



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

**Part II - Commissioner for  
Environmental Information**

# Chapter I

Waste  
energy  
legislation  
health  
landscape  
Regulations  
DIVERSITY  
Environment

## Chapter I: Introduction

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

### The Directive and the Regulations

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

### What is environmental information?

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

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

structures in as much as they may be affected by the elements of the environment.

## Promoting access to information

The expectation in the scheme of the Directive and the Regulations is that access requests will generally be granted. There is also a requirement that public authorities should organise information on the environment which they hold “*with a view to its active and systematic dissemination to the public*”. The outcome of the independent, external review of a decision on a request by a public authority - which under the 2007 Regulations is carried out by my Office - is binding on the public authority.

## Public authorities

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

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

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

## Charges

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

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

## Refusal grounds

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

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

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

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

## Guidance

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

## Appeals received in 2010

During 2010, 23 appeals were received by my Office (18 in 2009). Twenty one appeals were closed during the year. Ten formal decisions were issued - summaries of these are set out in the chapter following. Two cases were deemed to have been withdrawn as settled once the records were released following my Office's intervention. Five cases were withdrawn and a further four appeals were deemed invalid on the grounds that the appeal was premature or an internal review had not been requested. Fifteen cases were on hand at the end of the year. My staff recorded seventeen general enquiries about the Regulations.

While half of the appeals arose from requests to local authorities and government departments, other public authorities whose decisions were appealed included CIE, Coillte, the Commission for Energy Regulation, EirGrid plc and University College Dublin. Among the issues still under consideration is the complex matter of whether the National Asset Management Agency (NAMA) and Anglo Irish Bank are public authorities within the meaning of the Regulations. Most of the appeals during the year arose from disputes as to whether any or further environmental information within the scope of a request was held, the format in which it was available or whether the body was a public authority for the purposes of the Regulations, as opposed to cases where my Office had to decide whether or not the exceptions provided for in the Regulations had been properly applied.

Appeal decisions are published in full on my Office's website at [www.ocei.gov.ie](http://www.ocei.gov.ie).

## Issues arising in 2010

### Level of activity during 2010

As discussed in my Report for 2009, the level of activity in appeals and in applications under the Regulations has been low. I identified two main reasons for this - the level of the fee for making of an appeal to my Office (normally €150) is discouraging appellants and there is a lack of awareness generally regarding the rights of members of the public under the Regulations. While there has been a steady increase in the number of appeals received, the number for 2010 is still quite low, given that the Regulations have now been in place for over three years. My staff continue to be in touch with the Department of the Environment, Heritage and Local Government in relation to the operation of the Regulations and especially the matter of awareness raising amongst public authorities as well as with the public itself.

Of the 23 appeals received in 2010, 17 were from persons who had previously had contact with this Office and are known to have an interest in environmental matters. Three individuals accounted for 14 of the appeals.

Of the ten decisions issued in 2010, six of these related to appeals from one individual and the issues which arose in these appeals were similar.

### **Handling of requests by public authorities**

Appeals dealt with more recently brought to light numerous instances of poor handling by public authorities of requests made under the Regulations and, where relevant, these are referenced in the formal decisions which I issued. It is a matter of some concern to me that, almost four years after the Regulations came into effect, the level of awareness among public authorities of the statutory requirements remains low. Issues identified include:

- failure to adhere to statutory deadlines for issuing of decisions and internal review decisions (CEI/10/002\* – An Bord Pleanála, CEI/10/0008\* – University College Dublin),
- failure to engage properly with applicants in clarifying requests where appropriate,
- failure to properly advise applicants of their rights of appeal,
- failure to properly identify information relevant to a request, either claiming that no relevant environmental information is held or that the information sought is not environmental information when this simply could not be the case (CEI/08/0006\* – Kildare County Council)\*, and
- failure to properly apply the exceptions to release provided for in the Regulations and failure to properly consider the public interest in the release of the information sought (CEI/08/0012\* – Department of the Environment, Heritage and Local Government)

It is vitally important that public authorities have in place proper procedures for dealing with requests under the Access to Information on the Environment Regulations and that I, as Commissioner, can rely on the validity of statements made to me by public authorities in dealing with appeals. Decisions made by me are final and binding on the affected parties, unless appealed to the High Court within two months of the decision. It is vital that all public authorities cooperate with my Office diligently and fully.

