the Commissioner's review the individual who made the appeal on behalf of the body no longer acts on behalf of that body, then all correspondence will be addressed to an appropriate individual in that body or organisation.

<sup>4</sup> However, where a case has been closed because of a "deemed refusal" of an internal review request or the determination of a threshold jurisdictional question, no additional fee will apply where the appellant seeks a further review following notification of the public authority's revised position on the request (see 11.1 & 16.2). Similarly, the appeal fee will be waived where the appeal relates to a previous search case (see 21.3).

the original decision was untimely) must likewise be submitted by the applicable deadline.

#### 4. Payment of fees

4.1. Fees can be paid using any of the following methods:

- **Online:** <https://www.ocei.ie/making-an-appeal/how-to-appeal/>
- **Cheque/Bank Draft/Postal Order:** crossed and made payable to the Office of the Commissioner for Environmental Information
- **Cash:** Fees in cash may be paid in person<sup>5</sup> at the Office of the Commissioner for Environmental Information, 6 Earlsfort Terrace, Dublin 2, between the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to 5.15 p.m. Friday.

4.2. Where a fee is paid and it is subsequently determined that the original decision of the public authority was in fact untimely, the fee may be waived or refunded in full or in part. Likewise, where a fee is paid and the appeal is subsequently deemed to be withdrawn, the fee may be waived or refunded in full or in part.

## Part 2 - Validation

#### 5. Validation

5.1. As noted above, it is necessary for the appellant to establish the validity of the appeal. This section describes the process to be followed by the Support Unit in confirming whether a new appeal is valid and thus eligible for acceptance.

#### 6. Recording the date of receipt

6.1. The date on which notice of an appeal is received will be recorded to enable compliance with the relevant time limits set out in the Regulations to be monitored. Where notice of an appeal is received in writing or electronic form by the Office outside of office hours, i.e. outside the hours of 9.15 a.m. and 5.30 p.m. Monday to Thursday and 9.15 a.m. to 5.15 p.m. Friday, it will be deemed to have been received on the next day on which the Office is open and dated accordingly.

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<sup>5</sup> Cash should not be sent by post.

## 7. Registering new appeals

- 7.1. Irrespective of the means by which notice is given, receipt of the appeal should be acknowledged immediately and a new case file should be opened. If the decision-making records have not been provided with the notice of appeal, the appellant should be asked to forward the necessary documentation or information within 3 days of the acknowledgement. Where the appeal fee or other information is required, this should also be specified in the acknowledgement; the appellant should be given a period of 1 week, or until the expiration of the appeal period, in which to comply.
- 7.2. The public authority concerned should also immediately be notified of the receipt of the appeal, preferably by email. Generic email addresses should be used for written communication with the public authority wherever possible. For the purposes of confirming the procedural history of the appeal, the public authority should be asked to forward by email to [info@ocei.ie](mailto:info@ocei.ie), within 3 days, copies of
- the original AIE request
  - the original decision (or confirmation that no decision was made)
  - the request for internal review (or confirmation that none was received)
  - the internal review decision (or confirmation that no decision was made)
  - any other relevant correspondence (e.g., clarification sought of request, extension sought, etc).
- 7.3. If the public authority indicates that the request has not been through the process of internal review, then the public authority should be asked to confirm this in writing and to forward a copy of the original request and the authority's original decision.
- 7.4. Where the requested documentation or information is not provided by the public authority within the time specified, an Investigator should be informed and a reminder should issue by email. The public authority should be advised that, if the requested documentation or information is not provided within 3 days of the reminder, the appeal will be accepted on the basis of the appellant's representations (where the appeal otherwise appears to be valid).

## 8. Screening

- 8.1. Once the relevant deadlines have expired, the screening checklist, included with this document at Appendix 2, should be used in determining whether the appeal should be accepted or not. Following the screening, the case file should be referred to the head of the Support Unit or an Investigator if it appears that the appeal is invalid.

Otherwise the appeal should be accepted (see paragraph 10.1).

## 9. Discretion to admit late appeals

9.1. Article 12(4)(a) provides an appeal to the Commissioner must be initiated **not later than one month** after the decision of the public authority under article 11(3) (generally the internal review decision) has been received by, or was required to be notified to, the appellant. However, the Commissioner may extend this period if he is satisfied that it is reasonable to do so in the circumstances of a particular case.

9.2. This means that late appeals should not be admitted as a matter of course. Among the grounds which might be considered reasonable in some cases are 'force majeure' situations, e.g., illness, absence from home, failure by the public authority to give the applicant details of his/her right of appeal to this Office, or evidence of genuine confusion by the appellant in relation to the appeal process. However, the Commissioner will decide each case on its merits and it is not possible to set out in advance a comprehensive set of grounds that will be considered reasonable.

9.3. In cases where the appeal is initiated outside the deadline, the appellant should be informed in writing that the appeal is out of time and that the Commissioner will only admit a late appeal if there are reasonable grounds for doing so. The appellant will be invited to make a submission setting out any reasonable grounds for extending the appeal period.

