



National Implementation Report 2025

Submission of the Commissioner for Environmental Information

July 2024

Introduction

1. The Office of the Commissioner for Environmental Information (OCEI) welcomes the opportunity to provide a submission in advance of Ireland's National Implementation Report on the Aarhus Convention.
2. Under the AIE Regulations, a request may be made to a public authority, which has one (or two) months to decide whether information must be released. Where a request is refused, a requester may apply to the public authority for internal review of the decision. This is a full *de novo* review by a person of the same or higher rank as the original decision-maker in the public authority who is unconnected with the original decision. The review must be carried out within one month of the request for a review. It is only after a further refusal on internal review that an appeal may be brought to the OCEI.
3. The OCEI was established under Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations) for the purpose of providing an external administrative review procedure in accordance with Article 6(2) of Directive 2003/4/EC on public access to environmental information (the AIE Directive) and Article 9(1) of the "Aarhus Convention" (i.e. the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters). The OCEI operates on a quasi-judicial basis with safeguards to guarantee due process. Decisions of the Commissioner are binding on the public authority as a matter of law.
4. This submission is largely focused on the issues arising out of Ireland's implementation of Decision VII/8i concerning the timeliness of investigations carried out by the OCEI. OCEI are committed to reducing the amount of time that it takes the office to complete appeals in so far as possible. It is, however, our position that we are required by law to prioritise ensuring fair procedures are afforded to parties to an appeal over the need to carry out a timely investigation. This means that a prescribed timeframe for decision-making cannot be placed upon the Commissioner for Environmental Information.
5. As set out below, the reason that this timeframe cannot be achieved is not related to resources. The procedural requirements of Irish law are extensive in disputes such

as these, and therefore even if the OCEI was over-staffed, it would still not be possible for the Commissioner to commit to a 4-month turnaround. Irish law requires that extensive measures be taken to ensure that fair procedures are achieved, and this necessarily takes time. The length of time required will vary from case to case. If the OCEI fails to follow fair procedures in an attempt to adhere to a prescribed timescale, it will be counterproductive from the perspective of timely access to environmental information, as it will simply result in inevitable adverse litigation in the Irish courts challenging this failure. Such litigation adds further to delay to the resolution of an appeal and a final decision on whether the requestor should be provided with the environmental information sought.

Recommendations and Findings of the Aarhus Convention Compliance Committee (the ACCC) and Ireland's Proposed Legislative Response

6. As outlined in our last submission, several of the findings of the ACCC about Ireland's compliance with the Aarhus Convention concern the timeliness of investigations carried out by the OCEI. (Decision VII/8i). We continue to have significant concerns about the proposed solution to this concern.
7. The Department of the Environment, Climate and Communications carried out a public consultation on the proposed amendment of the AIE Regulations in 2021, to which the OCEI provided a comprehensive response. In our submission, available [here](#), we set out the types of measures, both legislative and non-legislative, which we believe would have the cumulative effect of improving the overall effectiveness of the AIE regime, and ultimately, the timeliness of OCEI appeals.
8. In November 2023, the Department published [a draft version of amended and consolidated AIE Regulations](#) it stated had been informed by the public consultation process it undertook in early 2021. The Department launched a new public consultation process on that draft legislation that ran until 8 January 2024.
9. In our submission to this second public consultation process, available [here](#), the OCEI highlighted our informed concerns regarding the proposed insertion of regulation 10(8)(a), which states "A decision of the Commissioner under paragraph 5 shall be made in a timely manner, and insofar as practicable, not later than four months after the date of the receipt by the Commissioner of the application for the review concerned." We are aware that this provision is intended to address the ACCC's findings on the timeliness of decisions made by the OCEI, however this timeline is not achievable in the vast majority of appeals that come before the Commissioner.
10. We are aware that the ACCC have already commented in the first progress review of the implementation of this decision that this provision will not be sufficient to ensure that appeals are decided in a timely manner. The Committee also