### **Communication between applicants and public authorities**

It seems to me that, in general, there is an onus on applicants and public authorities to cooperate where necessary to ensure that requests are dealt with properly in the first instance and thereby avoiding the need for appeals to my Office to clarify and rule on matters that could have been cleared up at a much earlier stage.

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\* Decisions published on website [www.ocei.ie](http://www.ocei.ie)

### **Notice under Article 12(6) of the Regulations**

This Article provides that as Commissioner, I may do certain things in dealing with an appeal. These include that 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 on any premises occupied by a public authority so as to obtain environmental information.

I have only found it necessary to invoke this provision on one occasion to date in case [CEI/08/0006](#) in which I issued my decision in 2010 (see chapter 2).

### **What constitutes a public authority?**

While this issue has arisen previously and I have addressed it in earlier decisions, during 2010, I have been asked to adjudicate on whether NAMA and Anglo Irish Bank are public authorities for the purposes of the Regulations. This point raises significant issues of statutory interpretation and at the time of writing was still under active consideration.

### **My role as Commissioner**

In a number of decisions, I found it necessary to emphasise that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally. This means that my Office does not have the authority to investigate complaints against public authorities or to provide an alternative dispute resolution mechanism with respect to actions taken or not taken by public authorities; my role is confined to that prescribed in relation to appeals against decisions on requests for access to environmental information.

This issue has arisen in cases where much of the applicant's submissions concern criticisms of public authorities or where it is clear that the appeal to my Office is another element of a protracted engagement with a public authority.

## High Court judgment

My decision in case [CEI/07/0005](#) - Mr Gary Fitzgerald and the Department of the Taoiseach - was appealed to the High Court in December 2008. My decision in this case, summarised in my 2008 Annual Report, directed the release of one record which was regarded as being a report of discussion at Cabinet on Ireland's greenhouse gas emissions. In arriving at my decision, I found that the request related to information on emissions into the environment and I did not find it possible to interpret the part of the Regulations covering that matter as being in conformity with the provisions and objectives of the Directive.

The appeal was heard in July 2009 and judgment was delivered by Mr Justice O'Neill on 4 June 2010. The High Court held that I had erred in law and upheld the Taoiseach's appeal.

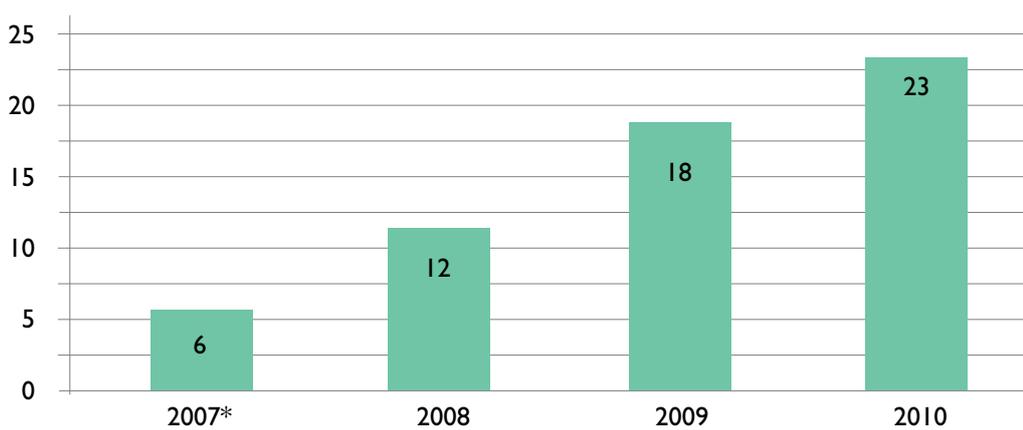
The Court found that the jurisdiction given to me was confined to the Regulations and that I had exceeded my jurisdiction and was not entitled to embark on a consideration of whether the Regulations correctly transposed the Directive, and that I had no jurisdiction to disapply the Regulations, in particular Article 10(2). The Court also found that a meeting of the Government was "*internal communications of public authorities*" and governed by Article 9(2)(d) of the Regulations and not "*proceedings of public authorities*" as governed by Article 8(a)(iv). The Court refused my application for a reference to the European Court of Justice under Article 234 of the Treaty of the European Union stating that the High Court is not a court of last resort in Ireland with competence to deal with the issues which have arisen in this case.