9.4. If the appellant requests the Commissioner to exercise his discretion and puts forward grounds for doing so, the matter should be discussed with an Investigator or Senior Investigator prior to making a recommendation as to whether to accept or reject the appeal. In certain cases, the Commissioner may invite the public authority's comments on a late appeal submission.

## 10. Notification of acceptance of the appeal

10.1. As soon as it has been decided to accept an appeal, it is necessary to notify:

- the public authority concerned
- the appellant

- the original applicant where the appellant is a person other than the applicant such as a third party who would be affected by the disclosure of the environmental information concerned.

A copy of the statement of appeal should be included with the notification of acceptance to the public authority, subject to the redaction of any personal data falling within the "special categories" set out in section 2 of the Data Protection Act 2018.<sup>6</sup>

## 11. Deemed refusals

11.1. In cases where the appeal has been accepted on the basis of a “deemed refusal” of an internal review request under article 12(4)(a)(ii) (i.e. on the basis of the public authority having failed to issue a decision on a request for internal review within the relevant time limit set out in the Regulations), the Support Unit should immediately instruct the public authority to notify the appellant of its position on the request. Once the public authority notifies the appellant of its position on the request, the case file relating to the appeal accepted on the basis of the deemed refusal of the request should be closed and the parties notified that the Commissioner will review the revised position on the request if the appellant notifies the Office within a specified period (normally 4 weeks) that s/he remains dissatisfied. Where the appellant seeks a review of the revised position within the specified period, a new case file will be opened. If, however, the appellant is satisfied with the revised position, or otherwise does not indicate dissatisfaction with the position within the specified period, the appeal fee (if any) will be refunded.

## 12. Other appeals

12.1. Otherwise, the notification of acceptance to a party other than the public authority should include an invitation to make submissions within 3 weeks of the date of acceptance.

12.2. Unless the appeal arises from a decision to refuse the request under article 11(5)(a) of the Regulations,<sup>7</sup> or in certain other limited circumstances such as search or fees cases, the notification to the public authority should include a request for a numbered copy of

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<sup>6</sup> Thus, for instance, information identifying an appellant as a medical card holder will not be shared with the public authority or any third party.

<sup>7</sup> Article 11(5)(a) of the Regulations clarifies that a decision to refuse a request for environmental information, which may be appealed to the Commissioner, includes a request that "has been refused on the grounds that the body or person concerned contends that the body or person is not a public authority within the meaning of these Regulations". Thus, where a body or person contends that it is not a public authority for the purposes of the Regulations, this is a matter for the Commissioner to determine on appeal. However, as a general matter, the notification of acceptance in such cases should not include a request for the subject records.

the subject records to be forwarded to this Office together with a schedule within 2 weeks of the date of acceptance. The request for a schedule should specify that the records be listed sequentially by number and that the following information also be provided: the date of the record; the title of the record (where relevant); a brief description of the record; whether access to the record has been granted or refused; and, if access was refused, the relevant provisions of the Regulations on which the refusal was based.

12.3. Where the subject records are not provided by the public authority within the time specified, an Investigator should be informed and a reminder allowing 3 further days should issue by email. Where the records are not provided within 3 days of the reminder, the matter should be forwarded to an Investigator or Senior Investigator for the purpose of recommending that the Commissioner issue an enforcement notice under article 12(6) of the Regulations.

## **Part 3 - Investigation**

### **13. Investigation**

13.1. When the required subject records have been received from the public authority, the case will be allocated to an Investigator, subject to capacity.

### **14. Prioritisation**

14.1. It is the Commissioner's objective to provide a timely and effective review procedure in all cases. As a general rule, fairness requires that priority be given to cases on the basis of age. Thus, older cases will generally be dealt with before more recent cases.

14.2. Cases will not be dealt with solely by reference to age. In some circumstances, more recent cases may be dealt with before older cases. The circumstances in which this may arise include:

- where it is determined at the time of allocation that the case is suitable for immediate processing because of the relatively straightforward issues or small number of records involved;
- where the case was previously before the Commissioner, for instance, on the basis of a threshold jurisdictional question (see paragraph 17.2);

- where it is more efficient to deal with a particular recent case alongside an older case (for example, a recent case is very similar to an older case and the same issues arise in both);
- where it is more efficient to deal with a particular group of cases together because they involve related issues;
- where, for staff development purposes, a particular case or category of case is allocated to a particular Investigator;
- where the appellant seeks priority for a specific pressing reason; however, as most appellants will be anxious, understandably, to have their cases expedited, this ground will apply in exceptional circumstances only and only where resources allow – time-consuming cases involving a large volume of records and/or complex issues are unlikely to be considered suitable for expedited processing;
- where the Commissioner forms the view that a particular case should be expedited, for example, in order to give general guidance to public authorities on the processing of a particular request or category of request.

## 15. Request for focused submissions

As soon as possible following assignment, the Investigator will invite the public authority to make submissions in support of its decision. The request for submissions should identify specific or key questions/issues for the public authority to address. A period of 3 weeks should normally be allowed for the making of such submissions. Where relevant, the request for submissions should explain that the Commissioner considers that there is a presumption in favour of release of environmental information.

