



**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

5<sup>th</sup> May 2017

**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 your letter dated 6<sup>th</sup> December 2016. Please find enclosed Ireland's response:

**1. INTRODUCTION**

**1.1.** A communication has been received from Right to Know Ltd, a company limited by guarantee, who are described as a nongovernmental organisation whose objective is *“to improve, promote and advocate for increased rights to public access for information, including access to environmental information”*. The communication alleges non-compliance by Ireland with the

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convention on access to information, public participation on decision making and access to justice in environmental matters as signed at Aarhus, Denmark, 24<sup>th</sup> June 1998 (hereinafter ‘the Convention’). The communication was received on 19<sup>th</sup> August 2016 and was considered by the Compliance Committee at its 44<sup>th</sup> meeting (27<sup>th</sup>-30<sup>th</sup> September 2016). At that meeting a preliminary determination was reached that the communication be deemed admissible.

**1.2.** The communication raises issues with regards to the manner in which the system for granting access to environmental information by public authorities has been implemented in Ireland. The complaint is made under the following headings:

- Non-compliance in respect of public authorities
- Non-compliance in respect of the Commissioner for Environmental Information
- Non-compliance in respect of Court jurisdiction and Court capacity
- Non-compliance in respect of the overall process

**1.3.** It is alleged that there has been non-compliance on the part of Ireland in the following manner:

- Article 4(2) and Article 4(7): where a Public Authority refuses a request on the basis of a jurisdictional issue, it does not make a final decision within the maximum two months allowed for in these articles.
- Article 9(1): the procedure mentioned in the second paragraph (i.e. the Commissioner for Environmental Information Appeal Procedure) is not expeditious since decisions can take 16 months to make and if a jurisdictional point is raised requests may be remitted causing further delays of several years.

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- Article 9(4): taken as a whole review of refusals to provide access to environmental information and lack of regard for provisions relating to public participation and access to justice.
- Article 3(1): as a consequence of the above non-compliance there is also non-compliance with Article 3(1).

## 2. Implementation of the Aarhus Convention in Ireland

2.1. Before turning to the specifics of the communication, it is necessary to explain the manner in which the Convention, as it relates to requests for access to environmental information, has been transposed into Irish law. The Convention was signed by Ireland on 25<sup>th</sup> June 1998 and ratified by Ireland on 20<sup>th</sup> June 2012, with it coming into force in September 2012. Ireland has implemented the relevant provisions of the Convention that relate to requests for access to environmental information by way of the transposition of Council Directive 2003/4/EC of the European Parliament and of the Council of 28<sup>th</sup> January 2003 and public access to environmental information and repealing Council Directive 90/313/EEC by the European Communities (Access to Information on the Environment) Regulations 2007 (SI No. 133/2007) as amended by the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (SI No. 622/2011) and the European Communities (Access to Information on the Environment) (Amendment) Regulations 2014 (SI No. 615/2014). Those Regulations will, throughout this document, be cited collectively as the AIE Regulations.

2.2. The AIE Regulations require that environmental information held by or on behalf of a Public Authority be made available in accordance with the regulations. The AIE Regulations establish the procedure for making a request for environmental information in accordance with

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Regulation 6. Regulation 7 sets out the manner in which a request shall be dealt with by a Public Authority.

2.3. Regulation 7(1) of the AIE Regulations requires a Public Authority to make available to the applicant any environmental information the subject of the request that is held by, or for, the Public Authority. A decision on a request for environmental information must be made not later than one month from receipt of the request but that one month period may be extended by a further month where the Public Authority is unable, because of the volume or complexity of the environmental information, to make a decision within the one month period. The Public Authority is also required, in the performance of its functions under Article 7, to have regard to any time scales specified by the Applicant.

2.4. Regulation 8 of the AIE Regulations establishes the mandatory grounds for refusal of a request for access to information with discretionary grounds for refusal of information being listed in Article 9. Where a Public Authority declines to grant the request for access to information, the Public Authority is required to specify the reasons for refusal and to inform the Applicant of his or her rights of internal review and appeal in accordance with the AIE Regulations.

2.5. Regulation 11 of the AIE Regulations provides for an internal review of a refusal to give access to Environmental Information. An Applicant may make a request for an internal review not later than one month following the receipt of the decision of the Public Authority concerned. That review must be carried out by a person unconnected with the original decision maker whose ranking is the same as or higher than the original decision maker. That decision must be

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notified to the Applicant within one month from the receipt of the request for the internal review.

2.6. Regulation 12 of the AIE Regulations establishes the Office of the Commissioner for Environmental Information. In accordance with Article 12(3) where the decision by a Public Authority has been affirmed in whole or in part under Article 11 or a person other than the Applicant will be affected by the disclosure of the environmental information concerned, the Applicant or other person affected may appeal to the OCEI against the decision of the Public Authority concerned. An appeal must be initiated either not later than one month after the receipt of the decision under Article 11(3) or not later than one month from the time when the decision was required to be notified under Article 11(3). The OCEI has jurisdiction to extend the time for initiating an appeal where he is satisfied that in the circumstances of the particular case it is reasonable to do so. The general powers of the OCEI are set out in Article 12(5) to Article 12(10).

