

DRAFT FINDINGS AND RECOMMENDATIONS WITH REGARD TO  
COMMUNICATION ACCC/C/2014/112 AND FINDINGS AND  
RECOMMENDATIONS WITH REGARD TO COMMUNICATION  
ACCC/C/2016/141 CONCERNING COMPLIANCE BY IRELAND  
OCEI COMMENTS

## INTRODUCTION

1. The Office of the Commissioner for Environmental Information (“OCEI”) welcomes the opportunity to make a submission to the Department of the Environment, Climate and Communications (the “Department”) in response to
  - (i) the Draft Findings and Recommendations of the Aarhus Compliance Committee (the “Committee”) with regard to Communication ACCC/C/2014/112; and
  - (ii) the Findings and Recommendations of the Committee with regard to Communication ACCC/C/2016/141,

both of which concern Ireland’s compliance with the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “Aarhus Convention”).

2. The OCEI notes the findings contained in both of the above Communications, which can be summarised as follows:

**(i) Article 4 – Access to Environmental Information**

- ACCC/C/2014/112 finds that, by refusing Mr Duncan’s request for the cost-benefit study prepared for the renewable energy export programme on the basis that the study was not “environmental information”, Ireland failed to comply with article 4(1) in conjunction with article 2(3) of the Convention. This finding relates to the decision of the Commissioner in Case [CEI/13/0005](#), which issued on 11 December 2015.

**(ii) Article 9 – Access to Justice**

*Article 9(4) – Timeliness of Review*

- ACCC/C/2016/141 finds that by failing to put in place measures to ensure that the OCEI and the courts decide appeals regarding environmental information requests in a timely manner, Ireland fails to comply with the requirement in article 9 (4) of the Convention to ensure timely procedures for the review of environmental information requests.
- ACCC/C/2014/112 reiterates the above finding with regard to the OCEI and finds that by not putting in place measures to ensure that the OCEI decide appeals regarding environmental information requests in a timely manner, Ireland fails to comply with article 9 (4) of the Convention.
- ACCC/C/2016/141 also finds that by maintaining a system whereby courts may rule that information requests fall within the scope of the AIE Regulations

without issuing any directions for their adequate and effective resolution thereafter, Ireland fails to comply with article 9(4) of the Convention.

3. The OCEI takes the draft findings and recommendations of the ACCC very seriously and is committed to taking all relevant steps to improve the efficiency of its practices and procedures. It is also the case that there are some areas in which greater cooperation from external stakeholders, particularly public authorities themselves, is required in order to achieve the efficiencies required.
4. This submission has been drafted with a view to assisting the Department in drafting its response to the findings of the Committee. It sets out some of the developments that have occurred since the events giving rise to the complaints before the Committee, which may allay the concerns of the Committee to a certain extent. It also outlines a number of issues which the OCEI considers to have contributed to the delay in the resolution of AIE appeals, in the hope that these can be addressed as thoroughly and efficiently as possible. The OCEI also hopes that the points raised herein will inform the Department's approach to its responsibilities under the AIE regime regarding steps that can be taken in addition to the necessary legislative review.

## EXECUTIVE SUMMARY

5. As outlined in further detail below:
  - (i) The OCEI notes that recent decisions of the Superior Courts in Ireland have provided greater clarity in terms of the interpretation and scope of "environmental information" and have made it clear that the concept is to be interpreted widely. The rationale which formed the basis of the decision in [CEI/13/0005](#) has been revised and adapted in light of clearer guidance from the Courts, which has been welcomed and followed by the Commissioner.
  - (ii) The OCEI has no objection to the introduction of a requirement on the part of the Commissioner to make decisions on appeals in a timely manner. In determining what constitutes "timeliness", the OCEI considers that regard should be had to the complexity of the AIE regime and that any legislative timeframe should retain sufficient flexibility for the resolution of more complex cases.
  - (iii) The OCEI considers that the introduction of any such timeframe must be accompanied by other measures (both regulatory and non-regulatory) if it is to contribute to improvements in the timely resolution of appeals.
  - (iv) The OCEI has made detailed submissions to the Department on the proposed review of the AIE Regulations, the adoption of which, in the OCEI's view, would contribute to more timely procedures for the review of environmental information requests.
  - (v) The OCEI considers that a number of non-regulatory measures, including increased training for public authorities and changes to the resourcing of the OCEI, could also contribute to a more efficient appeals process.
  - (vi) Finally, the OCEI notes, with regard to the Committee's findings on the issuance of directions by the courts for the adequate and effective resolution of information requests following a decision that such a request falls within the scope of the AIE

