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Re: Draft report to the Task Force on Access to Justice under the Aarhus Convention

Dear Jan,

It was a great pleasure to meet you in Geneva, and I wish again to thank you for highlighting the Irish Office of the Commissioner for Environmental Information (OCEI) as providing a good and interesting example of an independent review body operating under the Aarhus Convention. As we also discussed, you had a few questions in relation to our response to the questionnaire that was distributed last year. Please see our further response below.

Who may appeal to the High Court?
Your first question was whether the deciding (first) authority may appeal to the High Court. Yes, any party to an appeal before the Commissioner, or any other person affected by the decision concerned, may appeal to the High Court on a point of law from the decision. A judgment of the High Court may in turn be appealed to the Court of Appeal and to the Supreme Court, respectively, though some cases may proceed directly from the High Court to the Supreme Court. Examples of appeals made to the courts by public authorities are: *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51; *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86; and *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241, all available at www.courts.ie. An appeal to the High Court has recently been made by the Electricity Supply Board (ESB) against the Commissioner's decision in Case CEI/18/0003, available at www.ocei.ie, in which he accepted that a transcript of a hearing of the Property Arbitrator fell within the exception under article 9(1)(b) of the Access to Information on the Environmental (AIE) Regulations 2007 to 2018, but found, having regard to the public interest served by disclosure of the environmental information, that it was reasonable to require the ESB to allow the appellant/requester to inspect the transcript in situ.

Time limits for public authorities?
You also had a question about an apparent contradiction between the two first bullet points under Q1 relating to the time limits for public authorities holding environmental information to response to requests for environmental information.

The first two bullet points of our original response was as follows:

- There is no specified time limit within the Access to Information on the Environment Regulations 2007 to 2018 (AIE Regulations) for public authorities to hold environmental information for the purpose of responding to requests for environmental information at a future date.
- Article 7(2)(a) of the AIE Regulations provides that a public authority must make a decision on a request within one month from the date it receives a request. Under article 7(2)(b) of the AIE Regulations a public authority may, where it is unable because of the volume or complexity of the environmental information requested to make a decision within one month, extend the deadline for making a decision on a request to not later than *two months* from the date it received the request. (Emphasis added)

Clarification: The first bullet point only relates to the first part of the question regarding a time limit for public authorities holding environmental information. There is no requirement in the AIE Regulations that a public authority hold environmental information for specified period of time. Indeed, the issue arose in 2017 in Case CEI/16/0033, where the request was for a copy of information in the Minister's diary (which is a living document) and the diary entries were changed before the request was fully processed. As a result, the Commissioner was unable to determine if the diary as it was at the time of the request contained any environmental information. The second bullet point, on the other hand, relates to the timeframe for making decisions on requests.

Settlements

You also sought clarification about the possibility for mediation. You asked: "[I]f someone asks for a certain piece of information, s/he is probably not satisfied by receiving 50%, so what is there to negotiate?" The OCEI does not have a formal mediation procedure, but we engage in "settlement" efforts where it appears reasonably possible to do so. Moreover, we use the term "settlement" loosely to describe a range of scenarios in which cases are resolved in a satisfactory manner without the need for a formal, binding decision (with any appeal fees being refunded in such cases).

For instance, in many cases, the request does not in fact involve a "certain piece of information". Requests are often broad and/or ill-defined, or they may involve a misunderstanding of the role of our Office under the AIE Regulations. An example of this is a case that arose in 2013 involving a request for details of quantitative information in two published scientific journal articles by personnel of the Marine Institute regarding impact of sea lice from industrial fish farming on certain wild salmon populations. In fact, the appellant/requester (an academic institution) sought access to the "raw data" or "data sets" underlying the publications, but this was unclear from the actual terms of the request due to the format in which it was presented and the technical language used. In addition, however, the appellant disputed the conclusions drawn in the publications and apparently sought to use its appeal to the OCEI to require the Marine Institute to provide clarifications regarding the requested data sets. Our Office was able to secure the release of all relevant information or data held by the Marine Institute at the time of the request while at the same time explaining to the appellant that we were not in a position require the Marine

Institute to create new records in response to an AIE request or to otherwise "clarify" or "correct" the data in dispute. Our efforts involved numerous emails and telephone conversations, and the matter was complicated by the technical nature of the subject matter of the request and the distrust that the existed between the parties, but the appeal was ultimately withdrawn on the basis of the "settlement" thus reached.