2.7. Regulation 13(1) of the AIE Regulations entitles a party to an appeal under Article 12 or any other person affected by the decision of the OCEI to appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than 2 months after notice of the decision under Regulation 12(5) was given to the party to the appeal or the other person affected.

2.8. The table below gives an indication of the number of AIE requests received by public authorities between 2013 and 2015 and an indication as to how they have been dealt with. On an annual basis the Department of Communications, Climate Action and Environment collects data from each Department of Government and Local

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Authority in respect of the number of requests made under the AIE Regulations to them. Each Department of Government is also responsible for obtaining the relevant data from public authorities within its remit in order to furnish that to the Department of Communications, Climate Action and Environment.

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

2.9. In addition to collating relevant data about the manner in which the AIE Regulations have operated since they were enacted into law, the Department of Communications, Climate Action and Environment has arranged annual training days for Public Authorities about the operation of the AIE Regulations. Those training events were held in September 2014, November 2015 and October 2016 and included presentations on:

- The regulatory framework for Access to Information on the Environment and Ireland’s obligations under the Aarhus Convention (Aoife Joyce, Department of Communications, Climate Action and Environment – formally titled Department of Environment, Community and Local Government until 2016)
- Duties of Public Authorities and the processing of requests under the AIE Regulations (Catherine Allen, Mason Hayes and Curran Solicitors)
- Appeals to the Commissioner for Environmental Information (Diarmuid Goulding, Office of the Commissioner for Environmental information)

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- Duties on a Public Authority under Article 5 and the dissemination of environmental information under Article 7 (Karen Vaughey, Environmental Protection Agency).

2.10. In 2014, 2015 and 2016 there were over 100 attendees at each training event with attendees representing Local Authorities, Government Departments and other agencies falling within the definition of Public Authorities. The attendees were broken down as follows and a full list of Public Authorities represented, along with a copy of the training materials given to participants, is attached at *Appendix A*:

<b>2014</b>	
<b>Number of Attendees</b>	<b>Public Authority</b>
57	From 24 County/City Councils
36	From 5 Government Departments
24	From 15 other Public Authorities

<b>2015</b>	
<b>Number of Attendees</b>	<b>Public Authority</b>
49	From 27 County/City Councils
40	From 8 Government Departments
28	From 17 other Public Authorities

<b>2016</b>	
<b>Number of Attendees</b>	<b>Public Authority</b>
41	From 15 County/City Councils
26	From 7 Government Departments
34	From 19 other Public Authorities

2.11. The AIE Regulations establish a clear, transparent and consistent framework to implement the Convention. The statistics contained in the table at 2.8 above establish that, Public Authorities are aware of and utilising the AIE Regulations. Ireland notes that a review of previous decisions of the Committee establishes that

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findings of non-compliance against States has generally occurred where a State Party has failed to ensure that Public Authorities are generally abiding by a system for the disclosure of environmental information as required by Article 4 of the Convention. The facts as pleaded by the Communicant do not disclose non-compliance of that nature.

2.12. By way of a general principle, in response to this communication, Ireland relies on the decision of the Committee in *European Community ACCC/C/2007/21 (Appendix B)*:

*“The Committee considers it important to point out the aforementioned deficiencies on the handling of information requests in order to clarify the obligations under the Convention with regard to environmental information and thereby contribute to better implementation of its provisions. However, it does not consider that in every instance where a public authorities of a Party to the Convention makes an erroneous decision when implementing the requirements of Article 4, this should lead the Committee to adopt a finding of non-compliance by the Party, provided that there are adequate review procedures. The review procedures that each party is required to establish in accordance with Article 9, paragraph 1, are intended to correct any such failures in the processing of information requests at domestic level, and as a general rule, it is only when the Party has failed to do so within a reasonable period of time that the Committee would consider reaching a finding of non-compliance in such a case. Decisions on such a question need to be made on a case-by-case basis. In the present case, the requested information was provided, albeit with some delay, and thus the matter was resolved even before*

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*there was any recourse to the review procedures available to the communicant”.*

2.13. The evidence provided by the Communicant, which is considered in more detail below, does not establish non-compliance in circumstances where the Party concerned has established adequate procedures for the consideration of requests for environmental information and the determination of any appeals against decisions of Public Authorities.