The Court noted that Article 12(9)(a) of the Regulations permits me to refer any question of law to the High Court for determination.

My Office appealed this judgment to the Supreme Court on 17 August 2010 and a date for hearing is awaited.

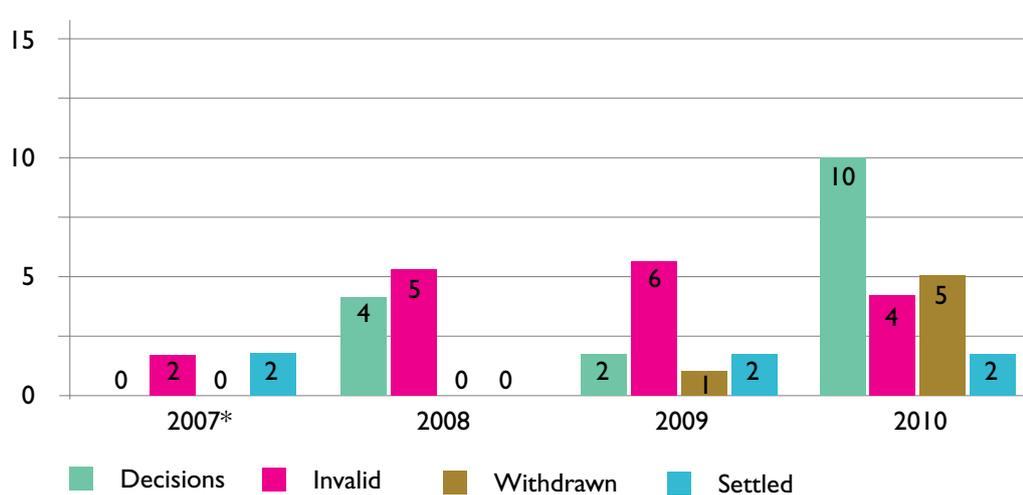
## Statistics

### Appeals received



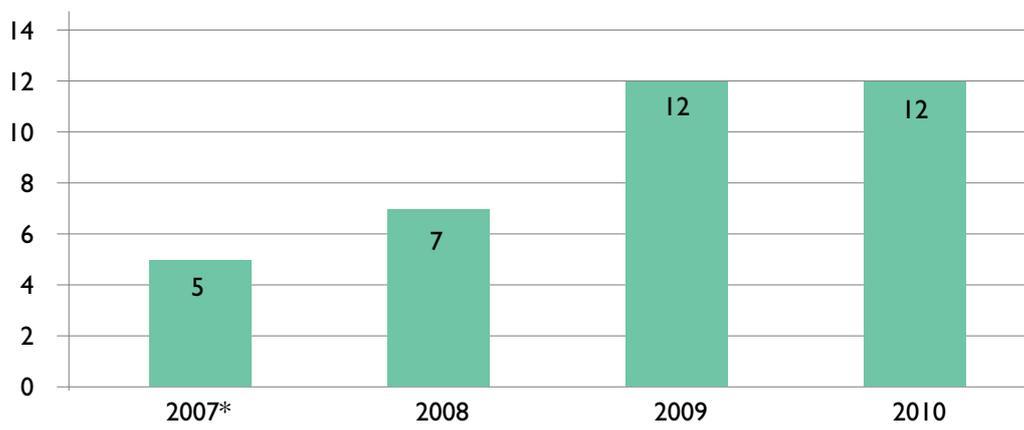
\*The Office was established with effect from 1 May 2007.

### Outcome of CEI appeals by year



\*The Office was established with effect from 1 May 2007.

### Appellants to CEI



\*The Office was established with effect from 1 May 2007.

## Chapter 2



## Chapter 2: Decisions

What follows is a summary of the decisions made in 2010. The full text of these can be found on my website [www.ocei.gov.ie](http://www.ocei.gov.ie)

### **CEI/09/0005 - Peter Sweetman & Associates and An Bord Pleanála (the Board) - Decision of 24 February 2010.**

#### **Background**

On 23 March 2009, the applicant sought “*digital copies of the transcripts of the hearing into Metro North... as soon as they are received by the Board*”. The Board refused the request on the basis of Article (9)(2)(c) of the Regulations as the request concerned material in the course of completion. At the time of the request, the hearing into Metro North had not begun – it was scheduled to commence on 1 April 2009.