## 16. Appraisal for best resolution

16.1. Following receipt of the focused submissions requested or the expiration of the deadline for making such submissions, the Investigator should carry out an appraisal of the case in consultation with the relevant Senior Investigator to decide on the best approach for resolving the case.

16.2. Cases suitable for immediate processing should generally be prioritised (see paragraph 14.2). Relatively straightforward issues may include refusal on the basis that the

environmental information requested is already available to the public in another form or manner (article 7(3)), that the information is not held by or for the public authority concerned (article 7(5)), that the request is manifestly unreasonable (article 9(2)(a)), or that the request remains formulated in too general a manner (article 9(2)(b)). Where a public authority has relied on article 9(2)(a) or article 9(2)(b) in its decision and the appellant offers to revise the request following acceptance of the appeal, the Investigator should invite the appellant to withdraw the appeal and to submit the revised request to the public authority concerned. If the appellant declines to withdraw the appeal, the review should proceed to a decision on the question of whether article 9(2)(a) or (b) applies or not. If it is determined that article 9(2)(a) or (b) does not apply, the decision of the public authority should be annulled with a direction to the public authority to undertake a fresh decision-making process in respect of the request.

16.3. As article 15(5) recognises, a case may be resolvable otherwise than by way of a binding decision. A case may be brought to closure by way of settlement between the parties or by withdrawal of the appeal altogether. It is relevant to note that appeal fees are refundable in full or in part where a binding decision is not required because of a settlement or withdrawal of the appeal.

16.4. As part of the appraisal, the Investigator should attempt to

- assess whether any party, other than the appellant and the public authority concerned, needs to be notified of the appeal (see instructions in chapters 18.1 and 19.1),
- assess whether the case may be capable of being resolved without a binding decision,
- assess, in particular, whether the case may be suitable for settlement, and
- assess what, if any, further information is needed from the parties (see chapter 23).

16.5. Following the appraisal, progress on the case should be monitored through weekly/fortnightly case reviews with the relevant Senior Investigator.

16.6. In each case, the Investigator should check at the outset of the appraisal whether the point at issue has been decided already in another case or is currently under consideration in another case. The form of research is at the discretion of the Investigator, but will normally involve a check of the case tracking system and the reference materials available at the Office, including any relevant Guidance Notes.

## **17. Threshold jurisdictional questions**

- 17.1. Some cases may involve a difficult or complex jurisdictional question, i.e. a serious question as to whether the request concerned is for “environmental information” or whether the body or person to whom the request has been made is a “public authority” within the meaning of the Regulations. A question of this nature must be resolved as a threshold jurisdictional matter, since the Commissioner’s powers apply only with respect to environmental information held by or for a public authority.
- 17.2. As a general rule, a determination on any such threshold jurisdictional question should be made before proceeding with the review. Once the determination is made, the case should be closed, administratively if agreement is reached but otherwise by way of a binding decision by the Commissioner. If it is determined that the matter is within the remit of AIE, and no appeal to the High Court is made, the public authority should then deal with the request in accordance with the Regulations. If the appellant remains dissatisfied with the handling of his/her request following internal review and thus appeals again to this Office with respect to the original request, then the matter will be reopened administratively without payment of a new fee and given priority treatment by this Office insofar as it is practicable to do so. However, depending upon the nature of the case and the resources involved, the Investigator, in consultation with the Senior investigator, has the discretion to proceed with the review already underway if the threshold question does not appear to be seriously in dispute.

## **18. Notification of relevant third parties**

- 18.1. Under AIE, only a third party who would be “incriminated” by the disclosure of the environmental information concerned has a right of appeal to the Commissioner. However, the Commissioner takes the view that procedural fairness requires that a third party be notified of an appeal and be given an opportunity to make submissions where the interests of the third party would be affected by any proposed disclosure of the environmental information under review.
- 18.2. Situations in which a third party notification is required include where the proposed disclosure would arguably amount to a breach of privacy or confidentiality or adversely affect the commercial interests or reputation of the third party concerned. However, mere mention of or reference to a third party in the records under the review is not sufficient; the third party must have a sufficient interest in the matter because of the risk of an adverse effect arising from disclosure.

18.3. Therefore, as part of the appraisal following assignment of a case, the Investigator should identify all third party information at issue and consider whether third party notification of the appeal may be required before any proposal to release the information is made.

18.4. Regardless of the interests involved, there is no need to notify any third party at the outset of the review where it appears on the face of it that the decision of the public authority to refuse access to the information at issue was justified. If, however, it is determined at a later date that the decision was not justified, whether having regard to the public interest or otherwise, then any affected third party should be notified without further delay.

18.5. The Commissioner's attention should be drawn to cases in which a recommendation is made to direct the public authority to release environmental information referring or relating to a third party that has not been notified of the appeal.

## **19. Form of notification of affected third parties**

19.1. A third party notification should generally contain the following:

- some details of the request made and at least a brief description of the environmental information concerned that is relevant to the third party's interests,
- an explanation of the procedural history of the matter, insofar as relevant, and of the Commissioner's role,
- some details of the public authority's decision, the grounds for refusal relied on, and any other relevant provisions of the Regulations,
- notification of other material issues for consideration,
- an invitation to consent to release (in suitable cases), and
- an invitation to make submissions (which need not be confined to the matters raised by the Investigator) if the party objects to release.

