

# Access to Information on the Environment (AIE) in Ireland

Update on the Administrative Review of AIE Decisions by  
the Office of the Commissioner for Environmental  
Information (OCEI)

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Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

# The AIE Regulations

- European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations)
- Secondary rather than primary legislation; therefore, strictly bound by the Directive
  - *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51 (O'Donnell J.): The provisions of the Regulations “must be understood as implementing the provisions of Directive 2003/4/EC (and indirectly the [Aarhus] Convention and . . . ought not to go further (but not fall short of) the terms of that Directive”.
- Unofficial consolidated version of the AIE Regulations available at <https://www.dccae.gov.ie/documents/Unofficial%20Consolidation%20AIE%20Regs%202011-2018.pdf>



# The OCEI

- Established by Article 12 of the AIE Regulations in May 2007
  - A fee of €50 generally applies
- Initially intended to fulfil the Article 6(2) review function under the AIE Directive, but question of the required “expeditious procedure” remains undecided
  - Difficult to manage expectations: best of both worlds desired (despite internal review procedure)
- The role of Commissioner is assigned to the holder of the Office of the Information Commissioner (OIC)
  - The Commissioner is also the Ombudsman
  - Previously Emily O’Reilly, the current European Ombudsman
  - Current office holder: Peter Tyndall
- The OCEI is a legally separate & independent office, but “assisted by” the staff and resources of the OIC



# Functions of the Commissioner

- To review decisions of public authorities
  - *De novo* approach taken
- To affirm, vary or annul such decisions, specifying the reasons
- Where appropriate, to require the public authority to make the requested environmental information available to the applicant
- The Commissioner's decisions (available on our website) are final & binding, but subject to appeal to the High Court on a point of law
  - Alternatives: settlements, withdrawals & deemed withdrawals
- If the public authority fails to comply, the Commissioner may apply to the High Court for an order directing compliance
- The OCEI has no other role (e.g., no role in providing guidance, or in promoting public awareness, or in reviewing the provision of environmental information generally by public authorities)



