Mary and Jim Redmond

Email:

10th May 2022

Ms. Fiona Marshall

Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe
Environment Division
Palais des Nations, Room S429-4
CH-1211 GENEVA 10
Switzerland.

BY EMAIL: Aarhus.compliance@unece.org

Dear Ms Marshall,

Re: Communication to the Aarhus Convention Compliance Committee concerning compliance by Ireland with article 3,4 and 9 of the Convention in relation to its system for reviewing decisions to refuse access to environmental information (ACCCC/C/2016/141).

We note the Committees findings in relation to the above communication and Irelands response to those findings. As you are aware we have been pursuing environmental information from Coillte in relation to the sale of a leasehold interest in land and forestry since 2014. We have received the decision to our recent appeal from the OCEI on the 14thApril 2022. We would like to put forward some observation on our experience of seeking environmental information. These observations deal with:

- Legal loophole between article 12(7) and 13(2) of the AIE regulations.
- Delays to appeals.
- Destruction of Documents.
- Veracity of Information.
- Article 7(1) Access to information held by or for a public authority.
- Adequate and reasonable searches.

Legal Loophole between Article 12(7) and Article 13(2)

In the Commissioners decision notice OCE-99843-F6K8M8 dated 14th April 2022 in the appendix section lists 21 separate records to be released to us. The Commissioner did not set down any time frame for the release of these documents, but Article 12(7) of the regulations provides that a public authority should comply with the Commissioners decision within three

weeks of receipt. If a public body fails to comply with his decision, then the Commissioner has the legislative power to apply to the High Court.

We contacted the OCEI to ask when the documents would be sent to us, and the response received from the OCEI on the 27thApril 2022 is enclosed below:

> *Article 12(7) of the Regulations provides that a public authority should comply with a decision of the Commissioner within three weeks of its receipt. However, article 13 provides that a party to an appeal or any person affected by it may initiate an appeal to the High Court within 2 months of being notified of the Commissioner's decision. There is therefore some ambiguity in the Regulations, but it is this Office's view that the periods run consecutively so that the 3 week period for compliance with the Commissioner's decision would not begin to run until after the period for appeal to the High Court.*

The office of OCEI recognises that there is an anomaly in the legislation between Article 12(7) and Article 13(2) whereby the public body does not need to comply with Article 12(7) until Article 13(2) has been complied with. In effect this means that if there are no legal challenges then the applicant must wait two months three weeks from the decision before they may receive the documentation. This is after the period for when an applicant can appeal to the High Court. This disadvantages the applicants should they wish to appeal the Commissioners decision to the High Court. As the appeal will be blind of the contents or the scrutiny of the information contained in the documents. The documents/information to be released may be important to the applicant's possible appeal to the High Court and the opportunity for a judicial decision which considers all the facts available will be lost due to the loophole described.

The legislation should not negatively impact on those seeking environmental information. This we believe is at odds with the spirit and intention of the legislation and although such a loophole exists in the legislation, public bodies should not capitalise on this, or potential applicants disadvantaged because of this loophole.

Delays to appeals

We believe Mr. Logue and Right to Know have done great work in bringing issues such as delays experienced by applicants in the AIE appeals process to the attention of the Compliance Committee. Because of this Ireland are engaging and subject to a decision on compliance and have put in place a plan of action. It is most welcome that Ireland is recognising that there are issues and are engaging with the Compliance Committee to review and improve the Regulations. Whilst Ireland's commitment to improve the OCEI's time frame for investigating appeals is welcome, our recent appeal has taken seventeen months for the OCEI to provide us with a decision.

We initially appealed to Coillte, the Irish Forestry Board, for Environmental Information in relation to the sale of a leasehold interest in circa 1000 acres of forestry at Kilcooley Abbey Estate Co. Tipperary in May 2014. We were refused information and therefore, appealed Coillte's decision to the OCEI in August 2014 it took fifteen months for the Commissioner to issue his decision in November 2015 (ref CEI/14/011). We then appealed the Commissioners decision by Judicial Review in the High Court and subsequently appealed the High Court's decision to the Court of Appeal. The Court of Appeal decision in April 2020 ruled that the information we sought was environmental information. After the Court of Appeal's decision, we reverted our original environmental questions from 2014 back to Coillte to provide the information. Coillte failed to provide us with the information sought, we therefore, appealed

Coillte's decision to the OCEI on the 14thNovember 2020. The Commissioner made his decision on the 14thApril 2022 seventeen months after we submitted our appeal.

Our original request was submitted to the Commissioner in 2014 and following the Court of Appeal decision we re-submitted the exact same questions back to the Commissioner in 2020. It has taken us eight years to get to this stage. In our experience little has changed in the way the OCEI prioritise environmental appeals, there is no urgency on behalf of the OCEI to tackle environmental appeals in a timely manner. Without specific amendments to the legislation, like the time frames imposed under the Freedom of Information legislation then there can be no protection for applicants to receive a timely decision from the Commissioner as freedom of information will always be prioritised above AIE.

Ireland in its response to the Compliance Committee regarding their findings of 7th August 2020, states at paragraph 8 that they intend to amend the AIE Regulations to introduce a requirement which will bring Ireland into conformity with the findings in respect of decisions of the OCEI. However, the expectation would be that if Ireland is aware of the issue with delays to decision making, then it should be actively seeking to reduce those timeframes rather than waiting for the legislation to catch up. Our experience between 2014 and 2022, is that there has been no demonstratable change in the OCEI's strategy in reducing decision timescales.

