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# Part II

## Commissioner for Environmental Information



## Introduction

2015 saw positive developments in the work of the Office of the Commissioner for Environmental Information (OCEI), with the allocation of additional resources and improved turnaround times for appeals.

The OCEI was established under article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 (the AIE Regulations). The AIE Regulations transpose Directive 2003/4/EC on public access to environmental information. The OCEI is legally separate from the Office of Information Commissioner (OIC); 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 and by such other resources as may be available to that office.

The right of access under the AIE Regulations applies to “environmental information” held by or for a “public authority”. These two terms have specific meanings defined by article 3(1) of the AIE 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.

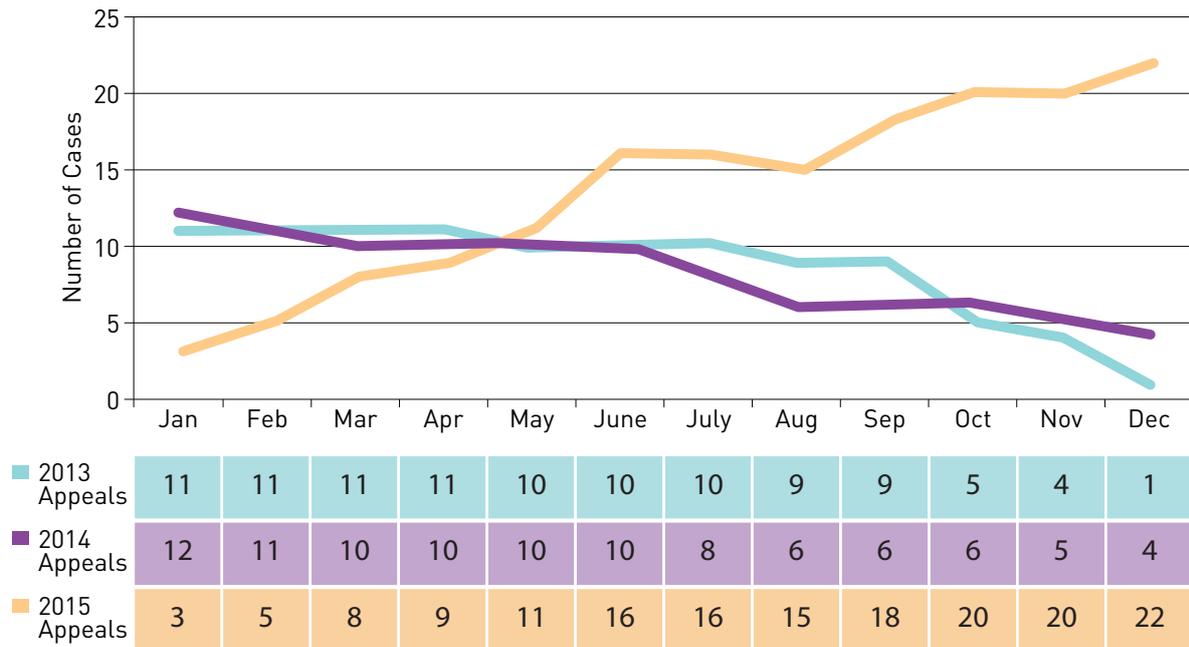
For further information on the operation of the AIE regime in Ireland, please visit my website at [www.ocei.ie](http://www.ocei.ie), which includes links to the previous Annual Reports of this office, the OCEI Procedures Manual, the website of the Department of the Environment, Community and Local Government, and Directive 2003/4/EC.

## Appeals and enquiries in 2015

At the beginning of 2015, the OCEI had 23 appeals on hand; 12 dating from 2014 and 11 from 2013. In 2015 the OCEI received 31 new appeals, which was an increase of 80% on the average number of appeals received in the five previous years. The OCEI closed 27 cases in 2015; 15 formal decisions were made, eight appeals were invalid, three cases were withdrawn, and one case was settled following engagement by an OCEI Investigator.