recommended the deletion of the phrase “in so far as practicable”.¹

11. We take very seriously the findings and recommendations of the ACCC which criticised the absence of any requirement in Irish law for the Commissioner to take a decision within a certain time frame or to act in a timely manner. However, we consider the stating of “four months”, or any other defined timeframe, to be impractical and unrealistic from both a legal and an operational perspective, for the following reasons.
12. First, the requirement to ensure fair procedures means that it is not possible for the OCEI to finalise appeals within 4 months. A review by the Commissioner is considered to be *de novo* and therefore a thorough investigation must be carried out in respect of each appeal before a decision can be finalised. This process involves seeking submissions from the parties involved, reviewing the information at issue and the consideration of complex legal and factual issues. It is often necessary to seek multiple sets of submissions from the parties to an appeal, as well as affected third parties in many cases. In a recent appeal, the investigation required consultation with 23 separate third parties. Unfortunately, while the OCEI consistently recommends that public authorities should fully engage with requests at first instance and fully deal with any issues arising, including the consultation of third parties, this is frequently not the case and new issues often arise at the appeal stage.
13. The Irish Courts place an onerous duty on independent, administrative decision-making bodies such as the OCEI to ensure fair procedures. The Courts have acknowledged that, unfortunately, this may have an impact on efficiency. For example, in one case the Courts stated:

“[T]he HSE must comply with rules which adhere to fair procedure/standards. The [HSE] might like it to be otherwise. To those involved in administration, adherence to fair procedure standards may appear cumbersome, irritating and even irksome on some occasions. Undoubtedly, the necessary adherence may slow down the administrators and may not be conducive to efficiency. But that is the way it is. The battle between fair procedures and efficiency has long since been fought and fair procedures have won out. Insistence on fair procedures governs all decision makers in public administration. It governs the courts as well. None of us can ignore the principle. We might wish it were otherwise. We might like to cut through procedural niceties to secure what we perceive as justice in a more expeditious way ... It is not sufficient that we justify our decision by alleging that we were focusing on the ultimate

¹ First progress review of the implementation of decision VII/8i on compliance by Ireland with its obligations under the Convention at paragraph 57: https://unece.org/sites/default/files/2024-06/VII.8i_Ireland_first_progress_review_final.pdf

objective. It is not sufficient that we were doing our best. It is not sufficient to say that we were motivated by public health and safety objectives.”²

14. One of the principal features of the right to fair procedures under Irish law is the right to be heard (also known as *audi alteram partem*). Every person affected by a decision must be alerted to it and allowed appropriate facilities to make the best possible case in reply. This entails notifying affected persons of relevant and material facts and arguments, including fresh facts or arguments made by another party to the appeal which are material or fundamental to the OCEI’s decision. The OCEI must conscientiously consider and engage with the arguments made by affected persons, to ensure that they are fully and fairly considered³. All of this necessarily takes time.
15. At a practical level, even the process of obtaining the environmental information itself, as well as a single set of submissions from each of the parties to an appeal, can take a substantial amount of time. These matters are the starting point for compliance with fair procedures. For example, the OCEI is not in possession of the information in question when it receives an appeal and must request the information from the public authority in question. In one case a public authority took 12 weeks to respond to the OCEI’s request that it provide the information, despite repeated requests and reminders. While parties are usually given three weeks to provide submissions, extensions of time are frequently sought on the basis of the complexity of the issues concerned or the availability of staff resources. While the OCEI welcomes and facilitates an informal approach to resolution of appeals, both appellants and public authorities frequently engage with the OCEI through legal representatives, meaning that submissions are often extremely detailed and complex.
16. The length of time required to ensure fair procedures will vary from case to case, and the OCEI continues to seek to do so as efficiently as possible, within the requirements of the law. While it is not possible to place a prescribed time period on this process, it is clear that a time period of four months is highly unlikely to be sufficient in the vast majority of the cases that come before the OCEI. If the OCEI fails to follow fair procedures in an attempt to adhere to a prescribed timescale, it will be counterproductive from the perspective of timely access to environmental information, as it will simply result in inevitable adverse litigation in the Irish courts challenging this failure.
17. Second, the duty to give adequate reasons for decisions also means that it is not possible for the OCEI to finalise appeals within 4 months. The AIE regime, by its nature, gives rise to complex factual and legal questions, with detailed factual and legal submissions being made by both parties to the appeal, as well as by third parties in appropriate cases. If the OCEI were to decline to engage adequately with those questions and with the submissions made to it, the OCEI would be unable to comply with its duties under Irish law to give adequate reasons for its decisions. The

² *Khan v Health Service Executive* [2008] IEHC 234, quoted with approval in *Law Society v Coleman* [2018] IESC 80, McKechnie J. at 110.