Some settlements, however, may result in only the partial release of the requested information. A good example is a case involving a request by a journalist for access to a contract between Dublin City Council (the Council) and a private third party company for the construction and operation of an incinerator at Poolbeg, Dublin. The Council refused access to the contract in large part on the basis that the redacted parts did not contain environmental information and were in any event subject to refusal because of commercial or industrial confidentiality. The contract was a lengthy and complex document, but this Office considered that, as it was in essence a project agreement affecting or likely to affect various elements and factors referred to in paragraphs (a) and (b) of the environmental information definition, the contract in its entirety was a measure within the meaning of paragraph (c) of the definition. On the other hand, however, we that accepted that certain particular parts at issue, such as a Schedule entitled "Base Case Financial Model and Databook", contained commercially confidential information and that the public interest to be served by disclosure of such information was not as strong as other information in the contract that was more directly related to the potential environmental impacts of the project. Following engagements with all of the relevant parties, we were able to propose a settlement based on the release of all but certain specified parts of the contract. The parties agreed to the proposal, and the appellant therefore withdrew his appeal.

A settlement can also involve the release of the requested information in a different format than that originally sought. For instance, our Office dealt with an appeal made by the Friends of the Irish Environment against a decision by Ordnance Survey Ireland (OSi) to refuse access to the photographs held from its 1973 aerial survey of Ireland on the basis that the photographs were protected by copyright and thus disclosure would adversely affect intellectual property rights. Our Office was able to ascertain that the OSi had no objection to making the images available for viewing in situ free of charge, and indeed, digitised images from the 1995, 2000, and 2005 aerial surveys were available on its website, but licensing fees and restrictions applied in relation to the production and use of any authenticated copies of the photographs. However, through our intervention, the parties ultimately agreed to access free of charge to "screen shots" of the photographs upon request and a reduced licencing charge for access to authenticated copies needed for the purposes of publication.

All three of the settlements described above were reached in 2013. Unfortunately, our more recent experience has been that certain appellants are not at all amenable to settlement efforts and seek to pursue appeals even when the requested information has been made available to them in full. Therefore, the Office has been less inclined to engage in settlement efforts in recent years. I am happy to say, however, that there was a case in the New Year that "bucked the trend". It involved a request made to Bord Iascaigh Mhara (BIM) by an organisation known as Galway Bay Against Salmon Cages for access to information relating to an Aquaculture Remote Classroom (ARC) education programme.

BIM had taken the view that the ARC is an "educational tool [that] will not itself be involved in any aquaculture activities directly" and was thus not a programme "affecting or likely to affect the elements" of the environment. Our Office invited BIM to reconsider its position in light of a Court of Appeal judgment stating (having regard to the French text of the Directive) that "the reference to 'likely to affect' the environment in article 3(1)(c) of the environmental information definition should really be understood in the sense of being 'capable of affecting the environment". Upon reconsideration, BIM decided to release all relevant information that it held, and the appellant in turn agreed to withdraw the appeal.

Experience of a manifestly unreasonable request close to abuse

In addition, you noted in your draft report that the Commissioner has considered some requests for information to be unreasonable, close to misuse. I wish to clarify that this was likely a reference to Case CEI/12/0005, which involved the question of whether the Department of Environment, Community and Local Government was justified in refusing the appellant's request in relation to public consultation on climate policy and legislation. The Commissioner considered that the term "manifestly unreasonable", as used in the Regulations, was sufficiently clear to denote, without further explanation, any request of broad or indeterminate range which has been made in bad faith or which otherwise appears to have been made for some purpose unrelated to the access process. It was readily apparent in this case that the appellant did not seek access to any identifiable environmental information which he genuinely believed may be held by the Department. Rather, he sought to challenge the Department's reliance on the mandatory greenhouse gas mitigation targets underlying the national climate policy and legislation development programme and to raise questions about the Department's intention to take "due account" of "all" submissions made in the context of the public consultation exercise being carried out at the time his request was made. While the Commissioner acknowledged the existence of controversy over the commitments which had been made at national and EU level to reduce greenhouse gas emissions, the Commissioner nevertheless found that the appellant's request represented a misuse of the right of access under article 6 of the AIE Regulations and was therefore subject to refusal on the basis of being manifestly unreasonable.

If you have any further queries regarding our response to the questionnaire or our functions under the AIE Regulations, please do not hesitate to contact me. I note, for instance, that there may be some misunderstanding regarding the fees for appeals: Your draft report at pages 9 and 30 suggests that the €50 fee referred to our response to the questionnaire applies to court appeals, but in fact this is the standard fee for an appeal to the OCEI (reduced to €15 for medical card holders).

Kind regards,

Melanie

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