There was further delays with our appeal as the OCEI decided to contact 3rd parties to ask for their comments giving them an arbitrary 21 days to respond despite the case being live for over eight years and the exact same questions put through Coillte twice and again through the OCEI twice, one High Court appearance and a Court of Appeal judgment and the OCEI thought that after eight years the purchasers should be given an opportunity to comment on the basis that they might be impacted by release of some of the information, needless to say there was no response from either 3rd party in relation to disclosure.

The Commissioners justification for the delay in paragraphs 30-31 of his decision notice is that Article 12 is silent on the matter of procedure and as the Commissioner is independent in the performance of his duties, it is for the Commissioner to determine the procedure which will apply to the exercise of the functions conferred on him by Article 12. The Commissioner relies on the OCEI's Procedural Manual to be his guide to the legislation. Article 7 provides protection for 3rd parties and the onus is on the public authority to contact 3rd parties not the Commissioner. Article 12 provides protection for 3rd parties by giving them an opportunity to appeal to the Commissioner only against the decision of the public authority concerned. We believe that article 12 isn't silent on the procedure relating to 3rd parties and we also believe there is nothing within the legislation that requires or allows the Commissioner to contact 3rd parties. The AIE legislation requires that 3rd party issues should be delt with by the public authority, and this keeps delays to a minimum because responses are time bound. By the Commissioner having his own procedural manual to deal with 3rd parties it circumvents the legislation and causes undue delays.

We note from Coillte's correspondence of the 6thMay 2022 is relating to one 3rd party document that it was stated '*we note from the Decision itself that the Commissioner corresponded with the third party in relation to that document. Therefore, the third party has a right to appeal the matter to the High Court on a point of law if they so wish*,' Article 13 allows for an appeal to the High Court by parties to the appeal or by any other person affected by the decision. What

Coillte are suggesting is that because the Commissioner corresponded with the 3rd parties, he has now made them party to the appeal and given them the same rights of appeal as the applicants and the public body. Coillte have advised us that they will not be appealing the decision and that they will not be releasing any of the documents until after the two months statutory period has expired or if any party appeals the decision despite only one document relating to the 3rd party being in contention.

If the Public Body and the Commissioner had followed the legislation and 3rd parties were dealt with in accordance with Article 7 it minimises the grounds for appeal and therefore cuts down delays and court time.

Destruction of Documents

In our appeal decision of the 14thApril 2022 the Commissioner states at paragraph 88 of the decision note that it could be argued that the minimum 7 years retention period might have expired in relation to documents we requested or were part of our request. A public authority should not be destroying documents while they are party to an environmental request or legal challenge. We requested information from Coillte in 2014 when they sold their leasehold interest in land and forestry at Kilcooley Abbey Estate in Co. Tipperary and from that time to now we have been actively requesting that information through the OCEI and the courts, it should be a requirement for public authority to retain that information and the regulations should provide protection for applicants in this respect. If there is no protection afforded to the applicant in cases such as this it gives the public authority the option to run the time down until the seven-year period for disposing of documents arrives, leaving the applicant without any recourse to obtain the information.

Veracity of Information

Coillte provided us with information on the price paid for the sale of the leasehold interest at Kilcooley Abbey Estate, we questioned the veracity of that information. The Commissioner points out in paragraph 68 that the appellants were provided with incorrect information by Coillte during the initial and internal review stages. The Commissioners in his decision notice paragraph 37 states that "*the Regulations do not provide for an obligation on a public authority to prove the veracity of the information… it is therefore, not my function to ensure that the appellants are satisfied by Coillte's explanation of the sales process."* The legislation should be strengthened so that there is a legal obligation on the public authority to ensure the information provided by them is credible and there should be an onus on the Commissioner to ensure that information provided by a public authority upholds information rights in the public interest, promoting openness by public authority.

An example of lack of veracity we believe is contained in paragraph 43

> "*Coillte has not provided executed versions of the 2009 Option Agreement or the March Option agreement and has submitted that it does not have executed copies. The copy of the 2009 Option Agreement provided to my Office does not include details of the party with whom the Option Agreement was entered into."*

The Commissioner has accepted the use of unsubstantiated copies of draft documents as proof that the public authority's environmental information is correct. This leaves open the opportunity for a public authority to provide any details as evidence to support a particular

position in the knowledge that the veracity of the information will not be challenged by the Commissioner.

Information Held by or for it

The Commissioner at paragraph 100 states that:

> "*However, were I to go any further and direct Coillte to provide information to the appellants beyond that which is held by or for it, I would be in danger of exceeding the jurisdiction conferred on me by virtue of article 12 of the Regulations. In addition, I do not agree with the appellants' contention that my jurisdiction under the AIE Regulations enables me to issue directions to Arthur Cox*"

The public authority stated to the Commissioner that they are unable to locate executed documents which evidence the information they presented. They provided a draft copy of that evidence with no names included. This is a draft copy being used as evidence to support the public authorities claims and the Commissioner is accepting this because he believes if he were to ask for this information which is being held by or for a public authority by their solicitors or legal firm, it would be exceeding his jurisdiction.

This would ultimately lead to a very slippery slope in the public's right to access environmental information as a public authority could hive off information to its legal firm as a means of putting it beyond the reach of applicant's access to information.

Adequate, Reasonable search

The Commissioner acknowledges at paragraph 37 that "*my Office requires a public authority to demonstrate that it has carried out adequate and reasonable searches to identify all relevant information held by or for it.*" There is no definition of what an adequate or reasonable search in the Regulation is and to who's standard it should meet. There should be some clarification in the legislation as to what standard an appellant can expect from a public authority when it carries out its searches.

Thank you for the opportunity to put forward some of our observations and experiences on the OCEI appeal process.

Yours sincerely

Mary & Jim Redmond