Regulations, that the policy of the OCEI is to give priority to appeals which are remitted from the courts.

#### ARTICLE 4 – ACCESS TO ENVIRONMENTAL INFORMATION

6. The application and interpretation of the definition of “environmental information” has given rise to significant challenges for the OCEI. The Commissioner had repeatedly flagged the issues arising from the lack of clarity on the scope of the definition of “environmental information” and the need for further guidance on the matter. Since the decision in CEI/13/0005, the OCEI has had the benefit of significant guidance from the Superior Courts in Ireland on the interpretation and scope of the definition of “environmental information” contained in the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the “AIE Regulations”). The decisions, in cases such as *Minch v the Commissioner for Environmental Information* [2017] IECA 233, *Redmond v the Commissioner for Environmental Information* [2020] IECA 83, *Electricity Supply Board v the Commissioner for Environmental Information* [2020] IEHC 190 and *Right to Know CLG v the Commissioner for Environmental Information and Radio Teilifis Éireann* [2021] IEHC 353, have provided greater clarity in terms of the interpretation and scope of “environmental information” and have made it clear that the concept is to be interpreted widely.
7. The application of such guidance, and the adoption of a broader approach to the interpretation of “environmental information” by OCEI can be seen in many of the Commissioner’s recent decisions including [OCE-93480-F7W4P3](#) *Mr D and the Department of Housing, Planning and Local Government*, [OCE-93420-N1Y6Y4](#) *Ms L and the Department of Housing, Planning and Local Government*, and [OCE-101846-L2D7P1](#) *Ken Foxe/Right to Know and the Department of Environment, Climate and Communications*. As such, the rationale which formed the basis of the decision in [CEI/13/0005](#) has been revised and adapted in light of clearer guidance from the Courts, which has been welcomed and followed by the Commissioner.
8. Where cases of this nature are remitted to the OCEI for fresh consideration, it is the OCEI’s policy to prioritise such cases in order to minimise any further delay.
9. As we set out in more detail below, the OCEI also considers that the amendment of Article 5 of the AIE Regulations to reflect a more comprehensive duty to disseminate environmental information would contribute to greater levels of compliance with Article 4 of the Aarhus Convention.

#### ARTICLE 9 – ACCESS TO JUSTICE

10. The OCEI recognises that the current timeframe for the resolution of appeals is unsatisfactory. The Commissioner has noted this in each of the OCEI’s Annual Reports over the past number of years.
11. It continues to be the case that AIE appeals are often difficult and time-consuming, when compared with FOI cases. This is due to factors such as the volume of records involved; the complexity of the subject matter; a lack of clarity on how the law should be interpreted;

delays in receipt of information from the parties; strongly contested disputes on threshold jurisdictional issues; and the frequent requirement to consult third parties.