### **3. Non Compliance by Public Authorities**

3.1. The Communication alleges that there is non-compliance by Public Authorities in refusing requests on what are described as *“a narrow threshold jurisdiction point knowing that if there is an appeal to the CEI it will be more than a year before the matter returns to it”*. It further alleges that in the scenario outlined the *“time frames provided for in articles 4(2) and 4(7) will not be met”* and alleges that a final decision can only be expected after two to three years. The Communicants do not provide a definition of what they consider to be *‘narrow threshold jurisdiction point’* but it is assumed that they take issue with findings that institutions are not Public Authorities or that the request made is not environmental information. Ireland disputes the characterisation of determinations of that nature as *‘narrow’* points and considers that they are more properly to be seen as substantive determinations on the application of the Convention, and, by extension, the Regulations.

3.2. The Communicants do not provide evidence in support of the allegation that there has been non-compliance on this ground. In particular, no evidence is provided to support the contention that Public Authorities are deliberately making determinations on certain

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issues in the knowledge that it may take some time for any appeal to be determined. Ireland rejects the implication that requests for environmental information are considered by public authorities in this manner. The statistics shown above establish that the majority of requests for environmental information are granted by public authorities with only a very small percentage being considered on appeal to the OCEI for Environmental Information still fewer appealed to the High Court on a point of law.

3.3. Without prejudice to the foregoing, it is the position of Ireland that the Convention does not require a substantive consideration of a request for environmental information in circumstances where the request falls outside of the scope of the Convention. Article 4 of the Convention only applies to requests made to '*public authorities*' in relation to '*a request for environmental information*'. Therefore in any case, the first determinations made must be to confirm that the body against whom the request is made is a '*Public Authority*' and that the information sought is '*environmental information*' within the meaning of the Convention. If the request is not made of a Public Authority or it does not relate to environmental information then the provisions of the Convention, and by extension, the AIE Regulations have no application. The fact that a finding on the question of whether something is environmental information determines whether the Convention applies at all to the request was recognised by the Committee in *European Community ACCC/C/2007/21*.

3.4. It is appropriate for determinations to be made by bodies to whom requests were made that a request is one that falls outside of the scope of the AIE Regulations and therefore need not be further considered. It is axiomatic that there can be no issue of non-compliance with the AIE Regulations in respect of requests which are

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determined to fall outside their scope. It would not be a reasonable use of time or resources, and the Convention cannot be said to require Public Authorities to engage in a substantive analysis of any request in circumstances where, because the request does not relate to environmental information, or is made of a body other than a Public Authority, the Convention does not apply.

3.5. In so far as it is alleged that the time periods mandated by Article 4(2) and Article 4(7) of the Convention are not complied with, it is noted that no evidence is provided to support this contention.

#### **4. Commissioner for Environmental Information – Time to make a decision**

4.1. As outlined above, the Office of the Commissioner for Environmental Information (hereinafter ‘the OCEI’) was established by Regulation 12 of the AIE Regulations and is tasked with considering appeals from decisions reached by public authorities under the AIE Regulations. The communication takes issue with the alleged length of time that it takes for decisions to be reached by the OCEI. The Communication is not precise in the manner in which it is alleged that the Convention has been breached save in that it is indicated that there is a failure to comply with the obligations arising under Article 9 of the Convention.

4.2. Ireland notes the general approach of the Committee in examining complaints relating to Article 9 of the Convention, as set out in *Bulgaria ACCC/C/2011/58 (Appendix C)*:

*“When evaluating the compliance of the Party concerned with Article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in light of the purpose also reflected in the preamble of the Convention, that ‘effective judicial mechanisms should be accessible to the public, including organisation so that its*

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*legitimate interests are protected and the law is enforced". Therefore in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organisations, in different stages of the decision making ('tiered' decision making').*

4.3. The Party Concerned notes that Article 9 places an obligation on Parties to the Convention to ensure that persons who have made a request coming within Article 4 have *"access to a review procedure before a court of law or another independent and impartial body established by law"*. Article 9 continues that where a Party provides an appeal mechanism before a court of law, it shall also ensure that persons have access to an *"expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a Public Authority or review by an independent and impartial body other than a court of law"*.

4.4. As outlined above, the AIE Regulations provide for both an appeal before *"an independent and impartial body"*, namely the OCEI, and also a further appeal before a court of law, the High Court. It is respectfully submitted that the framework established by the AIE Regulations is compliant with Article 9 of the Convention.

4.5. The Office of the Commissioner for Environmental Information is an office held by the same individual, Mr. Peter Tyndall, who holds the position of Information Commissioner<sup>[1]</sup> and Ombudsman<sup>[2]</sup>. The statement in the communication that *"the CEI was not allocated any funding from the Party Concerned and the CEI was forced to rely on resources from the Information Commissioner's office to fulfil his*

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<sup>[1]</sup> Established by the Freedom of Information Act, 1997 and currently governed by the Freedom of Information Act, 2014

<sup>[2]</sup> Established by the Ombudsman Act, 1980 as amended

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*obligations*” is not correct. Resources are allocated by the Department of Public Expenditure and Reform to the Office of the Information Commissioner. The Functions of the OCEI are funded from within that allocation. As outlined below, the resources of the office are currently allocated having regard to the different functions carried out by the Commissioner in his different roles and the volume of requests received to his office under the different statutory frameworks.