19.2. Any third party notified of a review should be given an appropriate opportunity to comments, usually no longer than 3 weeks. Where a party fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the party concerned.

## 20. Notification of material issues

- 20.1. As noted below, the policy of this Office is that, in general, submissions will not be exchanged between parties to a review. However, in exceptional cases, submissions may be exchanged with the consent of the relevant parties. The parties should be notified of any new material issues arising for consideration in any event.
- 20.2. As submissions may contain sensitive information that would not be appropriate for disclosure to others, submissions are not exchanged as a general rule. Any exception to the rule against the exchange of submissions requires the consent of the relevant parties and the prior approval of the relevant Senior Investigator. Any objection to the exchange of submissions will be respected by this Office.
- 20.3. Formal preliminary view letters are discouraged in the normal course of a review. The use of formal preliminary view letters in special circumstances should be agreed with the relevant Senior Investigator in advance.
- 20.4. However, an Investigator may set out his or her view of the likely outcome of the review on an informal basis, e.g., by telephone followed by a brief email, in the following circumstances:
- when seeking to narrow the scope of the review,
  - when endeavouring reach a settlement or similar resolution without a binding decision, and
  - when seeking further information from the public authority or other relevant party.
- 20.5. In any event, the Investigator should notify the relevant party or parties, preferably by email, of new material issues arising for consideration insofar as they affect the interests of the party or parties concerned. Material issues are issues that are relevant to the outcome of the review. Such issues involve information of significance (i.e. of substance and importance) that is likely to influence the decision the Commissioner will make, i.e. information that will make a difference to the outcome of the review. Where the influence of new material issues is likely to be adverse to a party to a review, the party concerned should be given notice of the matter and an opportunity to respond. In other words, any new matter of which a party to a review is unaware and which is likely to cause the Commissioner to make a decision adverse to the interests of that party should be communicated to the party concerned. Such matters would generally include applicable grounds for refusal not previously raised, pertinent search details not previously disclosed to the appellant, and new legal developments which are likely to have a significant bearing on the outcome of the review.

- 20.6. The notification need not necessarily be detailed and should be given by informal means wherever possible, but the appellant should be made aware of the pertinent factual matters under consideration, particularly where and insofar as these matters are likely to cause the Commissioner to affirm the decision of the public authority. By the same token, the public authority or, where relevant, affected third party should be given notice where a new matter of relevance arises that is likely to result in a decision to direct release of the environmental information concerned. (For the sake of clarity, please note that this would not include a simple failure of proof or conclusions drawn having regard to the contents of the records at issue. Furthermore, it would not include an explanation of how the Commissioner interprets and applies the grounds for refusal claimed.)
- 20.7. Thus, for instance, if an appellant who has been notified of new material issues arising from the public authority's submissions raises pertinent factual matters in turn which appear to undermine the public authority's case for refusal, the public authority should be given an opportunity to respond before a decision is made. If, on the other hand, the appellant simply argues against the case made by the public authority without identifying new material facts for consideration, the matter should be ready for decision even where the appellant's arguments are persuasive or the proposed decision is otherwise in the appellant's favour (subject of course to any required notification of affected third parties).
- 20.8. As new claims for refusal are likely to involve new matters of relevance, these too should generally be notified to the appellant. The need for notification can arise even within a ground for refusal. For instance, a claim of confidentiality under article 8(a)(iv) that is based on a certain exemption provision in the FOI Act can differ substantially from a claim of confidentiality that is based on another exemption or area of law. Thus, where a general claim for refusal under article 8(a)(iv) has been made, it may be necessary to notify the appellant once the basis for the claim is identified by the public authority. The same may be true for a claim of commercial confidentiality based on trade secrets v. a claim based on prejudice to the competitive position of a company.
- 20.9. However, where the public authority has identified all material facts that are relevant to more than one ground for refusal, it may not be necessary to put an applicant on notice that an alternative ground for refusal than the one referred to by the public authority will be applied by the Commissioner. Where an Investigator is satisfied that no new material issues arise, or that the appellant has had an adequate opportunity to make submissions addressing the material issues arising in the case, s/he may make a recommendation to the Commissioner without further reference to the appellant.

- 20.10. Determining the materiality of an issue, as well as the level of detail that may be required, is a judgment call. A standard of reasonableness has been found to apply in other legal contexts, but it nevertheless can be difficult to know what is truly “material” unless and until a challenge arises and the matter is determined in court. Moreover, the requirement of procedural fairness will depend upon the particular circumstances of the case. However, we should always have regard to our Values and Behaviours Framework, on the one hand, and the need for the timely resolution of reviews on the other. Notification does not mean that a view on the matter must be taken or that a full explanation is required. Moreover, as our procedures are intended to be as informal as possible, a simple phone call or email should generally suffice.
- 20.11. Parties notified of an Investigator’s views on the likely outcome of the review or of material issues arising for consideration should be given an opportunity to comment, usually no longer than 3 weeks. Where a party fails to respond within the timeframe specified, the Commissioner may proceed to a decision without further reference to the party concerned.