12. Progress has been made in recent years. Unfortunately, the average timeframe for the resolution of appeals increased in 2020. This was due to a number of factors, not least because many of the cases falling for consideration in 2020 were of a complex nature, as well as the diversion of the limited resources of the OCEI to dealing with court challenges throughout the year. As outlined above, the recent guidance obtained from decisions of the Superior Courts is welcome. However, the clarity gained through judgements of the superior courts comes at a cost to the progress of cases on hand in the OCEI. Such strains on OCEI resources must be balanced in order for the work of the OCEI to contribute meaningfully to the objectives of the Aarhus Convention. As set out in our detailed response to the public consultation on the review of the AIE Regulations, the OCEI is hopeful that such meaningful contribution will be achieved through clearer legislative measure, as well as the resolution of further appeals by the Superior Courts.
13. While the OCEI has no objection to the introduction of a requirement on the part of the Commissioner to make decisions on appeals in a timely manner, it considers that a mirroring of the requirements contained in the Freedom of Information Act 2014 would not be realistic. As stated above, consideration of appeals under the AIE regime is often more time consuming. While any such time limit would of course be treated by the OCEI as an indication of the legislature's intentions with regard to the resolution of AIE appeals, flexibility is required in relation to complex investigations, which may take longer than usual. For example, cases raising novel legal issues or involving large amounts of complex information will inevitably take longer than an average case.
14. The OCEI also notes the introduction of any such timeframe must be accompanied by other measures if it is to contribute to improvements in the timely resolution of appeals. These measures include both regulatory and non-regulatory measures, as outlined in further detail below.

## REGULATORY MEASURES

15. The OCEI has made detailed submissions to the Department with regard to the regulatory measures it considers would contribute to a more efficient review of environmental information requests and a more timely resolution of appeals. While, we do not propose to repeat those submissions in detail, it seems appropriate to briefly reiterate some points, which are relevant to the draft findings in ACCC/C/2014/112 and the findings in ACCC/C/2016/141:
  - (i) We submitted that achieving timeliness of review is the highest priority, both in terms of urgency and importance and proposed a package of measures to achieve this. This should include provisions designed to ensure that public authorities give *adequate reasons for their decisions*, to *improve public authority engagement* with the OCEI, to *clarify who is a public authority*, to provide for a *duty of timeliness* for resolution of appeals to the OCEI, and to *reduce OCEI participation in court appeals*.

- (ii) We also noted that effective investigation and enforcement is crucial to the smooth and timely operation of the AIE regime and proposed empowering the Commissioner to delegate to staff and broadening the Commissioner's powers to obtain information from public authorities.
- (iii) From a fair procedures perspective, we suggested measures to ensure appropriate involvement of third parties, to clarify matters that constitute a refusal of access to information and to clarify the procedures of the Commissioner on appeal.
- (iv) We also noted that lack of clarity and inconsistency in the Regulations cause confusion for both applicants and public authorities, resulting in poor decision-making and unnecessary appeals to the Commissioner. In order to ensure greater clarity and compliance with the AIE Directive, thereby maximising the resources of public authorities and the OCEI, we proposed providing for an express duty to disseminate environmental information, reconsidering the exception in article 9(2)(a) and reviewing the Regulations to ensure compliance with the GDPR.
- (v) Finally, we recommended greater alignment of the AIE and FOI regimes, as is the case in some other jurisdictions, on the basis that this would provide easier access to information for those using the AIE regime and simplify the processing of requests by public authorities and reviews by the OCEI. In that regard, the OCEI welcomes the recent announcement of the Minister for Public Expenditure & Reform with regard to the proposed review of the Freedom of Information Act 2014 and hopes that an opportunity will be taken to seek greater alignment between the two regimes as part of the concurrent review of their respective legal frameworks.

16. The OCEI also notes that appeals against a decision of the Commissioner are subject to the "special costs rules" under the Environment (Miscellaneous Provisions) Act 2011, as amended. These rules serve to limit the financial risk to parties bringing appeals against a decision of the Commissioner, where costs can only be awarded against a party in limited circumstances. The OCEI recognises the importance of rules limiting the costs of litigation, particularly where such rules facilitate the access to justice mechanisms envisaged by the Convention. However, as noted in our submissions on the review of the AIE Regulations, the application of those rules in appeals under the AIE Regulations results in costs being awarded against the Commissioner (a quasi-judicial body with no vested interest in the outcome of the case), rather than against the public authority (the decision-maker with a vested interest in the outcome of the case). In such cases, the defence of appeals by the Commissioner results in the resources of the Commissioner's small office being used to defend a decision based on a particular set of facts. This has significant implications for the Office from a costs perspective, as well as a knock on effect on the resolution of appeals, give the diversion of staff focus to deal with legal submissions and preparation for appeals before the Courts.