4.6. In 2015, specific resources were allocated to the OCEI to enable his office to process more appeals under the AIE Regulations in a timely manner. The funding allocated in 2015 is dedicated funding, specifically allocated to the OCEI in respect of the processing of appeals taken under the AIE Regulations. As a consequence, in June 2015 two additional investigators were appointed to the Office solely to deal with appeals brought under the AIE Regulations. The OCEI now has a dedicated staff allocated to the processing of appeals brought under the AIE Regulations which is comprised of 2 full time Investigators with part time involvement of a Senior Investigator and an OIC investigator together with clerical support. Office and administrative services are shared between the two offices, which allows for the most efficient use of limited state resources. In addition, the Department of Public Expenditure and Reform has recently granted sanction for the OCEI to recruit one additional Investigator. The appointment process for that position is currently being finalised and will be carried out through the Public Appointments Service. Unfortunately, until very recently, economic circumstances in Ireland since 2008 had resulted in a restriction in the public funds available to fund many public services or to recruit additional staff. The OCEI was subject to this restriction.

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4.7. The Office of the Information Commissioner (which is responsible for the processing of appeals under the Freedom of Information Act 2014) is currently staffed by 13 Investigation Officers, 1.5 senior investigators and 5 support staff. The volume of appeals processed in accordance with the Freedom of Information Act is significantly in excess of that which arises under the AIE Regulations. By way of example, in 2015 the Office of the Information Commissioner received 577 applications under the Freedom of Information Act, 2014 (representing a 62% increase on the number received in 2014), compared with just 52 AIE applications received by the Office pursuant to the AIE Regulations. 433 FOI reviews were carried out by that office in 2016. Based on the volume of these requests, it is submitted that resources are appropriately and proportionately allocated between the two functions undertaken by the Office of the Commissioner for Environmental Information and the Office of the Information Commissioner, having regard to the differing nature of the roles and the different volumes of requests made under the relevant legislation.

4.8. The manner in which appeals have been processed by the OCEI for 2013, 2014 and 2015 can be seen from the Annual Reports of the OCEI published for each of those years (*Appendix D*). In 2013, 19 AIE appeals were received by the OCEI. Sixteen appeals were closed during the year. Of these, 5 resulted in formal decisions and 5 were considered to be invalid. Four appeals were withdrawn with information being released after the intervention of the OCEI.

4.9. In 2014, 18 AIE appeals were lodged with the OCEI. 14 appeals were processed during 2014 with one formal decision being issued. Six appeals were either withdrawn or deemed as withdrawn, because the Public Authority concerned agreed to make the requested information

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available through publication or otherwise. Two further appeals were withdrawn following the decision of the OCEI not to pursue its appeal to the Supreme Court in the case of *An Taoiseach v. Commissioner for Environmental Information* [2010] IEHC 241 (*Appendix E*).

4.10. 2015 was the first full year during which the OCEI had the benefit of additional resources allocated to his office. At the commencement of 2015 the OCEI had 23 appeals on hand, of which 12 dated from 2014 and 11 from 2013. In addition 31 new appeals were received in that year. In 2015 27 appeals were closed, with 15 formal decisions being made, 8 being deemed to be invalid, 3 appeals being withdrawn and 1 resolved following engagement by an Investigator from the OCEI. The number of decisions issued in 2015 constituted the largest number of decisions to be issued in a single year since the establishment of the OCEI, evidencing the commitment of Ireland to ensure the proper and timely determination of appeals under the AIE Regulations. At the end of 2015, there were 27 valid appeals awaiting determination from the Commissioner, of which 22 had been submitted in 2015, 4 in 2014 and 1 in 2013.

4.11. In 2016, 52 new appeals were received by the OCEI. In 2016 40 appeals were processed and closed by the OCEI, with 27 formal decisions being made, 5 deemed to be invalid, 6 appeals being withdrawn and 2 cases settled. As of 1<sup>st</sup> January 2017, there were 38 appeals awaiting determination by the OCEI. Between 1<sup>st</sup> January 2017 to 27<sup>th</sup> April 2017, 16 new appeals were received by the OCEI. 22 cases have been closed by the OCEI in this period. Of these 22 cases 11 formal decisions were issued, 1 case was settled, 3 appeals were deemed invalid, 4 appeals were withdrawn and 3 appeals were discontinued.

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4.12. The information presented by the Communicant in Appendix 2 does not provide a complete picture of the work completed by the OCEI and only represents a sample of cases considered in each year. In particular, it only relates to formal decisions taken and therefore excludes appeals that were withdrawn following intervention by the OCEI. In so far as the Communicant relies on comments made by the Commission in the decision issued in *Mr. Pat Swords and the Department of Environment, Community and Local Government* (20 September 2013), it should be noted that this decision issued prior to additional resources being allocated to the OCEI and is not reflective of the current situation.