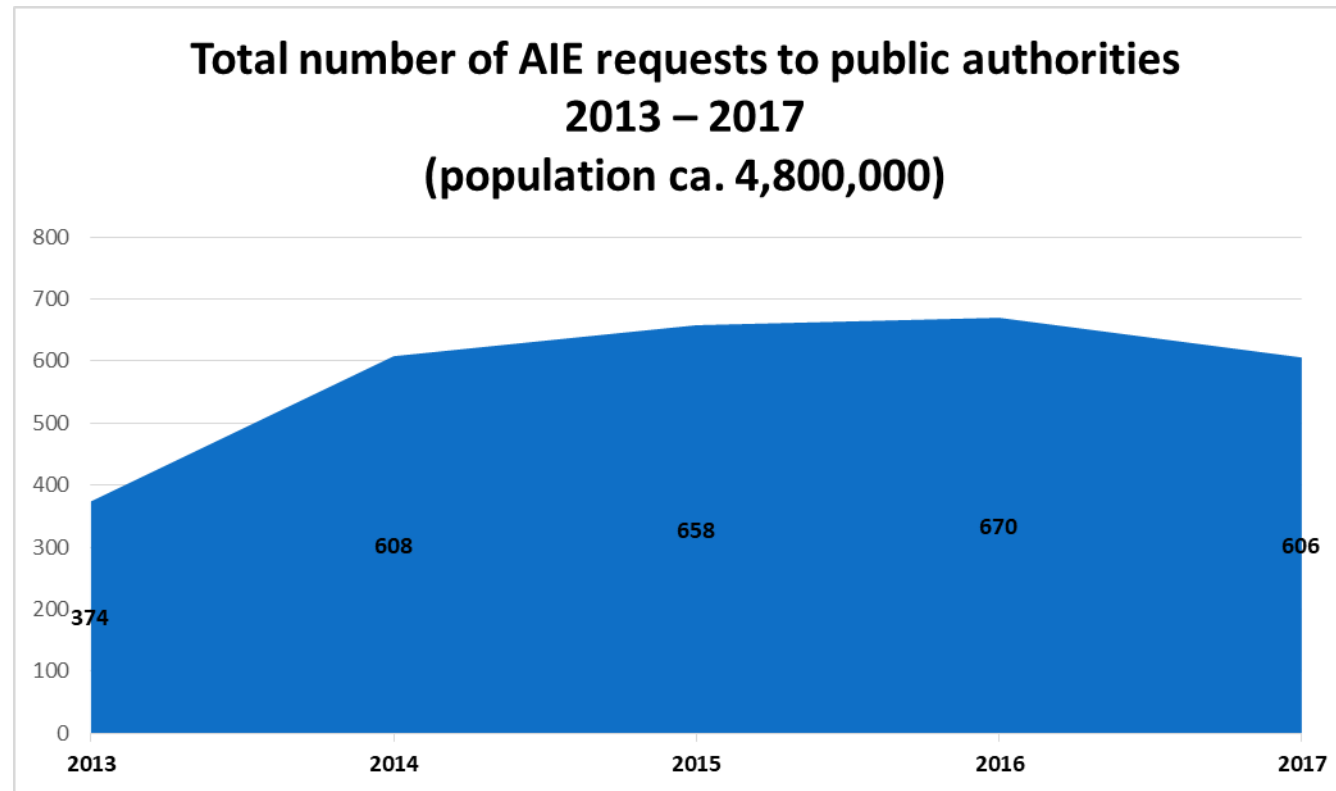
# Judgments of the Irish Courts

- *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241
- *Minch v Commissioner for Environmental Information & Anor* [2016] IEHC 91
- *Minch v Commissioner for Environmental Information & Anor* [2017] IECA 223
- *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86
- *National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51
- *Redmond v Commissioner for Environmental Information & Anor* [2017] IEHC 827
- Many others in the pipeline (very costly)



# Total number of AIE requests

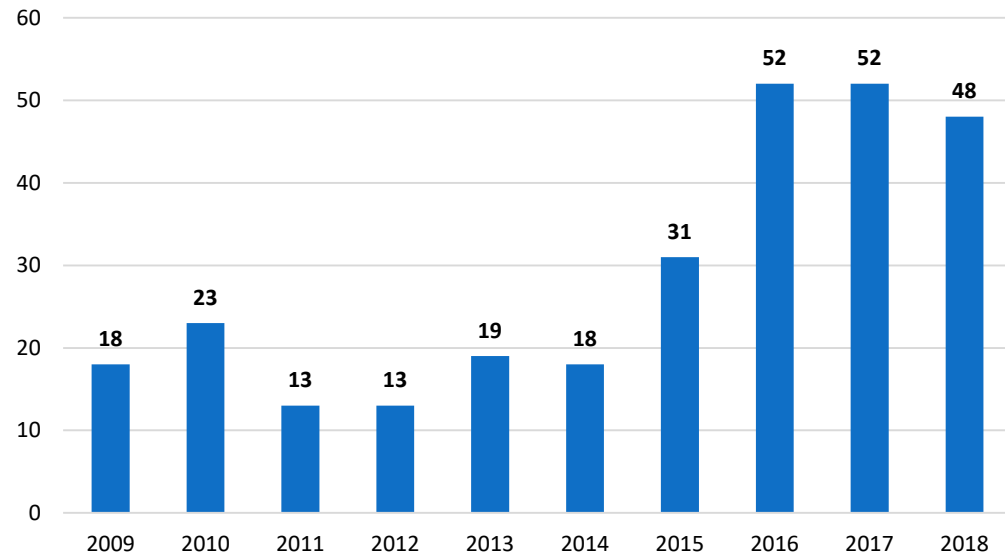
- Increase in the number of AIE requests being made to public authorities year on year from 2013 to 2016 with decline in 2017 (Government Departments/Bodies & Local Authorities only)