17. As such, the Commissioner would welcome a review of the current rules in order to facilitate access to justice while providing a safeguard against significant draws on the resources of the OCEI and other public bodies subject to the special costs rules. We strongly believe that, in relation to the majority of appeals by a requester or another person affected by the decision, the staffing and financial resources of the OCEI would be better used progressing

appeals under article 12 of the AIE Regulations, rather than defending appeals to the High Court under article 13 (except in cases where an appeal is brought by a public authority). We have suggested in this regard, in our submissions on the review of the AIE Regulations, that where an appeal is brought by a requester or other person affected by the decision: (a) the public authority shall be the respondent in the appeal, with the Commissioner as a notice party; and (b) where the Commissioner does not participate in the appeal, the special costs rules in the Environment (Miscellaneous Provisions) Act 2011 should not apply against the Commissioner.

18. The OCEI also considers that the amendment of Article 5 of the AIE Regulations to more directly transpose Article 7 of the AIE Directive would result in a decrease in appeals to the Commissioner. This would ensure that public authorities are under a duty to proactively publish environmental information, including at least the information referred to in Article 7(2) of the Directive. We believe that this would assist in ensuring that non-compliance with Article 4 of the Aarhus Convention, as found by the Committee, does not occur in the future. If an enforceable duty of proactive dissemination of environmental information were to be established, we believe that appeals to the Commissioner would decrease, and any appeals brought to the Office would be based on a restrictive application of the exceptions to access. We are of the view that this would greatly improve engagement with the AIE regime, in a manner that fosters the purposes of the Convention.
19. Finally, the OCEI notes that in other jurisdictions, such as the UK, appeals against decisions under the AIE regime are brought before administrative tribunals rather than the superior courts. Were such a system to be implemented in Ireland, it would have the potential to be more cost-effective and less resource-intensive than the current process. In his role as Information Commissioner, the Commissioner has called for the development of a tribunal to consider appeals brought under Freedom of Information legislation. If such a tribunal were to be formed, it would preferably also consider appeals brought against the Commissioner for Environmental Information. We note that the Law Reform Commission is considering the issue of creation of a single tribunal structure as part of its work on reform of non-court adjudicative bodies and appeals to courts.<sup>1</sup> While such an option is still in the very early stages of consideration, we would encourage the Department to consider carefully the benefit of providing for the inclusion of the AIE regime into any future administrative tribunal structure.

#### NON-REGULATORY MEASURES

20. The OCEI is of the view that a number of steps could be taken, distinct from and in addition to legislative amendments, to improve efficiency in the resolution of AIE requests, both at first instance and appeal stage. We believe that undertaking the following measures would demonstrate to the Committee Ireland's commitment to the letter and the spirit of the Convention.

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<sup>1</sup> <https://www.lawreform.ie/welcome/1-legal-system-and-public-law.378.html>

