



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

Part II – Commissioner for Environmental Information



Introduction

In this, my first full year as Information Commissioner and Commissioner for Environmental Information, I had to make difficult choices regarding the allocation of resources between the two Offices. I discuss the issue of resources in some detail below. The Office of the Commissioner for Environmental Information (OCEI) was established under Article 12 of the European Communities (Access to Information on the Environment) (AIE) Regulations. The AIE Regulations are based on Directive 2003/4/EC on public access to environmental information and provide for a separate access regime in Ireland from that of the Freedom of Information (FOI) Act. Thus, my role as Commissioner for Environmental Information is legally independent of the role I have as Information Commissioner. However, Article 12(10) of the AIE Regulations provides that the Commissioner for Environmental Information shall be assisted by the staff of the Office of the Information Commissioner (OIC) and by such other resources as may be available to that Office. Thus, the operation of the OIC necessarily impacts upon the performance of the OCEI, as discussed in last year's Report. On a positive note, the enactment of the Freedom of Information (FOI) Act 2014, which included a reduction in FOI fees, was followed by a very welcome amendment to the AIE Regulations providing for a reduction in the AIE appeal fees also.

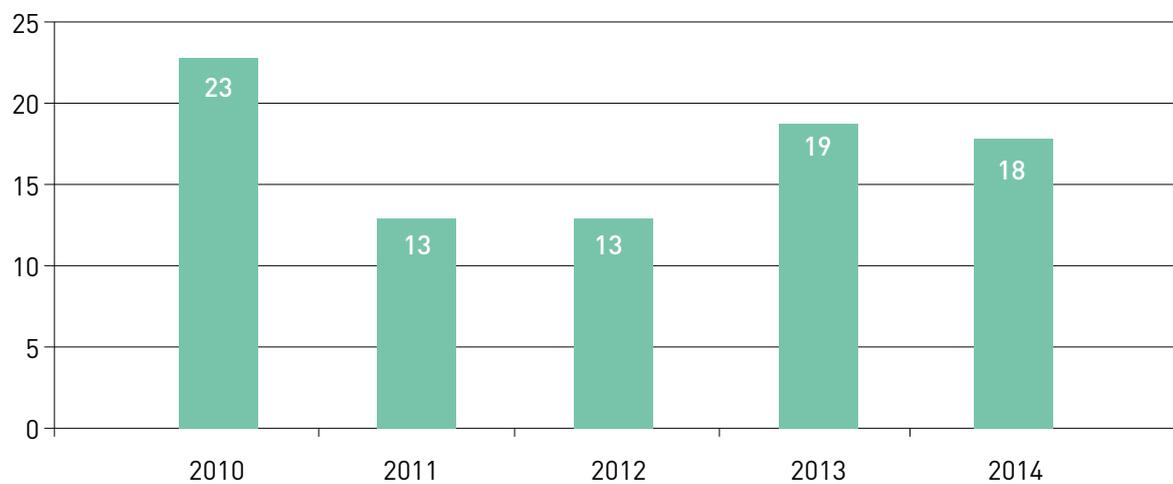
The right of access under the AIE Regulations applies to "environmental information" held by or for a "public authority" within the meaning of the Regulations. My role as Commissioner for Environmental Information is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their requests for information under the Regulations. A right of appeal to my Office also arises where the body or person to whom an AIE request has been made contends that it is not a public authority within the meaning of the Regulations. My decisions on appeal are final and binding on the affected parties, unless a further appeal is made to the High Court on a point of law within two months of the decision concerned.

For further information on the operation of the AIE regime in Ireland, please visit my website at www.ocei.gov.ie, which includes links to the previous Annual Reports of this Office, the website of the Department of the Environment, Community and Local Government, and Directive 2003/4/EC.