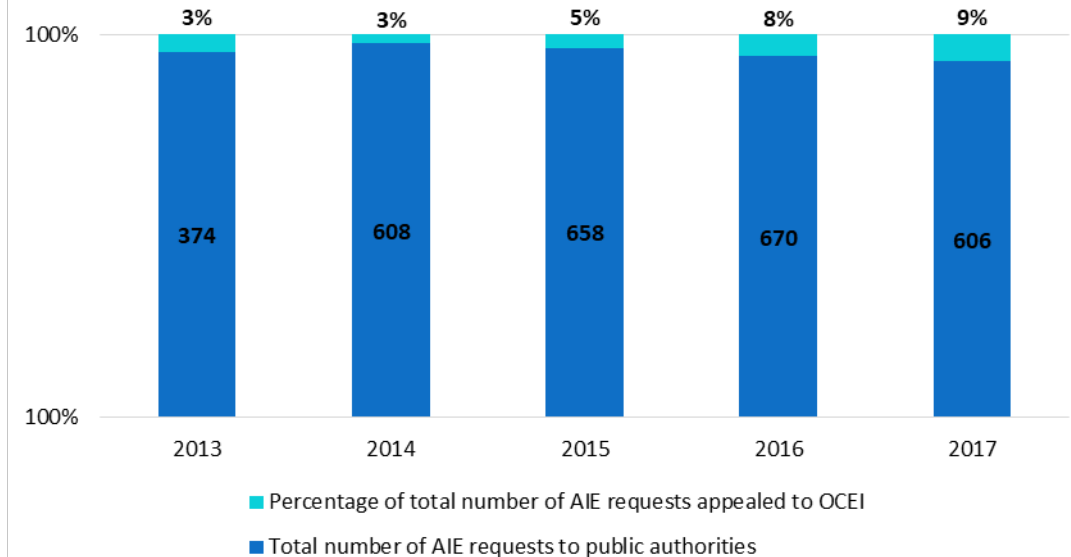
# AIE appeals to the OCEI

- Increase in appeals year on year from 2014 to 2016 (drop in fee from €150 to €50 in 2014)
- The OCEI received 52 new appeals from 16 appellants in 2017; 48 new appeals from 24 appellants in 2018 (rate of appeal to the OIC: <2%)

No. of appeals received from 2009 - 2018



Number of AIE requests appealed to the OCEI



# Challenges include . . .

- Difficulties with interpretation, including the basics:
  - Scope of “environmental information”, especially “measures . . . and activities”
  - What is a “public authority” (or what is not)?
- 12.5% of the Commissioner’s decisions in 2018 were appealed to the High Court
  - 10% (four of the five) appeals of the Commissioner’s decisions concern matters of interpretation
- Potential conflict with Irish constitutional principles
  - Cabinet confidentiality
  - Presidential immunity (hence S.I. No. 309 of 2018)
- Lack of awareness by public authorities of obligations & confusion with FOI
- Failure to meet statutory deadlines & poor decision-making generally
- Conflicting expectations among applicants
- Questions over third party rights & the complexity of such cases

