



**Roinn Cumarsáide, Gníomhaithe
ar son na hAeráide & Comhshaoil**
Department of Communications,
Climate Action & Environment

UNITED NATIONS
ECONOMIC COMMISSION FOR EUROPE

Ms. Fiona Marshall
Secretary to the Aarhus Convention Compliance Committee
Palais des Nations, Room 429-4
CH-1211 GENEVA 10
Switzerland

24 October 2018

Your ref: ACCC/C/2016/141

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with the provisions of the Convention on access to information on the environment, Right to Know case (ACCC/C/2016/141)

Dear Ms Marshall

We refer to previous correspondence in relation to the above Communication, which is due to be considered by the Aarhus Convention Compliance Committee (*'the Committee'*) at its 62nd meeting in Geneva on 8 November 2018. We are in receipt of the correspondence sent to the Committee by FP Logue Solicitors, on behalf of the Communicant, on 9 October 2018 and believe it would be

helpful to put additional information before the Committee to ensure that it has available to it all relevant evidence. This supplemental submission should be read in conjunction with the original response to the Communication made by Ireland in May 2017 (*'Ireland's Response'*).

1. Statistics on number of AIE Requests Received by Public Authorities

In Ireland's Response of May 2017, it provided information relating to the number of AIE requests received by public authorities between 2013 and 2015 along with an indication on how they had been dealt with. Ireland takes this opportunity to update this table to provide the data relating to 2016 and 2017

Year	Requests Received	Requests Granted	Requests Part Granted	Request Refused	Internal Reviews	Appeals to OCEI	Appeals to High Court
2013	374	192	60	91	40	7	0
2014	608	325	97	124	61	13	0
2015	658	322	94	174	57	23	1
2016	670	338	104	170	96	52	2
2017	606	276	128	141	91	52	2

The 2017 statistics collected by DCCAE show that there were 606 requests made for information under the AIE regulations to Public Authorities.

Of these 606 requests we have confirmed with the Public Authorities that there was a total of 35¹ deemed refusals in total, with 32 of those being deemed refusals after one month and 3 being deemed refusals after two months. This is 5.7% of the overall requests received by Public Authorities in 2017.

¹ The OCEI records 39 cases which were dealt with as "deemed refusals" in 2017. Ireland submits that this discrepancy arises from the fact that, in some instances, a public authority may issue a decision up to a week after the deadline (after consulting with the particular applicant). In this instance, the public authority does not count the decision as a deemed refusal. However, if the request is appealed to the OCEI, that office counts it as a deemed refusal.

Deemed Refusals after one month	Deemed Refusals after second month	Total Deemed Refusals
32	3	35

Although a request from the Communicant for information on withdrawals had initially been refused on the basis that it was not environmental information, the information was, in fact, provided on 9 October 2018. The OCEI has also confirmed his intention to publish statistics on deemed withdrawals in his annual report in the future.

2. Training of Public Authorities

As noted in Ireland's Response, the Department of Communications, Climate Action and Environment has arranged annual training days for Public Authorities about the operation of the AIE Regulations. In addition to the training days held in September 2014, November 2015 and October 2016, a further training event was held in March 2018. Over 100 people have attended each of these training events. The March 2018 training event was attended by the following participants:

2018	
Number of Attendees	Public Authority
46	From 20 County/City Councils
54	From 9 Government Departments
40	From 17 other Public Authorities

3. Resources assigned to the Office of the Commissioner for Environmental Information

In Ireland's Response, we outlined the additional resources that had been allocated to the Office of the Commissioner for Environmental Information (*'the OCEI'*) to deal with appeals lodged under the

European Communities (Access to Information on the Environment) Regulations 2007 – 2018 (*‘the AIE Regulations’*). Ireland can now provide a further update on those resources. In 2017 an additional investigator, recruited at a senior level from an open Assistant Principal Officer competition run by the Public Appointments Service, was assigned to the OCEI at the end of 2017, which brought the number of OCEI investigators to three. However, due to staff movements, the OCEI only had two investigators for much of 2017 and lost a very experienced investigator in late 2017.

In June 2018 a further additional investigator was re-allocated from the Office of the Information Commissioner to the OCEI on a part-time basis; bringing the number of OCEI investigators to four.