Appeals and enquiries

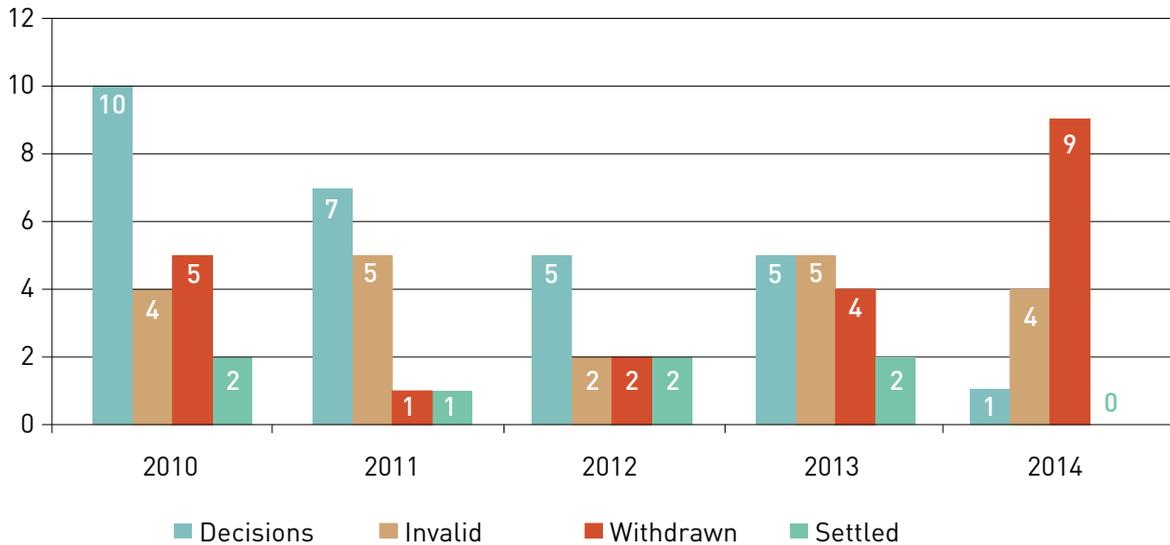
During 2014, 18 appeals were received by my Office. My Office recorded that 3 of these appeals involved a deemed refusal of the request concerned at the original and/or internal review decision-making stage, which is a significant improvement on the year before. A deemed refusal occurs when the public authority fails to issue a decision on the request within the relevant time limit specified in the Regulations (usually one month).

Number of appeals received



Fourteen appeals were closed during the year. Of these, only one resulted in a formal decision, the highlights of which are set out below. The decision is published in full on my Office's website at www.ocei.gov.ie.

Outcome of CEI appeals by year



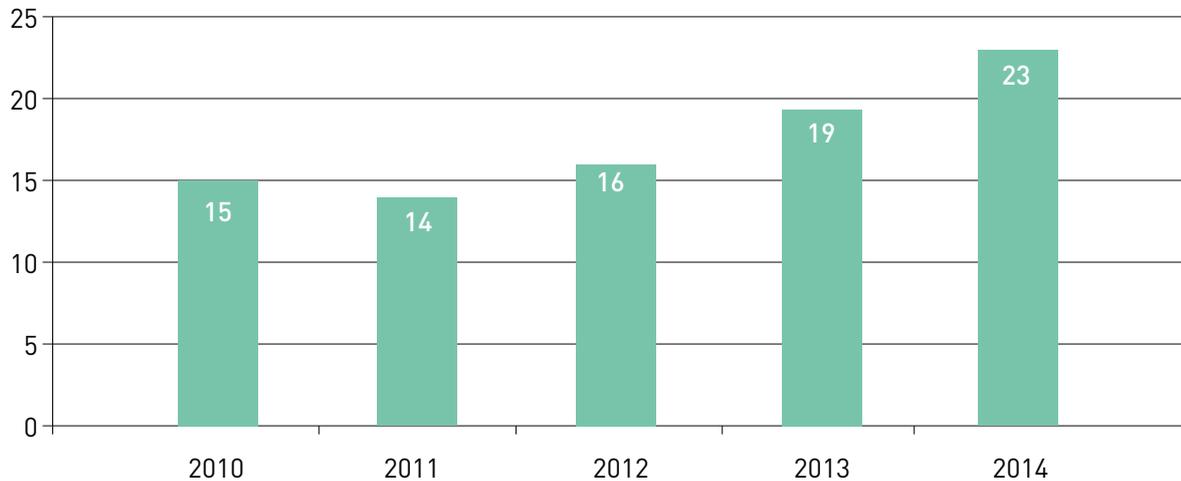
Six appeals were either withdrawn or deemed as withdrawn, because the public authority concerned agreed to make the requested information available through publication or otherwise. Two of these cases involved my Office’s direct intervention and are discussed below. In four of the cases, however, the public authority concerned agreed to make the requested information available of its own initiative following the appeal.