#### **Findings**

I was not satisfied that the Directive or the Regulations gave me the jurisdiction to direct a public authority to release information in records which had not been created at the time of the request. I also looked at the provisions of Article 4(1) and 4(2) and was satisfied that Article 4(1) would apply to the information sought in that it is required to be made available under another statutory provision.

#### **Appeal decision**

I found that the Board was justified in refusing the request but I varied the basis for the decision.

## **CEI/09/0007 Ms. Una Caulfield, Director, Residents for Realignment Ltd. and An Bord Pleanála (the Board) – Decision of 24 February 2010**

### **Background**

This case is very similar to CEI/09/0005 above. In this case, the applicant's request of 5 March 2009 asked the Board "*to broadcast the Oral Hearing into Metro North on the web, and to make transcripts of the hearing available online at the end of each day.*" The Board refused the request on the basis of Article 9(2)(c) and that the Regulations did not apply to the request for webcasting.

### **Findings**

As above, I was not satisfied that it was within my remit as Commissioner to direct the Board to arrange for webcasting of the hearing or to release transcripts which were not held by the Board at the time of the request. I noted in my decision that, subject to technical, operational and resource issues, there is nothing to prevent the Board from making the information sought available as soon as it becomes available or at some point earlier than it is required to be made available.

### **Appeal decision**

I found that the Board was justified in its decision to refuse the request and varied the basis for the decision.

## **CEI/09/0006 Percy Podger and Associates on behalf of Hands Across the Corrib Ltd. and An Bord Pleanála (the Board) – Decision of 30 March 2010**

### **Background**

The applicant sought a transcript of the oral hearing into the Galway City outer bypass. The Board advised that "*a transcript of the hearing has not and will not be made*". The Board provided an audio recording on compact disc (CD) of the proceedings of the hearing. The applicant advised this Office in his appeal that he had been unable to access the material on the CDs provided and it was not in the format requested. My Office examined the CDs and agreed that the material on them was not reasonably accessible, as the program required was not easily available and no instructions were provided as to how to access the material on the CDs. The Board was asked to provide new copies of the audio recordings to this Office and to the applicant. This Office was then able to access the material on the CDs.

### **Findings**

Article 7(3) of the Regulations provides for information to be sought in a particular form or manner unless it is already available to the public or access in another form or manner would be reasonable. While the Board said that no transcript was made, it did give an undertaking to provide one, referring to the audio recording. I did not consider it reasonable that the Board be required to prepare a transcript of a 21 day hearing where the hearing was held in public and an audio recording was available. Given the responsibilities placed on public authorities by the Directive and Regulations, I believe that there is also an onus on applicants to cooperate with the process. I believe it is unfortunate that the applicant did not attempt to resolve with the Board the difficulties he had with the original CDs and that he declined to confirm to my Office as requested if the fresh CDs provided were accessible.

### **Appeal decision**

I found that the Board was not required in the circumstances of this case to provide a transcript which it did not hold. I found that in refusing the request, the Board should have given reasons why the information was being provided in another format and should have ensured easy accessibility of the information in the alternative format.

## **CEI/08/0006 Mr. John Colgan and Kildare County Council (the Council) – Decision of 15 March 2010**

### **Background**

The applicant requested information relating to the installation of a sewer across the Liffey (Salmon Leap) bridge at Leixlip. The Council refused the request saying it had no information as the installation of the sewer was a private agreement. The applicant appealed to my Office and the Council eventually identified some 53 files relating to the refurbishment of the bridge, though the material specifically relating to the sewer was limited.

In this appeal, I found it necessary to serve a notice under Article 12(6) of the Regulations on the Council as, despite repeated reminders, the Council did not respond adequately to my Office's request for information to be provided to enable it to proceed with the appeal. This was the first and only time to date that I have found it necessary to invoke this provision of the Regulations.

The Council offered the applicant the opportunity to examine the files identified and this took some considerable period of time. Ultimately, I determined that the scope of the request was in fact quite narrow and as my appeal could only deal with material

within the scope of the request, much of the material identified by the Council was not relevant to the appeal.