4. Processing of Appeals by the Office of the Information Commissioner

The Communication places heavy emphasis on the manner in which appeals are processed by the OCEI and, in particular, the time taken to process those appeals. In Ireland’s Response, the number of appeals processed by the OCEI was explained. The current position is explained herein and is reflected in the 2016 and 2017 Annual Reports published by the OCEI (*‘Appendix 1’*). At the start of 2017, the OCEI had 39 appeals on hand; 36 from 2016 and three from 2015. In 2017, the OCEI received 52 new appeals from 16 appellants. This is the same as the number of new appeals that were received in 2016. In addition to the 52 new appeals received in 2017, one case was remitted to the OCEI by the Court of Appeal (see *Minch -v- Commissioner for Environmental Information & Anor* [2017] IECA 223).

Cases “on hand”

At the end of 2017, the OCEI had 41 valid appeals on hand. Of those 41 appeals, 38 were received in 2017, two in 2016 and the final appeal was the appeal remitted by the Court of Appeal in *Minch*. OCEI had 41 cases on hand as of 31 December 2017.

As at 30 September 2018, the OCEI had 44 cases on hand. OCEI received 34 new cases from 1 January 2018 to 30 September 2018 (the OCEI received 35 new cases for the same period in 2017) and closed 31 cases for the same period (the OCEI closed 39 cases in the same period in 2017).

Appeals

In 2017, the OCEI received 52 new appeals from 16 requestors i.e. the same persons have multiple appeals with the OCEI. The 34 new appeals received in 2018 were from 21 requestors. Only 8 of the 21 requestors were appealing to the Commissioner for the first time; 13 of the requestors had made appeals to the OCEI in previous years.

Decisions

The Commissioner made 35 formal decisions in 2017 which is more than in any other year since the establishment of the OCEI in 2007. As at 30 September 2018, the Commissioner has made 21 formal decisions in 2018.

The process by which the OCEI considers an appeal is explained on their website under the heading '*How We Do It*' (*Appendix 2*). The OCEI undertakes a three stage process comprised of validation, investigation and review. In addition, the OCEI has published a "Procedures Manual for Appeals Under Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 – 2014 (October 2015)" (*Appendix 3*). The procedures adopted by the Commissioner are designed to ensure a resolution of appeals without undue delay in a manner consistent with affording fair procedures to all parties.

As stated in the 2017 Annual Report, the average number of days taken for a case to be closed in 2017 has been reduced by 54 days from 316 days in 2016 to 262 days in 2017.

As at 30 September 2018, the average number of days taken for a case to be closed between 1 January 2018 and 30 September 2018 was 235 days.

For a case to be closed, all of the stages outlined above (validation, investigation and review) must be completed and this process includes observance of the principle that adequate time must be given to all parties involved to respond within each stage. The procedures used by the OCEI are designed to ensure that all parties are afforded appropriate fair procedures while also permitting decisions to be reached without undue delay. As can be seen from the Procedures Manual, the OCEI has adopted careful procedures that allow appeals to be assessed to determine whether they can be resolved or whether they require further investigation. Where matters proceed to an

investigation, it may be necessary for an Investigator to revert to parties on different issues. Certain appeals raise complex issues of domestic and European law which require engagement with the relevant parties and careful assessment by the OCEI. In certain instances, it may be necessary to notify Third Parties and permit them to make submissions on an appeal.

5. Number of appeals by Right to Know in 2017

In light of the contents of the Communication, Ireland considers it appropriate to outline the number of appeals lodged by the Communicant in 2017, the details of which are fully set out in a spreadsheet prepared by the OCEI (*Appendix 4*).

In 2017, 11 appeals were lodged with the OCEI by Right to Know. A further 3 were made by a named individual using a Right to Know email address, bringing the total number of appeals to 14. This amounts to 27% of the total appeals lodged with the OCEI.

The outcome in the 14 appeals in 2017 was:

- In 3 appeals the public authority's decision was affirmed (upheld).
- In 2 appeals the public authority's decision was annulled.
- In 1 appeal the public authority's decision was varied.
- In 1 appeal, the appeal was deemed withdrawn as the information in question was released in full by the public authority.
- 2 appeals were voluntarily withdrawn by Right to Know.
- 5 appeals have not been finalised.