³ See, for example, the decision of *Grange v Information Commissioner* [2022] IECA 153.

duty to give reasons has been a matter of increasing significance in the Irish Courts in recent years, with the decisions of bodies like the OCEI being regularly quashed on the basis of a failure to give adequate reasons. While the duty is an “*obligation to provide the main reasons on the main issues*”⁴, this includes a duty to address relevant, significant submissions and to provide an explanation why they are not accepted, if that is the case.⁵ Reasons must suffice to disclose that the decision maker has “truly engaged with the issues which were raised.”⁶ As an illustration of the extent of this duty, in a 2024 High Court decision the OCEI was found to have failed to give adequate reasons for two of the specific conclusions reached in a detailed, 24-page decision.⁷ As with the duty to follow fair procedures, compliance with the duty to give adequate reasons under Irish law takes time. The length of time will vary depending on the complexity of the issues in the case and the nature and complexity of any submissions made by affected parties, but it is clear that a prescribed period of four months is unlikely to be sufficient in many of the categories of case that come before the OCEI. Again, an attempt to adhere to such a prescribed time period to the detriment of the duty to give adequate reasons would be counter-productive, ultimately resulting in further delays to access to environmental information.

18. Third, it is our strong view that the OCEI is not required under either the Aarhus Convention or the AIE Directive to carry out reviews “expeditiously”. The OCEI is a body which satisfies the requirements of Article 6(2) of the AIE Directive, and of the first sub-paragraph of Article 9(1) of the Convention, because: it is quasi-judicial, with safeguards to guarantee due process; third parties have access to it; the OCEI’s decisions may become final, following the expiry of the period for appeal to the High Court; the OCEI’s decision is binding on the public authority as a matter of law; decisions of the OCEI are recorded in writing and are publicly accessible; and the procedure before the OCEI is easily accessed and is generally not prohibitively expensive. This is consistent with the finding of the ACCC in case ACCC/C/2016/141.⁸ The Aarhus Implementation Guide draws out the distinction between an ‘expeditious’ and a ‘timely’ review, noting that court (or court-like) procedures may be time-consuming so, while the court procedures should not be too lengthy, the reconsideration procedure must be more “efficient and speedy”. The Guide gives an example of the distinction between an ‘expeditious’ reconsideration procedure taking one month (ie: the internal appeal process within the public authority), but a

⁴ *O’Donnell v An Bord Pleanála* [2023] IEHC 381, Humphreys J, paras.39-60; *Balscadden Road SAA Residents Association Ltd. v. An Bord Pleanála* [2020] IEHC 586.

⁵ *Balz and Heubach v An Bord Pleanála* [2019] IESC 90, O’Donnell J at para.57; *Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta v The Labour Court & Ors* [2021] IESC 36.

⁶ *Náisiúnta Leictreach Contraitheoir Eireann Cuideachta Faoi Theorainn Ráthaíochta v The Labour Court & Ors* [2021] IESC 36.

⁷ See *Electricity Supply Board v Commissioner for Environmental Information* [2024] IEHC 17, in respect of the decision in Right to Know and ESB, available at

<https://ocei.ie/pdf/?file=https://assets.ocei.ie/media/272748/81533ddc-dbbf-4443-a3b6-c07b510e766a.pdf#page=null>. This matter is currently under appeal to the Court of Appeal.

⁸ See, in this regard, the decision of the Committee in case ACCC/C/2016/141 at paragraphs 88-97, available at https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf.

court review procedure (ie: the Commissioner's review) taking one year.⁹ The requirement that should be placed on the Commissioner is one of timeliness in line with the wording of article 9(4) of the Aarhus Convention, with the requirement of expedition imposed on the public authority on internal review. We would respectfully suggest that this guidance and the manner in which it relates to reviews by the Commissioner be considered by the ACCC in the next progress report on the implementation of decision VII/8i.