4.13. While, in certain instances, it may appear that there has been a lengthy delay in the resolution of appeals before the OCEI, it should be noted that the time frame identified in Appendix 2 to the Communication is the total time between the appeal being accepted as valid and it being finally disposed of. At present there may be a delay between the appeal being accepted as valid and it being assigned to an Investigator. AIE is a complex and evolving subject and appeals generally involve detailed legal and factual disputes that cannot be resolved simply. As has been outlined above, the OCEI often make significant efforts to engage between parties to seek to resolve the matter without the need for a formal “AIE” decision. This can result in environmental information being released outside of the formal AIE process.

4.14. It is noted that the Communicant argues that the OCEI ought to be able to process an appeal in an equivalent time frame to that within which public authorities process the original request for information. This ignores the significantly different roles being played

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by public authorities and the OCEI. While public authorities must simply process a request and either grant, partially grant or refuse the information sought, the OCEI is required to adjudicate between two parties (the requester and the Public Authority). Section 15 of the Procedures Manual (Appendix F) sets out the procedure that is followed in the investigation of an appeal with the priority being to identify the best approach for resolving the case. As part of that process an Investigator is required to:

- Assess whether any party, other than the appellant and the Public Authority concerned, needs to be notified of the appeal
- Assess whether the case may be capable of being resolved without a binding decision
- Assess, in particular, whether the case may be suitable for settlement
- Assess what, if any, further information is needed from the parties.

4.15. As can be seen from the Procedures Manual and the Annual Reports of the OCEI, the OCEI makes every attempt to resolve appeals between the parties without the need for a formal AIE decision by the OCEI (*Appendix F*). This may involve an agreement being reached for the release of certain information that falls within the scope of the request. This course of action has been successfully used to dispose of a number of appeals by the OCEI, the details of which are contained in the Annual Reports. If an appeal requires a formal determination, procedures allow for the making of submissions or the submission of further information by parties. In order to adhere to the overarching requirement of fair procedures, it is necessary to give both parties time to prepare those submissions which may raise complex factual and legal issues, all of which must then be considered and adjudicated on by the OCEI. As can be seen, the process and function of the OCEI is

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entirely different and more complex compared to that carried out by a Public Authority. The drawing of a direct comparison between the two processes, as has been done by the Communicant, is not appropriate and ignores these fundamental differences.

4.16. Further, the Party Concerned notes that Article 9 of the Convention does not identify that appeal decisions must be taken within a specific time frame, merely that they must be '*expeditious*'. In line with that, the AIE Regulations do not specify a specific time limit in which the OCEI must reach decisions but it is acknowledged that the OCEI must seek to operate within both the specific framework and the spirit of the Convention and reach decisions within a reasonable period of time. It is acknowledged that there were some initial difficulties with decisions being taken within an appropriate period of time but with the improving economic circumstances in the State, it has been possible to provide additional resources to the OCEI to allow an additional number of investigations to be undertaken and decisions issued.

4.17. The level of resources required to enable the OCEI carry out its functions in an appropriate manner is reviewed from time to time in the context of the overall assessment of budgetary requirements of state administrative bodies.

4.18. Having regard to the foregoing, it is respectfully submitted that there are no grounds upon which it would be appropriate for a finding of non-compliance to be made.

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## 5. Commissioner for Environmental Information – Threshold jurisdictional issues

5.1. The Communicant makes a complaint about the OCEI taking decisions relating to what are described as “*threshold jurisdictional issues*”. This appears to be a similar complaint as that which is made in respect of the manner in which public authorities have reached certain decisions. Ireland relies on the arguments made above to the extent that the Convention places no requirement on public authorities or the OCEI to engage with the substantive merits of an application in circumstances where it has been determined that the application falls outside of the scope of the Convention and the AIE Regulations. The Communicant has not identified the Article of the Convention that is alleged to have been breached by the approach taken by the OCEI.

5.2. It is noted that the Communicant relies on commentary contained in the decision of MacEochaidh J in *NAMA v. Commissioner for Environmental Information* [2013] IEHC 166 (*Appendix G*). It is necessary to explain the background to this decision, as it is relied upon in a number of instances by the Communicant.

5.3. The comments by MacEochaidh J were made in the context of an application made by NAMA for a stay to be placed on a decision reached by him pending the outcome of an appeal to the Supreme Court. The application for a stay was refused, meaning that the determination of the High Court that NAMA was a Public Authority took effect from the date on which the decision of the High Court issued. In the circumstances of that case the Court found that the balance of justice favoured refusing the application for a stay and thus NAMA was required to consider the request made. The decision is not authority for the proposition that Public Authorities and the OCEI are

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required to engage in a substantive analysis of a request for environmental information when a determination is made that a request does not fall within the scope of the Convention. The application only arose because the Court had already determined that NAMA had *incorrectly* refused the request on the basis that it was not a Public Authority. The Court was in no way suggesting that all requests for environmental information should be dealt with in substance even where a determination is made that the request falls outside the scope of the AIE Regulations. Rather, the Court decided that where it had determined that request did fall within the scope of the Regulations (insofar as the request was made of a Public Authority), the prejudice to the party who had made the request if the Public Authority did not at least consider whether the information at issue was 'environmental information' outweighed the prejudice to NAMA if it transpired, on foot of an appeal to the Supreme Court, that it was not a Public Authority and should therefore never have had to carry out that further assessment.