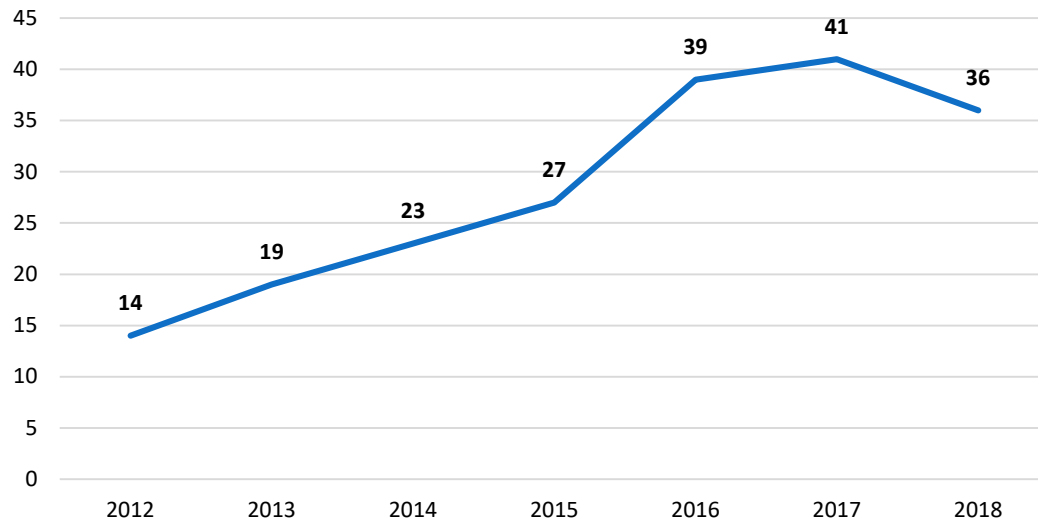




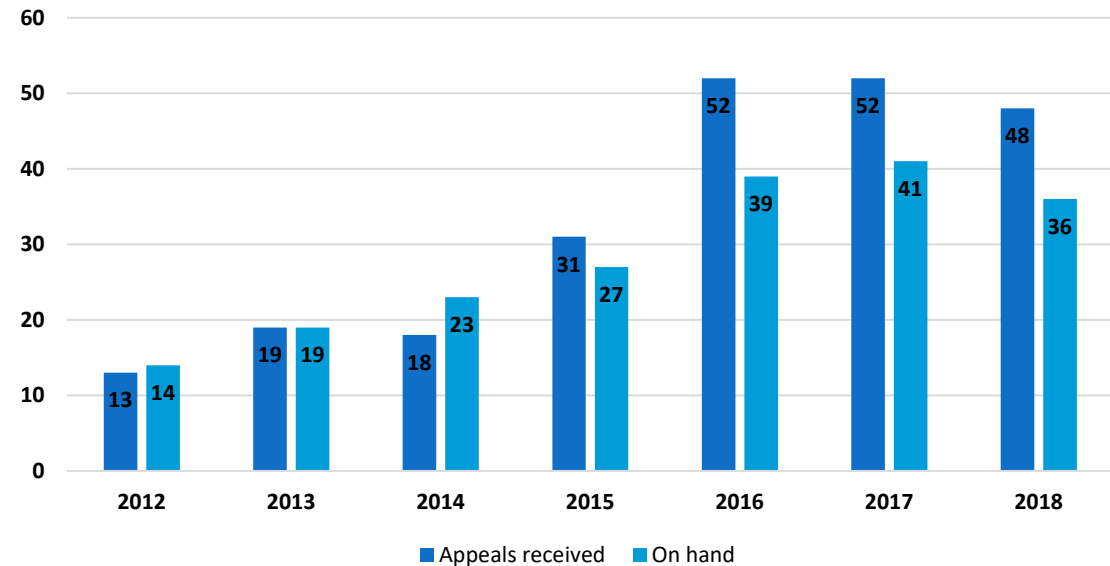
# Drop in the number of cases on hand

- The number of appeals on hand at the end of the year dropped for the first time since 2012 in 2018
- The OCEI had 36 valid appeals on hand as of 31 December 2018

No. of appeals on hand as of 31 December from 2012 - 2018

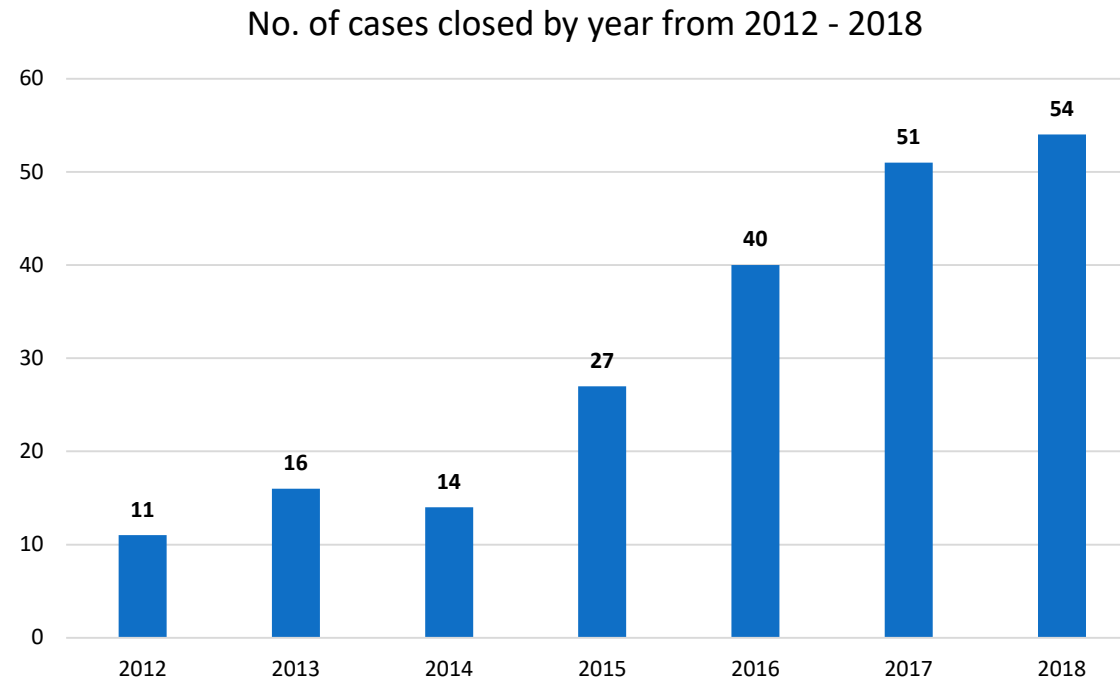


Comparison of appeals received & on hand from 2012 - 2018



# Increase in the number of cases closed

- The OCEI closed 54 cases in 2018 - more cases than were closed in any other year since its establishment in 2007
- The Commissioner made 40 formal decisions in 2018; this too is more than in any other year since 2007



# The only alternative

- Average length of judicial review proceedings before the High Court: 376 days (according to the Courts Service Annual Report 2017)
- Court of Appeal waiting times
  - Generally: 20 months
  - Fast tracked short appeals: 10 months
- Just an indication of the costs:
  - €218,000+ in solicitor fees alone in 2018 on 18 OIC cases (most without judgments)
  - *NAMA v. Information Commissioner*: €203,000 in legal fees (solicitors & barristers) for the OCEI alone
    - OCEI decision in Sept. 2011; High Court judgment in Feb. 2013; Supreme Court judgment in June 2015
  - *Minister for Communications, Energy & Natural Resources v Information Commissioner* [2017] IEHC 222: €94,500+ in solicitor fees over two years (2016 & 2017); now on appeal to the Court of Appeal
    - OIC decision in Nov. 2015; High Court judgment in April 2017; Court of Appeal hearing in Feb. 2019



# For further information

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