6. Appeals to the High Court

In Ireland's Response, it outlined the position relating to a number of appeals lodged with the High Court against decisions of the OCEI. It is necessary to provide a further update on those cases and other appeals that have been lodged.

- *Stephen Minch v. Commissioner for Environmental Information*

On 28 July 2017 the Court of Appeal delivered its decision in *Stephen Minch v. Commissioner for Environmental Information* and found that the Report constitutes environmental information within the meaning of article 3(1)(e) of the AIE Regulations. The appeal was remitted to the OCEI

for further determination. On 15 February 2018 the Commissioner delivered a decision and determined that the AIE request did not relate to information on emissions into the environment as per article 10(1) of the AIE Regulations. The appellant was issued with a redacted copy of the material requested in January 2018 and the Commissioner held that the non-disclosure of the redacted information was justified on commercial confidentiality grounds by article 9(1)(c) of the AIE Regulations, following a weighing of the public interest in accordance with article 10(3) of those Regulations. No appeal was lodged against that decision.

- *John and Mary Redmond v. Commissioner for Environmental Information*

This application for judicial review was heard by the High Court which, by judgment of 14 December 2017, dismissed the Applicants' case. That decision has been appealed to the Court of Appeal by Mr. and Mrs Redmond and is listed for hearing on 13 January 2020.

In addition, there are currently three appeals pending before the High Court

- (i) *Friends of the Irish Environment v. Commissioner for Environmental Information*

This case concerns the question of whether the Courts Service, the statutory body responsible for the management of the court system in Ireland, may rely on the exemptions relating to judicial functions. The case is listed for hearing before the High Court on 25 October 2018

- (ii) *Right to Know v Commissioner for Environmental Information and the Department of Transport, Tourism and Sport*

This case concerns the question of whether two particular documents are environmental information within the meaning of the AIE Regulations. The case is listed for hearing before the High Court on 14 February 2019. The information sought has been released to Right to Know by the Department of Transport, Tourism and Sport outside the AIE process. It is the position of the OCEI and the Department of Transport, Tourism and Sport that this appeal is now moot as the information has been released to Right to Know. This is contested by Right to Know who intend to pursue the appeal.

(iii) *Right to Know CLG v. Commissioner for Environmental Information and Rahleenleagh Power DAC*

This case concerns the question of whether Rahleenleagh Power DAC, a limited liability company that is the owner and operator of a wind farm, is a public authority within the meaning of the AIE Regulations. On 22 October 2018, the OCEI accepted that it had not provided adequate reasons for the decision given in this case and agreed that the decision would be set aside and remitted to the OCEI for a fresh determination.

The issues that arise for consideration before the High Court are usually weighty and concern matters that impact on the interpretation of key aspects of the AIE Regulations.

7. Review of the AIE Guidelines and AIE Regulations

In May 2014 the Minister for Housing, Planning and Local Government published Guidelines for Public Authorities and others on the Implementation of the Regulations pursuant to Article 14 of the AIE Regulations. A review of those Guidelines commenced in 2017 and was undertaken by Eunomia Consulting Limited. Updated draft Guidelines are currently in the final stages of preparation and it is hoped to publish them shortly. When published they will be circulated to all public authorities.

Separately, it is proposed that a full review of the AIE Regulations will be undertaken, which will include a full public consultation. It is currently proposed that the public consultation will run for a 12 week period to allow sufficient time for members of the public and interested parties to engage with it. It is anticipated this will commence in early 2019.

As part of the Department's continued commitment to the Access to Information Pillar of the Aarhus Convention it was decided to establish an AIE Officers Network Group. This group is aimed at AIE Officers and serves as a platform for information sharing. It will work towards creating a unified approach to dealing with AIE requests and also the dissemination of environmental information. The first meeting of the AIE Officers Network Group was held in July 2018 with 35 AIE Officers from different public authorities in attendance. It is proposed to host the second meeting after the AIE Guidelines are published.

8. Conclusion

Ireland reiterates that there is no basis upon which a finding of non-compliance could be made arising from the matters contained in the Communication. Ireland is happy to address any specific questions from the Committee on these matters at the hearing on 8 November 2018.

Yours sincerely,



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