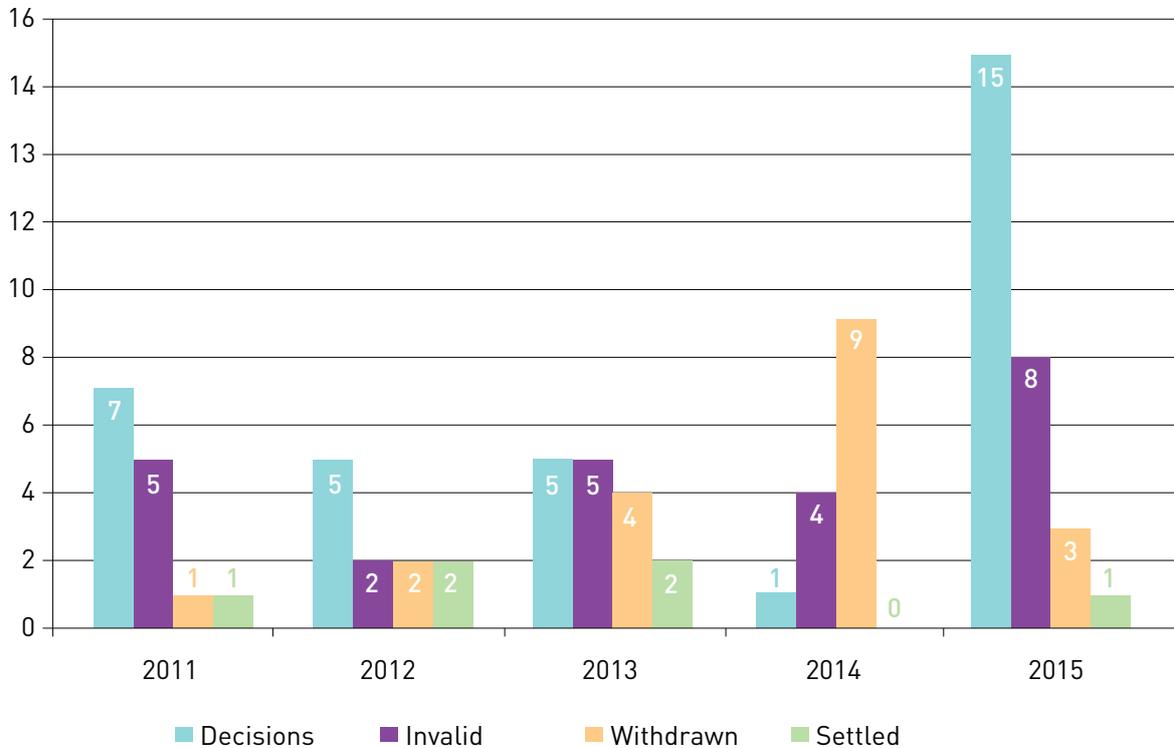
At the end of 2015, there were 27 valid appeals on hand – 22 from 2015, four from 2014 and one from 2013. At the time of writing, the outstanding 2013 and 2014 cases are being progressed by Investigators. My staff recorded 27 general enquiries about the AIE Regulations in 2015.

### Cases on hand during 2015



Following a concerted effort by my office in the second half of 2015, I issued 15 formal decisions on appeals. This is the largest number of decisions to be issued in a single year since the establishment of the OCEI. All of these decisions have been published on the OCEI website ([www.ocei.ie](http://www.ocei.ie)). Notwithstanding the improved turnover of appeals, significant challenges remain to process the increased volume of appeals we currently receive.

## Outcome of OCEI appeals by year



## Deemed refusals

The AIE Regulations include fixed time limits for decisions on AIE requests. A request is deemed to be refused when the public authority fails to issue a decision within the relevant time limit specified in the Regulations (usually one month).

In 2015, my office recorded deemed refusals concerning five public authorities that had not responded to requests within the time limits provided for in the Regulations. These public authorities were: ESB Networks Limited, the Department of the Environment, Community and Local Government, Dublin City Council, the Marine Institute, and the Commission for Energy Regulation.