19. Fourth, the proposed four-month timeline mirrors the timeline provided in the Freedom of Information Act 2014 (the FOI Act), but this timeline is already operationally problematic under that Act, even in circumstances where that regime lacks some of the more complex aspects of the AIE regime. In 2023 only 51% of reviews before the Office of the Information Commissioner were concluded within four months. This demonstrates that the four-month timeframe is not reachable in a significant proportion of FOI appeals. The majority of FOI appeals that are concluded within four months relate to straightforward requests for personal information e.g. access to hospital records. Our view is that the four-month timeframe will be even less achievable in the context of AIE appeals, where our experience is that the AIE regime more frequently gives rise to novel and complex legal issues. In addition, there are a significant number of bodies within the AIE regime that are not FOI bodies, some of which hold significant amounts of environmental information. Given they operate outside FOI, these bodies often use data storage systems that are not designed to respond to a transparency and access regime. The Commissioner has no powers to enforce article 5 of the AIE Regulations which sets out the general duties of public authorities to make all reasonable efforts to maintain environmental information in a manner that is readily reproducible and accessible, or to otherwise ensure that environmental information is progressively made available and disseminated to the public.
20. Finally, while resources continue to be a challenge for the OCEI, resources are by no means the sole reason for delays in the determination of appeals by the OCEI. The OCEI is staffed by a dedicated team legally independent from, but based within, the Office of the Information Commissioner, which itself shares corporate services with the Office of the Ombudsman. Under the AIE Regulations, the Commissioner for Environmental Information is the person who holds the office of Information Commissioner. Although not mandated by legislation, the Information Commissioner has to date always been the person who holds the office of Ombudsman. The staffing resources of OCEI are set out on our website [here](#). Our investigations team is led by a Senior Investigator. At the time of our last submission, OCEI had four investigators working on AIE appeals. This has since been considerably increased, bringing the number of OCEI staff to twelve, with ten investigators (assistant principal officer level) and, for the first time, one graduate-entry investigating officers (administrative officer level).

⁹ The Aarhus Implementation Guide, available at https://unece.org/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf, p.192.

21. However, since our last submission, the number of appeals to OCEI has grown more than fivefold: in 2019 OCEI received 64 appeals. In 2023 we received 351. An overview of our case numbers is set out below.

Year	Number of appeals received	Cases completed
2020	46	37
2021	147	83
2022	369	227
2023	351	216

22. Unsurprisingly, the additional staffing available to OCEI in the years leading up to 2023 led to an increase in the number of appeal cases closed. More cases were closed in 2022 than in any other year since the establishment of the OCEI. Staff turnover and leave meant that the number very slightly dropped in 2023. OCEI's Annual Report for 2023 was published earlier this year, and is available [here](#) on our website.

23. The OCEI continues to review its resources and will seek appropriate additional resources in 2025, commensurate with the marked increase in demand for its services and the need for timely decision-making. However, for all of the reasons outlined above, while additional resources will substantially reduce delays in the conclusion of appeals by increasing the capacity of the OCEI to allocate them promptly to an investigator on receipt, increases in resources will not make it possible to comply with a prescribed timeframe of four months for the determination of those appeals.

24. At the time of publication, the OCEI continues to engage with the Department on the draft amended AIE Regulations. As demonstrated in our decisions and publications, we recognise the role that the OCEI plays in ensuring the smooth running of the AIE regime.

25. We are committed to working with the Department, and with all parties involved in the AIE regime, to improve the timelines involved in completing appeals as expeditiously as possible and we look forward to further constructive engagement to make greater progress in this regard.

Measures implementing the dissemination of environmental information in article 5

26. Ireland has transposed the provisions of Article 5 of the Convention in accordance with the requirements of Directive 2003/4/EC through the AIE Regulations. As per the recitals of Directive 2003/4/EC, increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

27. Making information available without the need for requests allows public authorities to reach a wider audience. It reduces the time needed to respond to requests, as public authorities will be able to respond to requests by directing the requestor to where the information is publically available.
28. As set out above, the Commissioner does not have any role in enforcing this provision, however considers that it is relevant to the challenges in ensuring access to environmental information in Ireland and that appropriate measures should be taken to ensure that public authorities continue to progressively make environmental information available to the public without the need for request. This is a vital part of a multi-faceted strategy to strengthen the AIE regime in Ireland.
29. This can particularly be seen in the area of forestry. Since 2021, approximately 60% of appeals brought to the OCEI relate to requests for forestry related information. Often requests relate to the same types of information. The Commissioner acknowledges that some data relating to forestry matters is already available publically, however given the number of requests for environmental information made to forestry related bodies that can be seen from the statistics gathered by the Department of the Environment, Climate and Communications¹⁰, this is clearly not sufficient. If the types of data made available publically in relation to forestry were expanded, this could potentially reduce the number of requests to these particular public bodies, and ultimately reduce the requirement for appeals to the OCEI.
30. The Minister for Public Expenditure, NDP Delivery and Reform launched the 2023-2027 Open Data Strategy in November 2023. The Commissioner considers that it is essential that public bodies whose work has an impact on the environment, and working in the area of forestry in particular, engage with this strategy and ensure that environmental information is proactively disseminated to the public.

¹⁰ National AIE Statistics: <https://www.gov.ie/en/collection/257c4-national-aie-statistics/>