Two further appeals were withdrawn in light of the decision taken by my Office in early 2014 to withdraw its appeal to the Supreme Court in the case of *An Taoiseach v. Commissioner for Environmental Information* [2010] IEHC 241. An additional appeal was withdrawn because the appellant accepted the view of my Office that the public authority concerned did not hold the requested information. The remaining appeals closed in 2014 were deemed to be invalid, primarily because no internal review request had been made.

Half of the appeals last year arose from requests to government departments and local authorities. Other public authorities whose decisions were appealed included An Bord Pleanála, Bord na Móna, Coillte, ESB Networks, and Eirgrid. In two cases, the bodies dispute that they are public authorities within the meaning of the Regulations.

Twenty-three cases were on hand at the end of the year, an increase of four from the year before. My staff recorded 42 general enquiries about the Regulations.

Number of appeals on hand by year



Article 12(6) of the Regulations

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

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

I am pleased to report that I had no need to invoke this provision in 2014.

Significant cases

Case CEI/13/0006, Mr. Stephen Minch and Department of Communications, Energy and Natural Resources (the Department) – Decision of 18 December 2014

Whether the Department was justified in refusing access to the report entitled “Analysis of options for potential State intervention in the roll out of next-generation broadband” on the ground that the information concerned is not environmental information within the meaning of the Regulations

In this decision, I confirmed that, in order for information to qualify as “environmental information” for purposes of the Regulations, it is necessary for the information to fall within one of the six categories set out in the definition in Article 3(1); it is not sufficient that the

requested information simply “relates to” one of the six categories, however distantly. I also noted that the judgment of the European Court of Justice in Case C-524/09, *Ville de Lyon* (22 Dec. 2010), involving a request for access to trading data relating to greenhouse gas emission allowances, indicates that not all information with a connection even to greenhouse gas emissions necessarily qualifies as environmental information within the meaning of the Directive. Having examined its contents, I observed that the report concerned is about the cost implications for the State of deploying various types of next-generation broadband infrastructure to areas underserved by the private sector. I found no basis for concluding that it qualifies as environmental information within the meaning of Articles 3(1)(b) or (c), as the appellant argued.

I also considered the question of whether the National Broadband Plan (NBP) may itself be a “measure” within the meaning of Article 3(1)(c) such that the requested report could qualify under paragraph (e) of the environmental information definition. I noted, however, that the NBP is merely a high level strategy setting targets for the delivery of high speed broadband throughout Ireland. I found that the NBP is not itself a measure affecting or likely to affect the environmental elements and factors referred to in paragraphs (a) and (b) of the definition, as the link between the plan and any effect on the environment is simply too remote, unlike the measures and activities that may be adopted to implement the plan. I concluded that the Department’s decision to refuse the appellant’s request in this case was correct.

[Note: This decision has been appealed by the applicant to the High Court; a hearing date has been set for 25 June 2015.]

Case CEI/12/0007 – Mr. David Healy, Friends of the Irish Environment and Department of Environment, Community and Local Government (the Department) – Appeal deemed as withdrawn on 11 June 2014

Whether the Department was justified in refusing access to an unredacted version of the “Irish Water: Phase 1 Report” and its Appendices

The question presented in this case was whether the Department was justified in refusing access to information relating to the funding requirements of Irish Water and future water charges. The Department did not dispute that the requested information, which had been redacted from a published version of the report concerned, was environmental information, but it refused access under Articles 8(a)(iv) (confidentiality of the proceedings of public authorities), 8(b) (Cabinet confidentiality), and 9(1)(c) (commercial or industrial confidentiality) of the Regulations.

During the course of the review, my Office met with officials from the Department to discuss a number of concerns, but in particular the Department’s reliance on FOI exemptions as a basis for refusal under Article 8(a)(iv) of the Regulations. The meeting concluded with what may be described as an “agreement to disagree” on the matter. Subsequently, having regard

to the judgment of O’Neill J. in *An Taoiseach v. Commissioner for Environmental Information* [2010] IEHC 241, the Department made a new claim for refusal under Article 9(2)(d), which relates to internal communications of public authorities.