5.4. To the knowledge of the Party Concerned, following the refusal of the stay in the High Court, Mr. Sheridan took no immediate steps to have NAMA process the request that was the subject matter of the appeal. The Party Concerned understands that Mr. Sheridan first sought to re-activate that request in August 2016.

5.5. The contention of the Communicant is a radical one. In essence, it argues that notwithstanding a finding that an entity is not a Public Authority or that the information requested is not environmental information, the substantive request must be processed. It is difficult to understand as a matter of logic how the Convention could be said to impose obligations in circumstances where it has no application.

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5.6. It is not made clear in the Communication whether the Communicant maintains that any request ought to be complied with and information provided notwithstanding the fact that it has been determined that the entity to which the request is made is not a Public Authority, or the information comprising the request is not environmental information. If that is the position of the Communicant, it would amount to a removal of two core requirements of the Convention – namely that requests may only be made to Public Authorities and that requests may only relate to environmental information.

5.7. The Communicant also takes issue with the practice of the OCEI of remitting a decision back to a Public Authority following a determination on a threshold jurisdictional point. This criticism is not well-founded. The procedures adopted by the OCEI are entirely appropriate and fall within the discretion afforded to Parties to the Convention as to the manner in which the Convention is to be implemented. The approach of the OCEI is practical and encourages that substantive determinations in relation to requests are primarily made by Public Authorities, thus limiting the nature of the issues which may be required to be subject to determination by his office. As evidenced by the statistics above, the majority of requests for environmental information are granted by Public Authorities within the timeframes required by the AIE Regulations.

## 6. Non Compliance by Courts

6.1. The Communicant asserts that *“the Irish Courts do not have full jurisdiction to review the acts or omissions of Public Authorities in respect of AIE requests”* and that the only jurisdiction of the Courts is on a *“point of Law”*. The jurisdiction of the High Court under the AIE Regulations is found in Regulation 13 of the AIE Regulations with the procedures for bringing such an appeal governed by Order 84C of the

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Rules of the Superior Courts. In so far as it is argued that the nature of the review provided by a statutory appeal on a point of law is in breach of the Convention, it is noted that the Communicant does not provide any supporting evidence for such a contention. The communication does not specify the manner in which the facts outlined in the communication amount to a breach of the Convention, nor is it specified what Article of the Convention is alleged to have been breached. In those circumstances, Ireland is only in a position to make a number of general comments in relation to the issues raised.

6.2. It is noted that Article 9 of the Convention requires that contracting Parties establish a framework of legislation that ensures that a *“person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law”*. Therefore Article 9 mandates that there is access to a ‘review procedure’ but does not mandate the standard of review that must be provided in that procedure. In particular, Article 9 does not mandate that a Court of law carrying out a review must have jurisdiction to consider both factual and legal aspects of an appeal in circumstances where such ‘full’ jurisdiction is vested in an administrative body created for the purpose of hearing appeals that arise in respect of requests for environmental information.

6.3. The Party Concerned has established a three stage review procedure. Firstly, a decision can be subject to an internal review within the Public Authority. Secondly, an appeal may be lodged to the OCEI with the OCEI being given jurisdiction to carry out a full factual and legal review of any decision taken. Finally, the High Court is mandated to

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carry out a review on ‘a point of law’, allowing the legality of any decision of the OCEI to be tested. It is respectfully submitted that this review process established by the AIE Regulations complies with the requirements of Article 9 of the Convention.

6.4. The review provided by Article 13 of the AIE Regulations amounts to review of legal issue that arises out of proceedings and may be brought in accordance with Order 84C of the Rules of the Superior Court (*Appendix H*). An appeal on a point of law is brought by a party against the OCEI. The other party to the decision will be a Notice Party to the proceedings before the High Court, with full rights of participation but with no obligation placed on them to participate. The defence of the decision in question is primarily a matter for the OCEI.