## 21. Search cases

- 21.1. Search queries may be at issue where a request is refused, in full or in part, on the basis that the public authority does not hold the information concerned.
- 21.2. Article 7(5) of the Regulations is the relevant provision that applies where the requested information is not held by or for the public authority concerned. A similar though not identical ground for refusal in relation to records "not held" is provided for under section 15(1)(a) of the FOI Act. Accordingly, the Commissioner’s approach in dealing with cases where a public authority has effectively refused a request under article 7(5) is guided by the experience of the Office of the Information Commissioner in relation to section 15(1)(a) cases. Guidance Notes on section 15(1)(a) and other provisions of the FOI Act are available on the website of the Office of the Information Commissioner at <https://www.oic.ie/guidance-and-resources/guidance-notes/>.
- 21.3. As a general rule, where a public authority locates additional records containing the environmental information requested during the course of a review, the review should be brought to closure without a determination on the question of access to those records. The public authority should then make a new decision under article 7 of the Regulations on the question of access to the records concerned (which in turn will be subject to right of review). If, following internal review, a further review on the matter by the Commissioner is sought, the appeal fee will be waived in full, since any such review would relate, in effect, to a decision on the merits that was significantly out of time.

21.4. However, the Investigator has the discretion to include the additional records in the review already underway where consideration of the additional records would not unduly delay the completion of the review. It would be appropriate for the Investigator to exercise his/her discretion to include the records in the current review where the additional records are few in number, third party notification would not be necessary, and the question of whether to release or not is otherwise straightforward.

## **Part 4 - Proceeding to Closure**

### **22. Settlements & withdrawals**

22.1. As part of the appraisal for best resolution, the Investigator should consider whether there is a reasonable possibility of resolving the case without issuing a binding decision by endeavouring to reach a settlement or by discussing with the appellant whether, in the circumstances of the case, s/he may wish to withdraw the appeal.

22.2. A withdrawal may include a deemed withdrawal following a grant of access by the public authority to some or all of the environmental information requested where the appellant raises or pursues no further issue for review (article 15(5) refers). The prior approval of the Commissioner is required, however, before an appeal may be deemed to be withdrawn without the explicit or implicit consent of the appellant.

22.3. Resolving cases through settlement or withdrawal has a number of advantages. From an appellant's point of view, settlement or withdrawal can result in a speedier resolution of the matter and a refund of the appeal fee. From the point of view of the public authority, granting access to the environmental information in question can avoid the need for any further time consuming written submissions.

22.4. In endeavouring to reach a settlement, the Investigator should make it clear that settlement is not an exercise designed to reduce the rights of the appellant in any way. Rather, it is a process which is aimed at narrowing the differences between the sides. In some cases, a point is reached at which the appellant is happy to accept the decision of the public authority as modified in the course of the settlement procedure. In other cases, differences remain which can only be resolved by way of a binding decision of the Commissioner. Even if a binding decision is required, the settlement process can help to ensure that the decision concentrates only on the essentials of the dispute between the parties.

22.5. In any case where the Investigator considers that there is a possibility of settling the case or narrowing the differences between the parties, s/he should contact the parties concerned, using informal methods of communication wherever possible (e.g., telephone call followed by brief email), and outline the possible basis of the settlement. In considering the possibility for settlement, regard should be had not alone to granting access to the environmental information at issue, but also to the possibility that a different form of access might be acceptable to the parties or that a deferral of access for a specified period might be acceptable. Whatever the potential basis for settlement might be or the method of communication used, however, the process followed should be fair, transparent and even handed.

### **23. Cases requiring further investigation or clarification**

23.1. In many cases, the Investigator will have insufficient information to enable a reasonable judgment to be made as to the likely outcome of the case.

23.2. In such cases, the Investigator should consider whether a request should be made to the public authority, or other parties as appropriate, for further information that may be relevant to the review. Normally, a period of 3 weeks should be given for making a response. Progress on the matter should be closely monitored in case reviews with the relevant Senior Investigator.

23.3. In contacting the public authority or a third party, it should be noted, where relevant, that the Commissioner considers that there is a presumption in favour of release of environmental information. It should also be noted that, where the public authority or third party fails to respond within the timeframe specified, the Commissioner may proceed to issue a decision without further reference to the parties.

23.4. In cases where the presumption in favour of release of environmental information applies, and in particular where threshold jurisdictional questions do not arise or have been adequately resolved, the purpose of requesting further information following the initial request for submissions should not be to afford the public authority (or other parties, where relevant) a further opportunity to meet the burden of proof in the first instance. However, even where the presumption applies, it may occasionally be necessary to seek clarification of certain matters in order to carry out the appraisal for best resolution or to make adequate recommendations to the Commissioner.