However, following further exchanges of correspondence, the Department eventually indicated that it would be willing to publish the report in full, subject to Government approval. On 29 May 2014, the Department informed my Office that the Government had approved the publication of the report in full and that it was available on the Department’s website. My Office notified the appellant accordingly, and he raised no further issues in response. The appeal was therefore deemed to be withdrawn.

Case CEI/12/0009 – Mr. Damien McCallig and Eirgrid – Appeal deemed as withdrawn on 8 July 2014

Whether a decision on an appeal is required where no further issue remains to be determined

This case involved a refusal of access by Eirgrid to environmental information relating to a third party grid connection application. The primary ground for refusal was Article 9(1)(c) having regard to a 2009 Directive and related Regulations providing for the confidentiality of commercially sensitive information held by the transmission system operator.

During the course of the review, my Office met with a representative from Eirgrid and also consulted with the third party concerned. My Office stressed that the scheme of the AIE Regulations, and of the Directive upon which the Regulations are based, makes it clear that there is a presumption in favour of release of environmental information. It was ultimately agreed that the requested information could be released in full. Following the release of the requested information, the appellant raised form of access and search issues, both of which were addressed by Eirgrid satisfactorily. My Office therefore proposed to the appellant that his appeal be deemed as withdrawn.

The appellant objected to the proposal and requested that I issue a formal decision on the matter. Article 15(5) of the Regulations states: “The Commissioner may deem an appeal to be withdrawn if the public authority makes the requested information available, in whole or in part, prior to a formal decision of the Commissioner under article 12(5).” In this case, all of the relevant information held by Eirgrid had been released to the appellant and no further issue remained to be determined. In the circumstances, I decided to exercise my discretion to deem the appeal to be withdrawn notwithstanding the appellant’s stated objection to the proposal.

High Court and Supreme Court proceedings

A party to an appeal to my Office or any other person affected by my decision may appeal to the High Court on a point of law from the decision. There were no new appeals to the High Court in 2014. However, in December, an application for judicial review was made to the High Court by the Friends of the Irish Environment seeking an order of mandamus in relation to an appeal that was made to my Office in July 2014.

The Supreme Court concluded its hearing in July in the case of National Asset Management Agency v. Commissioner for Environmental Information (CEI/10/0005), which involves the question of whether NAMA is a public authority within the meaning of the Regulations. Judgment is awaited at the time of writing.

Deemed refusals

A deemed refusal occurs when the public authority fails to issue a decision on the request within the relevant time limit specified in the Regulations (usually one month).

In 2014, my Office recorded deemed refusals concerning three public authorities which had not responded to a request within the time limits provided for in the Regulations. This is a marked improvement from the rate of seven the year before, which was also the year that I first started reporting on the details of the public authorities concerned.

Deemed refusal at first stage of the request

Two applications to public authorities were recorded by my Office as deemed refusals at the first stage of the request. The public authorities are:

- Bord na Móna, and
- Wexford County Council.

Deemed refusal at second stage of the request

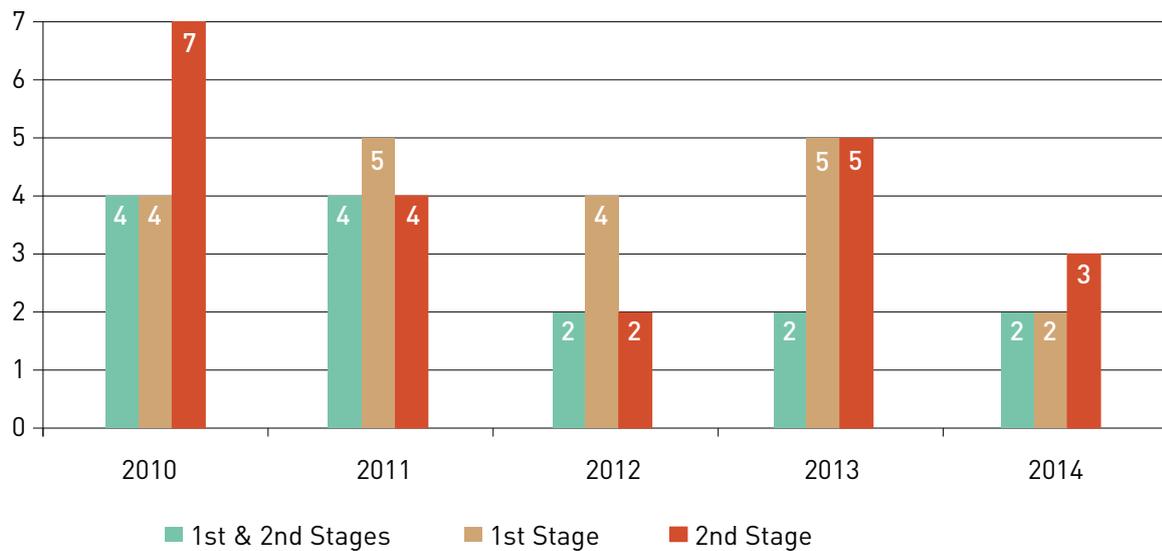
Three applications to public authorities were recorded by my Office as deemed refusals at the second stage of the request. The public authorities are:

- Bord na Móna,
- Wexford County Council, and
- Department of Agriculture. (The Department's internal review decision was dated 18 July 2014, but did not issue until 5 August 2014 and thus was late by one day.)

Deemed refusals at both stages of the requests

Two of the applications mentioned above were recorded by my Office as having been deemed refusals at both stages of the request. The public authorities are:

- Bord na Móna, and
- Wexford County Council. (I note, however, that the Council disputes that the request was valid in light of the technical requirements of Article 6(1) of the Regulations.)



Issues arising & other matters of interest

In 2014, the choices that I made regarding the allocation of the limited resources available to me unfortunately resulted in the increase in the backlog of OCEI cases on hand that is reported above. On the other hand, however, many positive developments occurred last year that will bring about improvements in the operation of the AIE regime in Ireland. One positive change, the reduction of the appeal fees from €150/50 to €50/15, has already been put into effect.

Resources

As I previously reported, the OCEI has historically been inadequately resourced. Although it is a legally independent Office, the OCEI had not, until very recently, received any specific funding allocation from the State and instead had to rely entirely upon the resources that could be made available from the Office of the Information Commissioner. However, the OIC itself faced significant challenges from the time of its inception in terms of securing an adequate level of funding having regard to the demand for its services. Thus, the OIC had very few resources to spare, with a significant increase in demand expected when applications for review start arising under the FOI Act 2014.

In this context, I had to consider how best to progress the overall work of the Office within the limited resources available to me. I identified as a priority for 2014 the objective of having no FOI reviews over 12 months old on hand by the end of the year and devoted the resources from within my Office's Vote as needed to meet that target. I am happy to say that my objective met with success, with very few FOI cases older than one year remaining on hand by the end of the year and significantly improved case turnaround times overall as a result of the organisational reforms implemented in June 2014.

However, it has been the experience of this Office that AIE appeals generally involve complicating factors that make them very difficult to process quickly; thus, while the numbers are low, AIE appeals tend to require a disproportionate amount of resources. Therefore, the success of the OIC in reducing its backlog and improving case turnaround times could not have been achieved while also giving priority to AIE appeals.

At the same time, I did not lose sight of the need to provide a timely and effective review procedure under the AIE Regulations. Once embedded, the OIC organisational reforms are expected to have a positive impact on the processing of AIE appeals. In addition, in a budget submission for 2015 made to the Department of Public Expenditure and Reform (DPER), my Office made a strong case for funding the OCEI based on what experience had shown was needed to meet its resource requirements and to achieve marked improvements in service delivery. I am very pleased to report that in October 2014 DPER approved a budget allocation which reflected the needs of the OCEI as identified in my Office's submission. Resources have now been secured for the OCEI for the first time. With these resources, the OCEI will be in a position to mirror the success of the OIC in reducing its backlog and improving case turnaround times.