### *Training*

21. The OCEI participates in the annual AIE Training Event for AIE Officers organised by the Department, which is a well-organised and useful tool for communicating to public authorities their obligations under the AIE Regulations. The OCEI noted with concern the postponement of this event in 2020 and welcomed its return this year.
22. In its last session, the OCEI emphasised the importance of the role of public authorities in the AIE process and in particular, the need to provide reasons for refusals of requests for information made under the AIE Regulations. The failure to give adequate reasons for decisions is just one example of the reasons for delays in dealing with appeals in a timely manner. If adequate reasons were provided by the public authority at decision and internal review stage, it is our view that some appeals would not be brought at all. The OCEI's aim in participating in these events is to improve engagement from and cooperation with public authorities.
23. Notwithstanding such training, the OCEI continues to receive appeals based on deemed refusals from public authorities, or decisions of public authorities which do not provide any basis for refusal. The OCEI often sees decision that cite a provision of the AIE Regulations as a basis for refusal, with no explanation as to the basis on which this provision is deemed to apply and no evidence of consideration of the public interest balancing test mandated by article 10(4) of the Regulations. The OCEI will keep the situation under review and in the event of continued delays, will consider a change to its procedures to allow for annulling and remitting cases where the public authority has not provided adequate reasons for its decision.
24. However, in our view, the continuation of these issues as well as the pace of change in the case law concerning the AIE Regulations demonstrates the need for more sustained training and engagement with public authorities. The OCEI does not believe that an annual event is an appropriate level of engagement with public authorities, particularly given the complexity of the regime and the increased volume of appeals to the Commissioner. It is the OCEI's view that continuous oversight of public authorities regarding their compliance with their responsibilities under the AIE Regulations, as well as mechanisms for interventions in the event of sustained non-compliance should be adopted by the Department.

### *Resourcing*

25. It is important to note that demand for the services of the OCEI is increasing year on year. The Office has accepted as many appeals to date in 2021 as it did in the entire year in 2019, which was the highest level of appeals since the Office was established. When combined with the backlog of appeals which has arisen due to resource constraints and the need to deal with competing demands including High Court appeals of the Commissioner's decisions, the total number of appeals on hand in the OCEI is now at 81. At present, there are two investigators on the OCEI team, with a further two investigators expected to join the team by the end of July 2021, replacing two experienced investigators who left the Office earlier this year. It is vital that the OCEI is adequately resourced to tackle its backlog and increasing

caseload as efficiently as possible, while ensuring proper interpretation of the requirements of the AIE Regulations and maintaining fair procedures.

26. As noted above, working on AIE appeals involves dealing with a high volume of records and a complex subject matter and strongly contested disputes on matters of law. At present, OCEI Investigators are drawn from the resources of the Office of the Information Commissioner, making it more difficult to assess and address capacity issues across both offices where the need arises. The specialist knowledge required of OCEI investigators is different to that of OIC investigators, especially considering the need to assess elements of EU law, which are not a feature of FOI law. The OCEI considers that structures allowing for the appointment of standalone OCEI resources would contribute to efficiency in the resolution of its appeals. With increasing complexity and volume of cases, it is difficult to see how the OCEI can make the significant inroads on its backlog that are required, unless considerably more resources are dedicated to the Office. This cannot, however, come at a cost to the smooth running of the Office of the Information Commissioner. To this end, a full capacity review may be necessary within the Office of the Ombudsman to ensure that adequate provision can be made for the increasing demands of the OCEI.
27. The OCEI also notes that the current structures for the handling of appeals of the Commissioner's decisions under article 13 of the Regulations create further pressure on resources and impede our ability to carry out our primary function under article 12 of the Regulations. We refer to our suggestions at paragraph 16 above in this regard.

#### FURTHER OBSERVATIONS

28. The OCEI notes the finding of the Committee in ACCC/C/2016/141 with regard to the issuance of directions by the courts for the adequate and effective resolution of information requests following a decision that such a request falls within the scope of the AIE Regulations. While the OCEI cannot comment on court procedures, we would note that any case which is remitted to the OCEI following an appeal to the High Court on a point of law is prioritised for decision.

#### CONCLUSION

29. The OCEI is grateful for the opportunity to provide its comments on the Committee's draft findings on Communication ACCC/C/2014/112 and its findings on Communication ACCC/C/2016/141, particularly with regard to setting out the developments that have occurred since the complaints were first made to the Committee. We believe that, through the ongoing review of the AIE Regulations and the adoption of the OCEI's suggestions with regard to both regulatory and non-regulatory measures, the review mechanism under the AIE Regulations can be further strengthened so as to ensure a robust AIE regime that complies with Ireland's obligations under the Aarhus Convention.