

Access to Information on the Environment (AIE) in Ireland

Whether the 'minimal connection' test facilitates or
restricts access to information under the
Aarhus Convention

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www.ocei.ie



Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

The OCEI

- Established by Article 12 of the AIE Regulations in May 2007
 - Secondary rather than primary legislation; therefore, strictly bound by the Directive (*National Asset Management Agency v Commissioner for Environmental Information* [2015] IESC 51)
- The role of Commissioner is assigned to the holder of the Office of the Information Commissioner (OIC), but the OCEI is legally separate & independent
 - To review decisions of public authorities; to affirm, vary or annul such decisions, specifying the reasons; and where appropriate, to require the public authority to make the requested environmental information available to the applicant
- The Commissioner's decisions are final & binding, but subject to appeal to the High Court on a point of law
- 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)



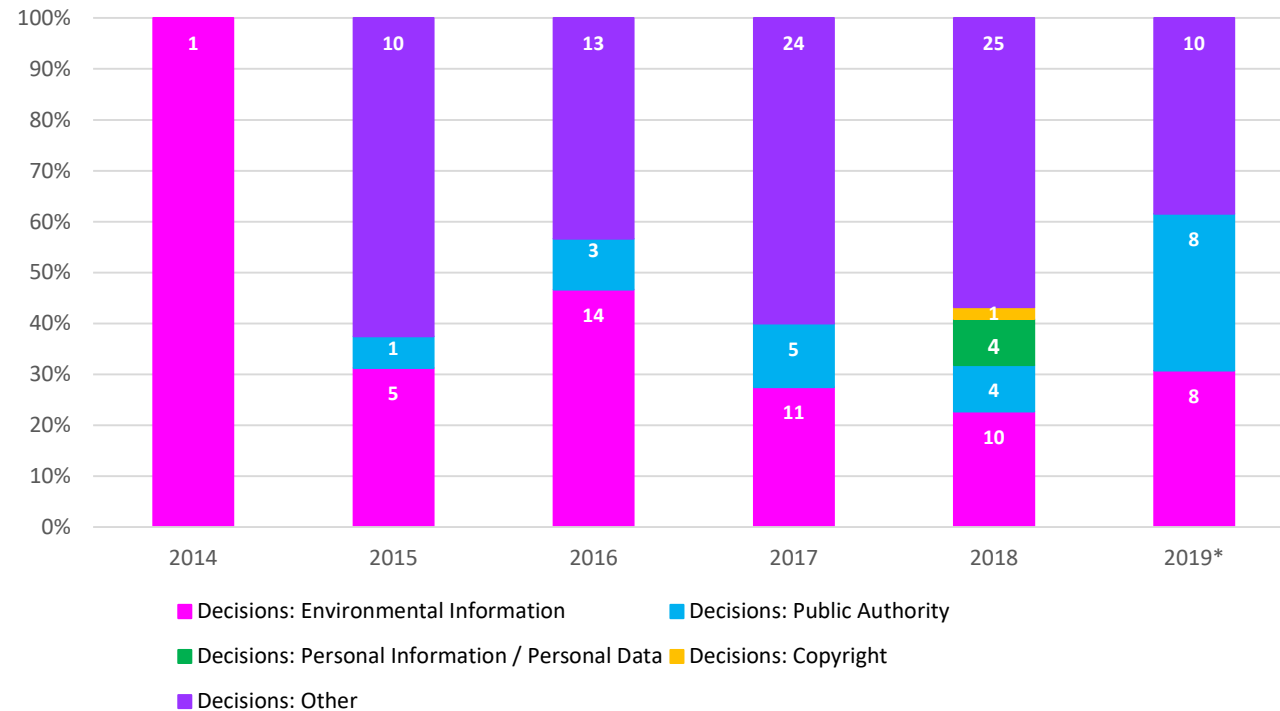
But what is “environmental information”?