The issues to be determined included:

- whether the information sought was held by or for the Council,
- whether information existed which had not been identified or released by the Council,
- whether contractors engaged by the Council were public authorities for the purposes of the Regulations, and
- whether the exceptions claimed by the Council in relation to a small amount of information were justified.

### **Findings**

I found that the Council was not justified in its original decision to refuse the request on the basis that it did not hold any environmental information within the scope of the request.

I found that Article 7(5) of the Regulations allowed the Council to refuse a request in relation to further records (other than those made available during the review) on the basis that the information was not held by or for it.

I found that, for the purposes of this particular request, the contractors engaged on the project were not “*public authorities*” within the meaning of the Directive and the Regulations.

In relation to a small amount of information, I found that the Council’s decision to refuse access under Articles 8(a)(iv) and 9(1)(c) on the grounds that disclosure would adversely affect confidentiality was not justified in the circumstances of this case and directed the release of that information.

### **Appeal decision**

I found that the Council’s original decision was not justified. I directed the release of a small amount of information within the scope of the original request and found that Article 7(5) applied to any further information which the applicant contended should be held by the Council.

## Article 7(5) decisions – Information not held

As each of the following six decisions relate to Article 7(5) of the Regulations and were from the same applicant, Mr. Pat Swords, I have presented them as a group. In each case, I found that the public authority was justified in refusing access to information sought on the basis of Article 7(5) of the Regulations which provides for a public authority to refuse access to information sought on the basis that the information is not held by or for that authority. In each case, it is not in dispute that the information to which the Article 7(5) finding applied, if held, would come within the definition of environmental information in the Regulations and Directive.

Five of the cases dealt only with this provision of the Regulations, as follows:

- CEI/09/0016 Mr Pat Swords and Department of Communications, Energy and Natural Resources – Decision of 28 Sept 2010 – aspects of renewable energy programme,
- CEI/10/0002 Mr Pat Swords and An Bord Pleanála – Decision of 16 July 2010 – the Corrib gas pipeline and related planning matters,
- CEI/10/0003 Mr Pat Swords and Industrial Development Authority (IDA) – Decision of 2 June 2010 – supporting information for comments made by the Chief Executive of the IDA about the wind energy programme,
- CEI/10/0004 Mr Pat Swords and EirGrid PLC – Decision of 14 June 2010 - the official response of Eirgrid to the Poyry report, and
- CEI/10/0008 Mr Pat Swords and University College Dublin (UCD) – Decision of 2 July 2010 – supporting information for comments by UCD academics about the Corrib gas pipeline and wind generation of electricity.

The final decision also dealt with the definition of environmental information.

## CEI 09/0015 Mr Pat Swords and RTÉ – Decision of 10 May 2010

### Background

On 26 October 2009, the applicant made a request for environmental information to RTÉ under the Regulations, seeking:

1. the criteria RTÉ uses with regard to assessment of environmental impact, environmental pollution, acceptable risk, unacceptable risk, unacceptable hazard,
2. the qualifications of RTÉ personnel who are reporting on matters relating to industrial development and implementation of the Environmental Acquis with regard to objectivity and accuracy,

3. the names and qualifications of all RTÉ researchers who in the last 3 years have been responsible for editing and producing programmes relating to the Corrib Gas development in North West Mayo, and
4. RTÉ's policy with regard to its obligation under the Aarhus Convention for dissemination of environmental information.

The applicant made criticisms of RTÉ's reporting of environmental matters, especially the coverage of the installation of the gas pipeline and terminal in Co Mayo.

The applicant's position was that RTÉ is a public body under Directive 2003/4/EC with obligations relating to dissemination of environmental information, such as detailed regulatory submissions prepared by the developer in the Corrib Gas case.

RTÉ's position was that it is a public authority for the purposes of the Regulations, but that the request did not cover environmental information and in any event it did not hold the information sought at 1 and 4.

### **Findings**

I found that RTÉ did not hold the information sought in 1 and 4.

I concluded that the information sought in 2 and 3 does not fall within the definition of environmental information as set out in the Directive and Regulations.

### **Appeal decision**

In this appeal, I also found that items 2 and 3 of the request did not come within the definition of environmental information.