## Article 12(6) of the AIE Regulations

Article 12(6) of the AIE Regulations 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 2015.

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## 2015 Court Proceedings

### NAMA v Commissioner for Environmental Information [2015] IESC 51

In June of 2015, the Supreme Court delivered its judgment in the case of National Asset Management Agency -v- the Commissioner for Environmental Information [2015] IESC 51. The Court found that NAMA is a public authority for the purposes of the AIE Regulations, but for different reasons than those relied upon by my office in reaching the same conclusion. The Court found that NAMA qualified as a public authority under the second category of the public authority definition, as a legal person performing public administrative functions.

In determining that NAMA was captured by the public authority definition, the Court had the benefit of the judgment of the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12), which had not been available to my predecessor at the time of her decision. In light of the *Fish Legal* judgment, the Supreme Court was satisfied that NAMA is indeed a public authority exercising public administrative functions on the basis that, although it is obliged to act commercially, it is vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

The Court also endorsed a purposive approach to interpreting the AIE Regulations. Judge O'Donnell explained that, in interpreting the Regulations, it is not sufficient to have regard to national law and, in particular, the normal principles of statutory interpretation in Irish law. The Regulations must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the Aarhus Convention) and, as a matter of constitutional law, ought not to go further, but not fall short of, the terms of the Directive. In interpreting the AIE Regulations, therefore, it is necessary to consider exactly what the Directive does and means, which may also mean interpreting the provisions of the Aarhus Convention.

### Friends of the Irish Environment Limited -v- Commissioner for Environmental Information 2014/726 JR

In 2015, a judicial review taken by Friends of the Irish Environment Limited (2014/726 JR) was concluded by settlement. This judicial review was initiated against my office in December 2014, and concerned delays in processing an appeal.

### Minch -v- Commissioner for Environmental Information [2016] IEHC 91

Following a hearing in 2015, the High Court delivered its judgment in the case of *Minch -v- Commissioner for Environmental Information* 2015/50 MCA on 16 February 2016. I note that the Court found in favour of the appellant, and I will address the matter in my Annual Report for 2016.

## Issues arising & other matters of interest

### Resources

In previous years, I have been supported in my role as Commissioner for Environmental Information by the staff of the OIC, without any specific funding allocation from the State. In 2014, I made a successful budget submission to the Department of Public Expenditure and Reform for increased resources to meet the operational needs of the OCEI. Following an open recruitment process, two additional Investigators were appointed in June 2015 to work specifically on OCEI appeals. This represents a significant improvement in the resourcing of the office, and has contributed to improved turnaround times for appeals.

### Increase in number of appeals to OCEI

The European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 reduced the fee for making an appeal to my office from €150 to €50. A lower rate of €15 applies to holders of medical cards and their dependents. Both my predecessor and I believed that the previous appeal fee of €150 discouraged applicants from initiating AIE appeals. This view is substantiated by the significant increase in the number of appeals since the reduction in the fee.

The consequential increase in the level of appeals to the OCEI has complicated efforts to eliminate the existing backlog of cases. As an office, we hope to improve our responsiveness and refine our practices in 2016. Notwithstanding this, AIE is a complex and evolving subject, and appeals generally involve detailed legal and factual disputes that cannot be resolved simply.

### Fees for AIE requests

Article 15(1) of the AIE Regulations provides that a public authority may “charge a fee when it makes available environmental information in accordance with the Regulations...provided that such fee shall be reasonable having regard to the Directive.”

In a decision of 6 October 2015 in *East Sussex County Council v Information Commissioner* (case C-71/14), the Court of Justice of the European Union addressed the question of what is a reasonable fee under the equivalent United Kingdom Regulations. The Court held that the charge for supplying a particular type of environmental information may not include any part of the cost of maintaining a database used for that purpose by the public authority, but may include the overheads attributable to the time spent by the staff of the public authority on answering individual requests for information, properly taken into account in fixing the charge, provided that the total amount of the charge does not exceed a reasonable amount. I note that this judgment may have implications for the OCEI approach in relation to fees, as stated previously in decisions CEI/07/0006 and CEI/11/0007.