23.5. Seeking clarification in cases proceeding to decision is required when certain gaps must or should be addressed in order to remove an element of uncertainty or confusion in relation to material matters. The need for clarification typically arises when a prima facie

case for refusal appears to have been made, but certain details are missing that are required in order for the Commissioner to give adequate reasons for affirming the refusal of access. Thus, for instance, where the records involve technical or complex information, clarification may be required in order to gain a better understanding of the subject matter or to distinguish the information at issue from other similar information that may appear to be available from other sources. It may also be necessary to check on the status of certain time-bound events that are relevant to a claim for refusal, for instance, whether a certain proceeding remains ongoing.

- 23.6. Where an element of uncertainty or confusion regarding a material issue of fact is not adequately addressed in the period allowed for providing the clarification sought, the Investigator should reconsider any conclusions that may have tentatively been drawn regarding the claims made for refusal. The Investigator should consult with a Senior Investigator to determine how to proceed, including whether an article 12(6) notice is warranted. The Commissioner must be in a position to ascertain and consider all relevant facts that are required to enable him to determine whether to affirm, vary or annul the decision under review.
- 23.7. Where the presumption applies and the public authority falls short of establishing a prima facie case for refusal in the first place, this is simply a failure of proof (though affected third parties may need to be consulted before the matter is ready for decision – see chapter 18). An example here would be where the public body makes general, unsubstantiated assertions in relation to a refusal ground under article 8 or 9 of the Regulations. In determining whether a prima facie case for refusal has been met, the Investigator should of course have regard to the contents of the records at issue and any relevant research (see paragraph 16.6). It should also be noted that seeking clarification is distinct from the requirement to notify parties of new material issues (see chapter 20).
- 23.8. Further submissions, made for whatever purpose, may give rise to further queries, but there are limits to any investigation. While the Commissioner’s review is inquisitorial in nature, it is not the role of the Investigator to determine beyond a reasonable doubt whether the decision of the public authority was correct or not. The question before the Commissioner in any review is whether the decision of the public authority was justified or not, and the process for determining this question must be not only fair and equitable but also timely. However, the Investigator/Senior Investigator must be satisfied that the Commissioner has sufficient information on which to make a decision and that all relevant information before the Commissioner is given due consideration. Moreover, any uncertainty over material issues of fact must be adequately resolved if these are to be relied upon in any findings in the Commissioner’s decision.

## 24. Conclusion of the appeal

- 24.1. Following investigation, the case should be ready to be brought to conclusion by settlement, withdrawal, or binding decision.
- 24.2. Having considered all the relevant facts and arguments contained in the submissions of all parties, along with any legal advice and any directions of the Commissioner, the Investigator should review the status of the case. The Investigator may conclude at this stage that the case is one which is capable of being settled as a result of a modification of the position of the public authority or a modification of the request or both.
- 24.3. On the other hand, the Investigator may come to the conclusion that neither party is likely to further modify its position in a way which will lead to settlement or withdrawal of the case. In such cases, the Investigator should prepare a submission and proposed decision for transmission to the Commissioner, along with the full file.
- 24.4. In drafting the decision, the corporate style, as set out in the OCEI Decision Style Guide (Appendix 3), should be followed. Where appropriate, the decision should specify the period in which the Commissioner's decision is required to be implemented. If the decision is to grant access to any environmental information affecting the interests of any third party notified of the review, the attention of the public authority should be drawn to the need to protect the third party's appeal rights under article 13 of the Regulations.
- 24.5. The purpose of a submission is to ensure that the Commissioner is fully informed as to the relevant facts of the case, arguments presented and any legal advice, and to explain the approach taken in the case to the extent that this is not apparent from the decision. The submission should direct the Commissioner's attention to any documents in the file which the Investigator considers will be of particular assistance to him in reviewing the case. A detailed submission is normally not required, however.
- 24.6. Once the case has concluded, the Investigator must:
- arrange for all parties to be notified of the outcome in writing;
  - arrange in conjunction with the Support Unit for the return of any original files or records supplied to the Office by the public authority.
- 24.7. In cases which are concluded by way of an express withdrawal of the appeal, the following instructions should be followed. If the appellant indicates orally that the appeal may be treated as having been withdrawn, then written confirmation should be issued, preferably by email. Notification of the withdrawal, whether initially made orally or in

writing, should be sent to the public authority and any other relevant parties as appropriate.

24.8. Where it is proposed to deem an appeal to be withdrawn based on release of the environmental information requested, the appellant should be notified of the proposal and be given an opportunity to respond. Where the appellant raises no objection to the proposal, the appeal may be deemed as withdrawn based on the appellant's actual or implied consent. Written confirmation of the withdrawal and case closure should be issued to the appellant, the public authority, and any other relevant parties as appropriate. Where an objection to the proposal is raised, however, the matter should be referred to the relevant Senior Investigator.

## Appendix 1



### Coimisinéir um Fhaisnéis Comhshaoil Commissioner for Environmental Information

**Privacy:** The Office of the Commissioner for Environmental Information fully respects your right to privacy. Full details of how we use your personal data are available at <https://www.ocei.ie/privacy-cookies/>. Please contact us if you would like us to send you a copy of our Privacy Policy.