6.5. By way of general principle an appeal on a point of law is limited to the consideration of legal issues and not factual matters. The scope of an appeal on a point of law was considered by McKechnie J. in the High Court in the Case of *Deely v Information Commission* [2001] 3 IR 439 (*Appendix I*), where it was held that the following principles should be applied by the Court when an appeal on a point of law was being considered (at p. 452):

*“There is no doubt but when a Court is considering only a point of law, whether by way of a constricted appeal or via a case stated, the distinction in my view being irrelevant, it is, in accordance with established principles, confined as to its remit, in the manner following;*

*(a) It cannot set aside findings of primary fact unless there is no evidence to support such findings.*

*(b) It ought not to set aside inferences drawn from such facts unless such inferences were ones which no reasonable decision making body could draw.*

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*(c) You can however reverse such inferences if the same were based on the interpretation of documents and should do so if incorrect.*

*(d) If the conclusion reached by such bodies shows that they have taken an erroneous view of the law then it is also ground for setting aside the result of the decision.”*

6.6. The jurisdiction of the High Court in a statutory appeal of this nature is somewhat similar to its jurisdiction in an application brought by way of Judicial Review. Ireland relies on the decision of the Court of Justice of the European Union in Case C-71/14 *East Sussex (Appendix J)* wherein it was stated (at para. 58):

*“In this respect the Court was held that the exercise of the rights conferred by EU Law is not made impossible in practice or accessibly difficult merely by the fact that a procedure for the judicial review of decisions of the administrative authorities does not allow complete review of those decisions. However, also according to that case law, any natural judicial review procedure must none the less enable the Court or Tribunal hearing an application for annulment of such a decision to apply affectively the relevant principles and rules of EU Law when reviewing the lawfulness of the decision. Judicial Review that is limited as regards the assessment of certain questions of fact is thus compatible with EU Law, on condition that it enables the Court or Tribunal hearing an application for annulment of such decision to apply affectively the relevant principles and rules of EU Law when reviewing the lawfulness of the decision.”*

6.7. Having regard to the nature of the appeals process created by the AIE Regulations and the differing jurisdiction of the OCEI and the High

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Court, it is submitted that the statutory framework established by the Party Concerned complies with the obligations arising from Article 9 of the Convention.

6.8. The Communicant makes a complaint that the OCEI has no power to suspend a decision-making process that is subject to a public participation process pending his decision, and that the Courts have a limited jurisdiction and cannot order interim measures pending a review of an AIE refusal. The Communicant puts forward no basis for the contention that the Convention mandates States to empower national authorities in the manner described. A determination that there has been non-compliance by reason of the failure to empower the OCEI with powers of that nature would be to extend the nature and scope of the Convention beyond its terms.

6.9. The Communicant identifies a number of proceedings and outlines the length of time that those cases were before the Courts in Ireland. The statement by the Communicant that *'a large fraction of CEI decisions are appealed and a large fraction of these concern jurisdictional issues'* is simply not correct. Since the introduction of the AIE Regulations, there have been 4 appeals brought under Regulation 13 to the High Court and one challenge brought by way of Judicial Review of a decision of the OCEI (Full details set out in Table at point 2.8). This constitutes a very small number of appeals in light of the number of decisions reached by the OCEI since that office was created.

6.10. In light of certain comments made in the Communication, it is necessary to provide more detail in respect of some of the appeals brought to the High Court in order to properly understand how they have progressed.

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6.11. In *NAMA v. Commissioner for Environmental Information*, the Commissioner for Environmental Information issued a determination that the National Asset Management Agency (NAMA) was a Public Authority within the meaning of the AIE Regulations. That decision was appealed by NAMA to the High Court on 11 November 2011, with judgment being given by the High Court on 27<sup>th</sup> February 2013 in which the decision of the OCEI was upheld (*Appendix K*). As noted above, the High Court refused to place a stay on the operation of its decision pending an appeal to the Supreme Court. The Party Concerned understands that the requester, Gavin Sheridan, took no action on foot of the High Court decision and did not seek to have NAMA process his request. NAMA appealed the decision to the Supreme Court on 19 April 2013 and the Supreme Court gave judgment on 23<sup>rd</sup> June 2015 with the appeal being dismissed (*Appendix L*). It should be noted that the reasoning of the Supreme Court in their conclusion that NAMA was a Public Authority was significantly different to that which is found in the judgment of the High Court. Following the judgment of the Supreme Court, no further order was made meaning the matter was simply remitted to NAMA. The Party Concerned understands that the Requester, Mr. Sheridan, took no action following the Supreme Court judgment until 18<sup>th</sup> August 2016 when he contacted NAMA to inform them that he wished to continue with his request under the AIE Regulations in respect of a category of environmental information identified by him, namely:

*“A breakdown of all properties and property loans currently owned or controlled by the Agency. This should be limited to the Leitrim local authority area covered by Leitrim County Council. It should also include information related only to non-residential properties or loans secured on non-residential properties.”*

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6.12. That request was refused on 30<sup>th</sup> August 2016 as NAMA did not consider that the information sought constituted environmental information within the meaning of Article 3(1) of the AIE Regulations. The Party Concerned understands that in the letter of refusal, Mr. Sheridan was informed that he was entitled to submit a request for the information under the Freedom of Information Act, 2014. To date NAMA has not received further correspondence, whether by way of a request for an internal review or a request under the Freedom of Information Act, 2014, from Mr. Sheridan.