## Contacts with the Department of the Environment, Community and Local Government

My office continues to liaise with the Department of the Environment, Community and Local Government in developing guidance and regulations that accurately reflect the purpose of the Aarhus Convention. In particular, I have stressed to the Department that my office is anxious to provide clarification and feedback based on our experience of implementing the AIE Regulations if and when it is considering any amendments to the Regulations.

## Website updates

2015 saw updates to the OCEI website, available at [www.ocei.ie](http://www.ocei.ie). A new search function has been implemented, available at <http://www.ocei.gov.ie/en/Decisions/Decision-Search/>. This allows interested parties to search previous OCEI decisions by reference to individual articles of the AIE Regulations. The OCEI has also adopted the practice of placing links to PDF versions of decisions at the top of each new decision webpage.

## Procedures manual

In October 2015, I published the [OCEI Procedures Manual](http://www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/Procedures-Manual.html) for the first time, which is available online at [www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/Procedures-Manual.html](http://www.ocei.gov.ie/en/About-Us/Policies-and-Strategies/Procedures-Manual.html). This manual is a comprehensive account of internal OCEI practices in carrying out appeals, and will be of guidance to appellants and public authorities interacting with the office.

## Events attended

Throughout 2015, my staff and I attended conferences and training events relevant to the work of the OCEI. In June 2015, a Senior Investigator participated in a University College Cork Workshop on Access to Information on the Environment. A representative from the OCEI attended the UCC Conference on Environmental Courts, Enforcement, Judicial Review & Appeals. On 13 October 2015, I addressed the Irish Environmental Law Association on the work of the OCEI. My presentation is available online at <http://www.ocei.gov.ie/en/News/Recent-Developments.html>. In November, an OCEI Investigator made a well received presentation at the annual Department of the Environment, Community and Local Government AIE training event held in Athlone. In December 2015, an OCEI Investigator made a presentation to the 4th Meeting of the UNECE Task Force on Access to Environmental Information, held in Geneva.

## Significant OCEI Decisions in 2015

### Decisions on validity of requests

Article 6(1) of the AIE Regulations sets out five requirements for applicants making an AIE request. Article 11(5)(c) provides that I have jurisdiction to carry out a review where a request has “otherwise not been dealt with in accordance with Article 3, 4, or 5” of Directive 2003/4/EC. In the case of Wind Noise Info and Wexford County Council - CEI/14/0017 I interpreted article 11(5)(c) as meaning that I have jurisdiction to carry out a review where a public authority finds that a request is invalid under article 6.

Article 6(1)(d) requires an applicant to state “in terms that are as specific as possible” the environmental information which is the subject of a request. In the related cases of Mr MK and Environmental Protection Agency - CEI/13/0017 and Mr MK and the Environmental Protection Agency - CEI/13/0007 I examined two requests which were made in the form of lengthy submissions, but which did not clearly specify the environmental information which was sought. In the circumstances, I found that both requests failed to meet the requirement of article 6(1)(d), and were invalid.

### Decisions on the definition of “environmental information”

Article 3(1) of the AIE Regulations defines “environmental information” for the purposes of the Regulations. The definition encompasses six different types of environmental information. In the case of Mr Jim Redmond and Coillte Teoranta - CEI/14/0011 I considered whether certain information on the transfer of an interest in land held by Coillte to a third party fell within the definition of environmental information. This appeal considered whether the information requested was information on a measure likely to affect the elements of the environment, pursuant to paragraph (c) of the definition of environmental information. As the transfer of the interest in land did not of itself reflect a possible change of use of the forest, and there was no indication that the parties had a future change of use in mind at the time of sale, I found that the information was not environmental information. This decision is the subject of an ongoing judicial review in the High Court, initiated by the appellant in January 2016 (Redmond & Anor -v- Commissioner for Environmental Information 2016/27 JR).