#### Personal Details

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone No: \_\_\_\_\_

Email: \_\_\_\_\_

**If you are making this appeal on behalf of someone else, please ensure you supply a copy of a letter of authority from them, which authorises you to act on their behalf.**

**Do you have any special requirements e.g. braille requirements, large text? If yes, please give details.**

\_\_\_\_\_

#### Your Appeal

Name of public authority to which the AIE request was made:

\_\_\_\_\_

AIE Reference Number (If applicable):

\_\_\_\_\_

What aspects of the decision are you unhappy with? Please be specific:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Fees:**

Fees may be paid by Cheque/Bank Draft/Postal Order, crossed and made payable to the 'Office of the Commissioner for Environmental Information', or by cash, in person at the Office from 9.15am to 5.00pm (Mon. to Friday)

**Please do not send cash by post.**

<b>Review by Commissioner</b>	<b>Fee</b>	<b>Select Option</b>
Access to information	€50	
Access to information by the holder of a current Irish medical card or a dependant of same (copy of medical card required)	€15	
Third party appealing a decision of a public authority to grant access to environmental information	€15	

**Fee payable and attached: €**

**Signed:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Please address to: Office of the Commissioner for Environmental Information, 6 Earlsfort Terrace, Dublin 2, D02 W773**

## Appendix 2

### Checklist for screening new OCEI Appeals

Other than for new appeals taken by third parties

**Appeal No: CEI/ /**

#### The AIE Request

1. Was the AIE request made to a public authority? Yes [ ]      Unsure [ ]
2. Did the AIE request refer to the AIE Regulations (or to Regulations made to implement the AIE Directive or some similar words)? Yes [ ]      No [ ]
3. Did the AIE request provide the requester's name and address? Yes [ ]      No [ ]
4. Did the requestor ask for an internal review? Yes [ ]      No [ ]

#### The Appeal to OCEI

5. Did the appellant make the AIE request Yes [ ]      No [ ]
6. If the answer to 5 above is 'no', was the appeal submitted to OCEI by someone acting on behalf of the appellant? Yes [ ]      No [ ]  
  
If yes, has Support Unit been provided with evidence of authority to act on behalf of the original AIE requester? Yes [ ]      No [ ]
7. Does the appeal appear to relate to the subject of the internal review request? Yes [ ]      No [ ]
8. Was the appeal initiated within 1 month of receipt of the internal review decision by the appellant (or when it fell due) - even if the fee was not paid at that stage?  
  
Yes [ ]      No [ ]      Unsure [ ]
9. If the appeal is clearly late, has a case been made for its late acceptance? Yes [ ]      No [ ]
10. Does this appeal arise from a deemed refusal of the original AIE request? Yes [ ]      No [ ]





## Appendix 3

### OCEI Decision Style Guide

In order to maintain consistency in the decisions issuing from the OCEI, the following style guide should be used when drafting decisions.

#### FRONT PAGE OF DECISION

(A template for the front page is set out at Page four of this guide for ease of reference.)

- The front page of the decision should be in Calibri 14pt font.
  - **Do not** use full stops at the end of text under the first four headings (Date of decision, Appellant, Public Authority, and Issue).
  - Use full stops at the end of text under the remaining headings (Summary of Commissioner' Decision and Right of Appeal), as the text should comprise full sentences.
  - **Appellant:** do not use (the appellant) or “the appellant” after the applicant’s name and address as this is denoted by the heading.
  - **Public Authority:** if you intend to use a shortened version/acronym of the public authority’s name in the decision put it in brackets (no inverted commas) after the full name, e.g. The Department of Communications, Climate Action and Environment (the Department)
  - Use **Double Spacing** between text and next heading.

#### BODY OF DECISION: FORMATTING

- Use Calibri 12pt font throughout the remainder of the decision.
- Text should be left justified.
- **Headings** should be as follows:
  - Section Heading: **12pt Bold Underlined**
  - Level 1 Subheadings: **Bold**

- Level 2 Subheadings: Plain, underlined
- Level 3 Subheadings: Plain.
- Use bold:** where necessary, to add **emphasis** to a quote or comment.

## **BODY OF DECISION: REFERENCING**

- **References to OCEI and OIC Cases:** use a hyperlink to the Case Number, not in bold or italics, together with a hyperlink to the website. For example: “[Case CEI/18/0029](#), which is available on our website, [www.ocei.ie](#)”; “[Case 170570](#), which is available on the website of the Office of the Information Commissioner (OIC), [www.oic.ie](#)”.
- **References to Court Cases:** Case name in italics, rest of citation in standard font, as a hyperlink to the judgment (where practicable), e.g., *Right to Know CLG v An Taoiseach* [\[2018\] IEHC 371](#) (Faherty J).
  - Quotations** from previous decisions and court cases: place the quote in inverted commas, indented, on a new line with a line’s space between the quote and the preceding paragraph. Do not use italics.
- **References to provisions of the Regulations**
  - Paraphrasing should be done in the body of the paragraph, with no italics or inverted commas.
  - Direct citations should be placed in inverted commas, indented, on a new line with a line’s space between the quote and the preceding paragraph. Do not use italics.