Positive engagement with the DECLG & others

On another positive note, 2014 saw an increased level of engagement between officials from the Department of the Environment, Community and Local Government (DECLG) and my Office. Following on from the meeting with the DECLG regarding Case CEI/12/0007, referenced above, another meeting was held to discuss various issues, including an EU Pilot (pre-infringement) case that had been brought by the European Commission in response to a complaint relating to Ireland's implementation of the AIE Directive. My Office took the opportunity to press its case for resources and to urge the DECLG to reduce the OCEI appeal fees in line with the reduction in application fees for a review by my Office under the FOI Act 2014. Other issues for discussion included possible amendments to the Regulations to address such matters as the confusion and increased administrative burden caused by the fact that the AIE and FOI regimes are not aligned as is the case in the UK and Scotland, omissions in the Regulations such as the absence of an express provision for the burden of proof in relation to justifying a refusal to make information available, and concerns over the purported incorporation of the FOI exemptions into the Regulations under Article 8(a)(iv). My Office also agreed to take part in an AIE training event for public authority staff that was being planned at the time for delivery in September.

Immediately following the meeting, my Office formally notified the DECLG in writing that at least two additional Investigators with suitable experience in the field of environmental law are considered necessary to allow for marked improvements in service delivery. My Office also made a submission in response to the public consultation ongoing at the time on the access to justice provisions of the Aarhus Convention. My submission again addressed the issues of the appeal fees, resources and legislative change.

I am pleased to report that the Secretary General of the DECLG supported my case for resources by writing directly to DPER on 28 November 2014 to raise awareness of the issue and to recommend favourable consideration by DPER of the OCEI staffing proposal. Subsequently, on 23 December 2014, sanction was granted by DPER for the filling of two Investigator posts in the OCEI, and the recruitment process for these posts is underway at the time of writing.

In addition, the DECLG agreed to the reduction in the appeal fees. Accordingly, on 19 December 2014, the Minister signed into law the European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 (S.I. No. 615 of 2014, which reduced the standard appeal fee from €150 to €50 with immediate effect.

Moreover, the AIE training event for public authority staff, which was held on 16 September in Tullamore, County Offaly, was well attended and resulted in positive feedback from a number of the attendees. My Office was very happy to make a contribution to the event and very much welcomes such initiatives to improve training and awareness among public authority staff. A related initiative is the establishment by DECLG of an "Environlink" portal through which training material is available to public authority staff, including the presentation that was delivered by my Office.

Yet another positive development, or at least a step in the right direction, was the insertion of a clause into the FOI Act 2014 which expressly refers to the AIE Regulations. Section 12(7)(b) of the FOI Act now provides that an FOI body may advise a person making a request whether the records concerned may be accessed under the Regulations instead of under the Act. This provision should at least increase awareness of a requester's AIE rights and may reduce some of the confusion arising from the existence of two separate but overlapping public access to information regimes.

I also attended a very informative European conference relating to the AIE regime on 4 November. The conference was organised by the Centre for Freedom of Information in Edinburgh, Scotland, and included talks on the Aarhus Convention and the definition of environmental information. Among the speakers were the current Scottish Information Commissioner, Rosemary Agnew, her predecessor, Professor Kevin Dunion, and other prominent academics and practitioners.

Concerns regarding Article 8(a)(iv)

As noted, among the topics of conversation with DECLG officials have been the concerns of my Office regarding Article 8(a)(iv) of the Regulations. The concerns arise from the reference to the FOI Act in the context of the protection of the confidentiality of the proceedings of public authorities.

My Office had flagged its concerns as early as 2006 in correspondence relating to the draft Regulations at the time. Following the meeting with the Department in November 2013 in relation to Case CEI/12/0007, my Office sought legal advice on the question of whether the FOI Act could be regarded as providing the requisite legal protection for the confidentiality of the proceedings of public authorities and whether this would be consistent with the Directive in light of the relevant case law of the European Court of Justice. Our legal advice indicates that incorporating the FOI exemptions into AIE is not necessarily inconsistent with the Directive, because “confidentiality provided for by law” may be regarded as meaning no access by the public as a matter of right. However, our adviser agreed that “the point is far from clear-cut”.

At the meeting with DECLG officials in August 2014 and in subsequent correspondence, my Office noted that the incorporation of the FOI exemptions into the AIE Regulations remains very problematic for numerous reasons, including:

- The “concept of proceedings” has not been clearly defined, which the ECJ has described as necessary under national law;
- While perhaps an increasingly common practice, it is administratively difficult to apply one piece of legislation in reference to a separate piece of legislation;
- The application of the FOI exemptions in this manner is likely to be subject to vigorous challenge.

My Office intends to pursue its concerns over these and other difficulties arising from the Regulations in further communications with the DECLG in the near future.