In the case of Mr Gavin Sheridan and An Garda Síochána - CEI/13/0013 I found that An Garda Síochána was justified in refusing access to information on the usage of Garda aircraft, information on a contract for the provision on fuel, and information on an electricity bill for a particular Garda station on the ground that the requested information was not environmental information within the meaning of the Regulations. While I accepted that helicopter and other aircraft usage by An Garda Síochána is an activity for the purposes of paragraph (c) of the definition, I found that the connection between the requested information and any impact on the environment from air travel is too remote, and subject to too many variables, to qualify as environmental information.

I found that the connection between a contract for fuel provision and the environment is too minimal where, as here, the requested contract does not provide meaningful information on such matters as the amount of fuel used by the public authority. I likewise found that the connection between a monthly electricity bill for a particular set of premises of a public authority and an environmental impact is too minimal for the requested information to fall within the ambit of the environmental information definition.

In Mr Andrew Duncan and Sustainable Energy Authority of Ireland - CEI/13/0005 I found that a study on the viability and cost-benefit analysis for Ireland exporting renewable electricity did not contain environmental information under paragraph (e) of the definition. This finding was based on an assessment of the content of the study, which revealed that although the study was clearly an economic analysis used in the framework of a measure or activity, this measure referred to a hypothetical scenario, which could not be regarded as affecting or likely to affect relevant elements or factors, as required by the definition.

In Mr Oliver Cassidy and Coillte Teoranta - CEI/13/0008 – I considered whether information in maps indicating locations of test surveys was environmental information. I found that the decision by Coillte to permit test surveys in connection with wind turbines amounted to the adoption of a “measure” under paragraph (c) of the definition, and that works on test surveys were “activities” within the meaning of the same paragraph. Since the maps showed the lands to which the measure related and where the activities took place, I was satisfied that the maps contained environmental information in the meaning of Article 3(1) of the Regulations.

### Decisions on the definition of “public authority”

Article 3(1) of the AIE Regulations defines “public authority” for the purposes of the Regulations. An entity may be a “public authority” under any one of the three categories set out in paragraphs (a) to (c) of the definition: as government or public administration; as an entity empowered by the State to act on its behalf; or as an entity controlled by the State.

In Dr Edward Fahy and Irish Fish Producers’ Organisation Limited - CEI/15/0011 I considered an appeal made on the basis that the Irish Fish Producers’ Organisation (IFPO) was a public authority under paragraphs (b) and (c) of the definition. I applied the interpretative criteria provided by the Court of Justice of the European Union (CJEU) in *Fish Legal and Emily Shirley v Information Commissioner and Others* (C-279/12). In that judgment, the CJEU created two tests for deciding whether a body is a public authority - the ‘special powers’ test which applies to paragraph (b), and a ‘control’ test which applies to paragraph (c). I examined the legal powers vested in the IFPO under European Union law, and found that they did not meet the special powers test. I also found that the control exerted by state authorities over the IFPO was not sufficient in this case to support a finding that the IFPO was a public authority under paragraph (c).

## Decisions on the exceptions to disclosure

The Regulations provide that access to environmental information may be refused in certain circumstances, such as where the information would adversely affect the confidentiality of personal or commercial information or the interests of third parties. Although some of the exceptions are described as mandatory, in fact, the public interest served by disclosure must be considered in every case.

In Marine Terminals Limited and Dublin City Council - CEI/14/0013 an appellant sought to access the Council's planning enforcement files, including details of individuals who had made planning complaints concerning the appellant itself. Having first found that article 10(1) did not apply to the information, I considered the exceptions under Articles 8(a)(i) and (ii) and found that, in the circumstances, release of planning complaints would adversely affect the interests and the confidentiality of personal information of the individuals involved.

In An Taisce and Bord na Móna - CEI/14/0002 the appellant requested access to information on compliance with the EIA Directive in relation to peat extraction. Article 8(a)(iv) of the Regulations provides that a public authority shall not make available environmental information where disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities. I examined the information held by Bord na Móna and found that legal advice privilege and litigation privilege applied, and so the information was covered by the exception under Article 8(a)(iv). I also found that the exception under article 9(1)(b), which provides for refusal of a request where disclosure would adversely affect the course of justice, applied to certain records prepared by Bord na Móna in contemplation of an infringement procedure taken by the European Commission.