- **BODY OF DECISION: LANGUAGE**

- **Date style:** use 18 June 2014, not 18<sup>th</sup> June 2014, 18 of June 2014, 18/06/14, etc
- **References to a public authority:** use "it" not "they",
- **References to the Commissioner:** refer to the Commissioner, not the Commissioner for Environmental Information.
- **References to the Office of the Commissioner for Environmental Information** should refer to “the Office”, not “the office”.

- **References to the name of the public authority** (e.g. the Department, the Council, etc) should be in upper case. References to **public authorities in general** should be lower case.
- **References to Judges:** Surname followed by J., e.g. McKechnie J., Carney J., etc.
- **References** to the appellant, decision maker, provisions of the Regulations should all be in lower case. However, provisions of the Directive and Aarhus Convention should be capitalised.
- **Bullet points:** use single indent bullet points, not numbered lists.
- **Numbers:** spell cardinal numbers up to nine, from 10 on use figures: i.e. one record, 11 records, etc.
- **Latin legal phrases** should be used only when necessary and should be in italics e.g. *ultra vires*
- Keep the **verb tenses** consistent. For example, “The Department argued” followed later by “the Department contended” is fine. “The Department argued”, followed later by “the Department contends”, is not. Saying that “the Department originally argued” but that “It now contends” is fine. As a general rule, the Commissioner uses the present tense in his analysis and findings, with restatements of the submissions of the parties in the past tense.
- Use **plain language** where possible.

**Decision of the Commissioner for Environmental Information  
on an appeal made under article 12(5) of the European Communities  
(Access to Information on the Environment) Regulations 2007 to 2018  
(the AIE Regulations)**

**Case <reference number>**

**Date of decision:** [date signed]

**Appellant:** <name of appellant>

**Public Authority:** <name of public authority> [shorthand name]

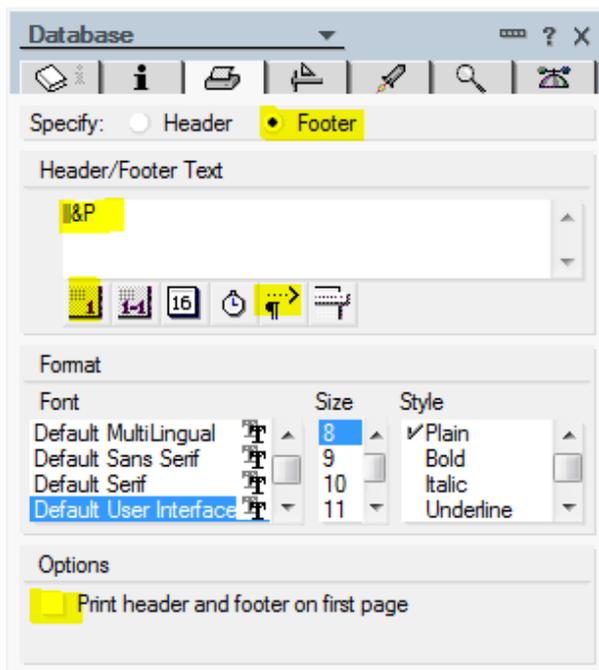
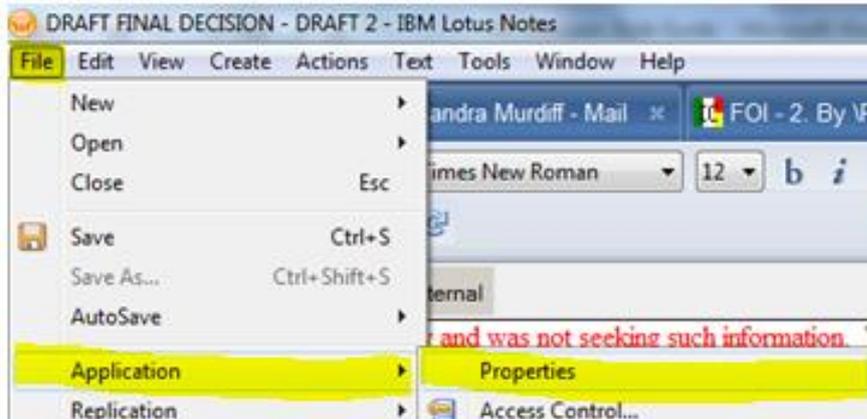
**Issue:** Whether

**Summary of Commissioner's Decision:** The Commissioner found that

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

## ADDING PAGE NUMBERS TO DECISIONS IN LOTUS NOTES

To add page numbers in Lotus Notes, click anywhere in the body of the decision (while editing it). Click File, Application, Properties (see below)



A Database window will open (see left), click on the printer tab (third tab from left)

As highlighted on the left, click Footer, then click the tab button twice  to ensure the page number is on the bottom right hand side of the page. Then click the page number button .

Finally make sure the "Print header and footer on first page" box on the bottom of the popup window is unticked. Click Save and Yes to save these changes.

Reopen the document and you can click File and Print Preview to see the page numbers before printing. Alternatively, use the attached decision template which has the page numbers already inserted. **NB This will add page numbers to all documents you print in Lotus until you change it.** To undo follow the instructions above, then delete the entry in the Header/Footer Text box () and Save.

To avoid printing errors click View, Show, Page Breaks before printing to see how the finished document will appear when printed.