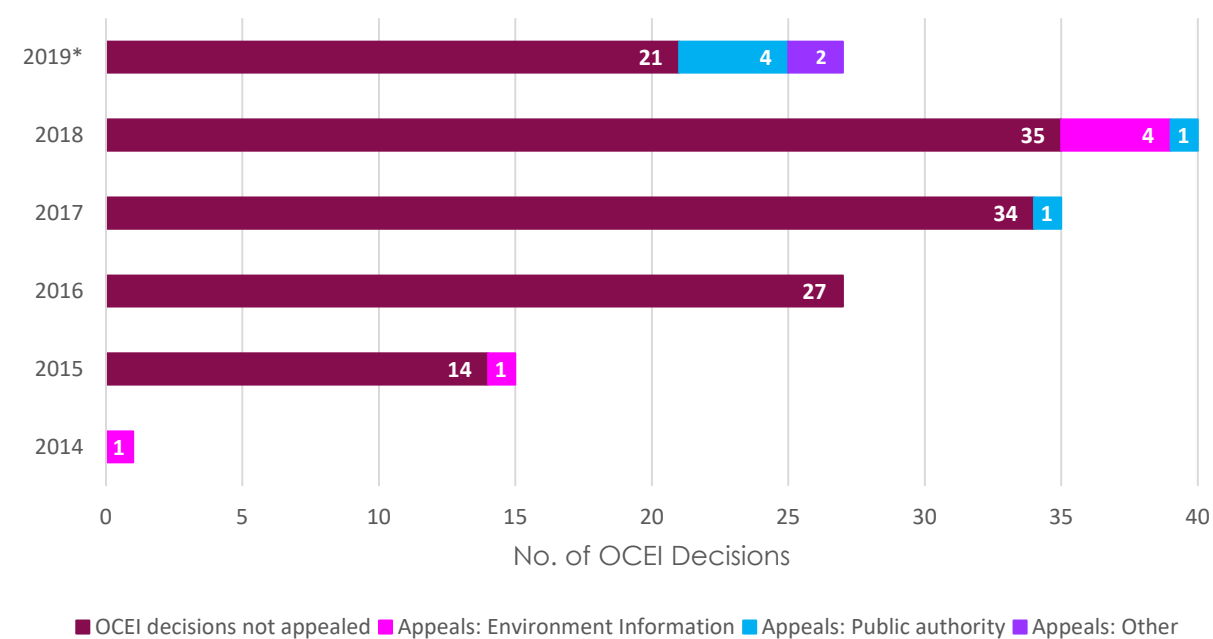
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Appeals involving the definitions

Main Issue in OCEI Decisions from 2014 - 2019*



OCEI Decisions Appealed 2014 - 2019*



- 12.5% of OCEI decisions made in 2018 were appealed to the High Court – all allege that the definitions of “environmental information” and/or “public authority” were misapplied
- 22 % of OCEI decisions made in 2019 were appealed to the High Court – 66% allege that the definitions of “environmental information” or “public authority” were misapplied



The Commissioner's approach

- Before *Minch*
 - The 'minimal connection' or 'remoteness' test
 - Consideration of the purpose of AIE as reflected in the Recitals to the Directive:
 - *environmental* decision-making
 - addressing problems identified in the report produced under Article 8 of Directive 90/313/EEC (refusal of information on such matters as the public health effects of the state of the environment, radiation or nuclear energy, and on financial or needs analysis underpinning environmental projects)
 - ensuring consistency with the Aarhus Convention
 - Concern for the integrity of AIE
- *Minch v Commissioner for Environmental Information & Anor* [2016] IEHC 91; *Minch v Commissioner for Environmental Information & Anor* [2017] IECA 223
- After *Minch*: how minimal is minimal?



What do you think?

- *Redmond v Commissioner for Environmental Information & Anor* [2017] IEHC 827; listed for hearing before the Court of Appeal in January 2020
 - Information, including the names of the purchasers, on the sale of afforested land
- *Coillte v Commissioner for Environmental Information* 2018/453 MCA; listed for hearing before the High Court in November 2019
 - Identities of purchasers of land with known plans or intended uses for the land which were likely to affect the elements and factors of the environment
- *Right to Know v Commissioner for Environmental Information and Minister for Transport, Tourism and Sport* 2018/119 MCA; listed for hearing before the High Court in March 2019 (for the third time)
 - Letter & submission (list of agenda items) sent by a business lobbying group (Ibec) seeking to arrange a meeting with an incoming Minister
 - But the information was released to the appellant outside of AIE



What about?

- *ESB v. Commissioner for Environmental Information* 2019/47 MCA; appeal pending before the High Court
 - Transcript of a property arbitration hearing relating to the compensation payable for the compulsory acquisition of land
- *Department of An Taoiseach V Commissioner for Environmental Information and Aine Ryall (Notice Party)* 2019/48 MCA; High Court appeal withdrawn on consent
 - Memorandum for Government (i.e. Cabinet record) concerning proposals to limit the timeframe for seeking judicial review of planning consents for strategic infrastructure developments
- Case CEI/16/0041 Right to Know CLG and Department of Defence (not appealed)
 - Details of the President's use of the Government jet service (dates of travel, departure point and destination, flying time, and the number of passengers)
 - Twitter feedback: what about his recycling and gardening habits?



Conflicts between AIE & other rights/privileges

- Potential conflicts include
 - Privacy rights, including in relation to “emissions” (e.g., CEI/17/0024)
 - Intellectual property rights (CEI/18/0003)
 - Legal professional privilege (e.g., CEI/17/0048)
 - Cabinet confidentiality (e.g., CEI/18/0010)
 - Commercial confidentiality (e.g., CEI/17/0045 – follow up to *Minch*)
 - Confidentiality generally (e.g., CEI/18/0034)
 - Presidential immunity (CEI/16/0041, CEI/17/0017, & CEI/17/0033)
- What about FOI?
- Does a broad interpretation serve the purpose?



“It’s the environment, . . .”

- General transparency v focus on “environmental matters”
- Diversion of limited resources
- Integrity of the AIE regime



For further information

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