In Mr Lar McKenna and ESB Networks - CEI/13/0010 the appellant sought an extensive range of property-related information from ESB Networks on thermal and hydro-electric power generation schemes. In the circumstances, I found that article 9(2)(a) applied, as the request was manifestly unreasonable having regard to the volume of information sought, therefore ESB Networks had a discretion to refuse the request. I noted that I did not consider it to be an appropriate use of the limited resources of this office to liaise with parties to bring the volume of material requested down to a reasonable level.

In Mr. Tony Lowes and the Department of Agriculture, Food and the Marine - CEI/14/0007 I addressed the question of whether the Department was justified in refusing the appellant's request for access to preliminary reports and related documentation regarding storm damage to fish farms at Gearhies, Bantry Bay on 1 February 2014 which resulted in the loss of 230,000 farmed fish. The Department's overall examination and deliberative process with respect to the matter were ongoing at the time of the appeal.

The Department claimed that the requested information should be refused on the basis that it concerned material in the course of completion and also internal communications under Articles 9(2)(c) and (d) of the AIE Regulations.

In my decision, I did not accept that the connection between the requested information and an ongoing, seemingly indefinite, deliberative process provided an adequate basis for refusal under Article 9(2)(c) of the Regulations. Having regard to the nature and contents of the requested reports, I found that they did not comprise material in the course of completion or unfinished documents for the purposes of Article 9(2)(c). In any event, I weighed the public interest served by disclosure against the interest served by refusal, as required by articles 10(3) and 10(4). In this regard, I noted that the Aarhus Convention recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. I also recognised a strong public interest in openness and accountability in relation to how the Department carried out its functions under the relevant legislation governing the aquaculture industry. I balanced these considerations against the public interest in maintaining the integrity of the regulatory process, having regard to the specific information at issue and the submissions by the Department. On balance, I found that the public interest in disclosure outweighed the interest served by refusal.

In Mr Oliver Cassidy and Coillte Teoranta - CEI/13/0008 – I found that Coillte could not rely on the ground for refusal under article 9(1)(c), which applies where disclosure would adversely affect commercial or industrial confidentiality, as the relevant third party had taken steps to publicise the same information. I also considered the ground for refusal under Article 8(a) (iv), which provides that, subject to the public interest test, a request must be refused where disclosure would adversely affect the confidentiality of the proceedings of public authorities. The AIE Regulations do not define the word “proceedings” in this context, and so I gave the word its ordinary literal meaning. In the circumstances, I was not satisfied that details of an agreement with a third party fell within the meaning of article 8(a)(iv).

## Decisions on emissions into the environment under Article 10(1) of the AIE Regulations

Article 10(1) of the AIE Regulations excludes the application of exceptions under articles 8 and 9 (1)(c) where a request “relates to information on emissions into the environment.”

In Marine Terminals Limited and Dublin City Council - CEI/14/0013 the appellant argued that certain grounds for refusal could not be applied because the complaints related to emissions of noise into the environment. Applying the test established by the General Court of the CJEU in Stichting Greenpeace Nederland-v-Pesticide Action Network Europe (T-545/11), I found that the information sought did not constitute information on emissions, because the information itself did not relate to emissions into the environment in a sufficiently direct manner.

I also considered the question of emissions under article 10(1) in Friends of the Irish Environment and the Department of Agriculture, Food and the Marine - CEI/13/0001. In this case, I found that article 9(1)(c) could not be relied upon as a ground for refusal because the

request related to emissions into the environment in the form of chemical therapeutants released at a marine aquaculture site.



**Commissioner for Environmental Information overturns DAFM decision to withhold salmon farm accident report**

Inshore Ireland - 08/09/2015



**Freedom of information requests double in some departments after fee abolition**

Irish Times - 11/05/2015