6.13. It is accepted that it took a number of years for that litigation to be finally determined. However, it should be noted that the question in issue, whether an entity such as NAMA was a Public Authority, involved difficult questions of legal principle. Ireland notes the comments of the Supreme Court on the question and notes that the Supreme Court stated that *“if the law stood as it was at the time of the High Court decision I would have considered it necessary to refer a question to the ECJ as to whether a body such as NAMA was a public body for the purpose of the Directive which exercised public administrative functions”*. The Supreme Court was of the view that the language of the Directive was unclear and the issue was only clarified by way of the judgment of the Court of Justice of the European Union in Case C-279/12, *Fish Legal & Emily Shirley v. Information Commissioner, United Utilities Water Plc, Yorkshire Water and Services Ltd and Southern Water Services Ltd* ('Fish Legal') (Appendix M).

6.14. The case of *IBRC Limited (formerly Anglo Irish Bank) v. Commissioner for Environmental Information* was lodged in 2011 and was placed in abeyance pending the decision of the Supreme Court in *NAMA*. Since the giving of that decision, no party has sought to reactivate the proceedings

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6.15. The Communicant refers to *Minch v. Commissioner for Environmental Information*, which concerns a determination of the OCEI that the subject matter of a particular request is not environmental information. The High Court quashed the OCEI's finding that the subject of the request was not environmental information and found that the OCEI had applied an incorrect legal test (*Appendix N*). That judgment has been appealed by both the OCEI and the Notice Party (the Department of Communications, Climate Action & Environment). The appeal involves complex and important issues of principle relating to the definition of environmental information. It should be noted that in *Minch v. Commissioner for Environmental Information*, the Court of Appeal accepted the argument made by all parties that there was an urgency in having that appeal heard and determined. In those circumstances, an earlier hearing date of 16<sup>th</sup> June 2017 was assigned to the appeal.

6.16. The proceedings entitled *John and Mary Redmond v. Commissioner for Environmental Information and Coillte Teo* were lodged in February 2016 and are listed for hearing on 3 October 2017. These proceedings have been brought as a Judicial Review as the Applicants did not bring a statutory appeal under Regulation 13 of the AIE Regulations within the time allowed by Order 84C of the Rules of the Superior Courts.

6.17. The fact that each of the cases identified have taken a number of years to resolve does not amount to a contravention of the Convention. In each case, complex legal issues have arisen with parties exercising their rights to maintain their argument in different courts. In that regard, Ireland relies on the decision of the Committee in *Kazakhstan ACCC/C/2004/2* where it was acknowledged that “*appeal*

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*processes in the case in question were indeed overall lengthily, this seems primarily due to the different interpretations of the then existing legal provisions by various judicial instances, rather than the procedures being unfair, costly or inequitable” (Appendix O).*

## **7. Conclusion**

7.1. The Communication submitted on 19<sup>th</sup> August 2016 makes complaint regarding the manner in which the Convention has been implemented in Ireland with specific reference to the implementation of the obligations relating to access to environmental information. The Communication complains of the approach of the OCEI to certain topics and the time taken by that office to reach decisions. The Communication also makes complaint relating to the time taken to hear appeals before the High Court and the nature of the jurisdiction granted to the High Court. In many instances the complaints made in the Communication are made in a general manner or made without supporting evidence.

7.2. The Party Concerned has implemented the access to environmental information provisions of the Convention in a robust manner, creating a framework in which Public Authorities are obligated to release environmental information within strict timeframes. Statistics submitted with this response shows that the majority of requests for environmental information are granted by Public Authorities within the timeframes required. The OCEI is granted jurisdiction to consider factual and legal appeals from any decisions to refuse a request for environmental information.

7.3. The OCEI has now been granted additional resources to deal with the volume of appeals received by that office and to enable appeals to be processed in an appropriate manner. The resources required by that

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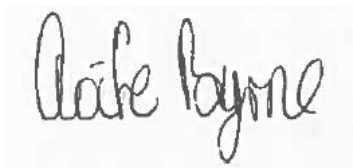
Office are kept under review having regard to the nature and volume of work being carried out by it.

7.4. The approach of the OCEI to appeals is firstly to determine whether a request for environmental information properly falls within the framework of the AIE Regulations. It is only when it has been determined that a request has been made to a Public Authority and that the request is made in relation to environmental information that the substance of a request requires to be considered. The consequence of the argument made by the Communicants is that every *request for information* of any body should be equated with a *request for environmental information from a Public Authority* within the meaning of the Convention and processed accordingly, notwithstanding the fact that it may fall outside the Regulations and therefore the Convention. There is no logic or authority that would support such an approach.

7.5. In those circumstances and having regard to the foregoing, there is no basis for a finding of non-compliance under the Convention on the part of Ireland.

Please do not hesitate to contact the undersigned if you require any further information.

Yours sincerely,



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Aoife Byrne

National Focal Point - Aarhus

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