

Our Reference: FPL/113/  
Your Reference:

29 March 2023

**By Email**

Minister Eamon Ryan TD  
Minister for Environment, Climate and Communications  
[REDACTED]

**Our client: Right to Know CLG**

**RE: Charges and costs for access to environmental information**

Dear Minister

We act for Right to Know CLG (**R2K**), a well-known information rights NGO established in Ireland<sup>1</sup>. As you are no doubt aware, R2K is a non-profit organisation whose mission includes ensuring that there is the widest possible access to environmental information through active publication under Article 5 of the Aarhus Convention (the **Convention**) and through the full implementation of the public right to request access to environmental information under Article 4.

We are instructed to write to you, as Minister responsible for Ireland's compliance with the Convention. We write to ask you to take urgent and concrete action to ensure that (a) Ireland complies with Article 4(8) of the Convention which limits the charges that may be applied for supplying environmental information to the public; and (b) to ensure that appeals to the Commissioner for Environmental Information (the **Commissioner**) are not prohibitively expensive as required by Article 9(4).

**Charges for supplying environmental information – Article 4(8)**

At the moment, most public authorities charge indirect costs for search and retrieval of information as well as material costs relating to copying and other media such as CDs or USBs. Typically search and retrieval is charged at €20 per hour, copying at €0.04 per page and CDs at €10 each. Several public authorities charge many multiples of these costs<sup>2</sup>.

While there is no specific national legislative basis for these charges, it appears that public authorities are generally relying on Circular AIE/2/2017 which was produced following the decision of the Court

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<sup>1</sup> [www.righttoknow.ie](http://www.righttoknow.ie)

<sup>2</sup> For example, An Bord Pleanála charges €0.20 per page with a minimum €1.00 charge (including charges for scanning), Offaly County Council generally €0.04 per page but charges €0.30 per page for copies of documents on planning files, Kilkenny County Council charges a €20 file retrieval fee and €0.15 per page to make copies.

of Justice in Case C-71/14 *East Sussex*. A copy of this circular does not appear to be publicly available on the internet, so it is unclear to us what the basis for it is or how it is being applied. It also appears that many public authorities are simply applying the prescribed fee structure for Freedom of Information (FOI) requests<sup>3</sup> even though there is no power under the Freedom of Information Act 2014 for the Minister for Public Expenditure and Reform to prescribe AIE charges and in any event, FOI charges are not set by reference to the principles set out in Article 4(8) of the Convention as interpreted by the Courts and by the Aarhus Convention Compliance Committee (the **Compliance Committee**).

While charges for supplying environmental information are not prohibited under the Convention, they are significantly constrained by Article 4(8) which aims to safeguard the right of access. These constraints are as follows:

1. Charges are discretionary not mandatory; a Party is not required to provide for charging for supplying environmental information.
2. Charges may only be applied for supplying environmental information.
3. They shall not exceed a reasonable amount.
4. Public authorities intending to charge must publish a schedule of charges indicating when charges may be levied or waived and when supply of information is conditioned on the advance payment of a charge.

As you are no doubt aware, the issue of charges for supplying environmental information was subject to findings and recommendations of the Compliance Committee in case ACCC/C/2017/147 concerning compliance by Moldova<sup>4</sup>, where the Committee stated:

86 Article 4 (8) of the Convention provides that public authorities may charge for supplying information, under the condition that any such charge does not exceed a reasonable amount. Given the importance of the right of access to environmental information to achieve the objective of the Convention and also the wording of article 4 (8), it is clear to the Committee that the presumption is that such information should be supplied free of charge, but Parties may allow charges provided that they do not exceed a reasonable amount. [...]

...

89. Moreover, the Committee underlines that any charges for supplying environmental information must be based on a transparent calculation and, while they may include a contribution towards the material costs for supplying the environmental information, they must not include the cost of the initial production, collection or acquisition of the information itself or any other indirect cost. Thus, information held by public authorities should be provided for free or at no more than the reasonable material costs of supplying the requested information (e.g. postage or copying costs). Lastly, any charge must not have a deterrent effect on persons wishing to obtain information, effectively restricting their right of access to information.

Furthermore, the Compliance Committee has held that even where charges for material costs are applied, the reasonableness of these charges is gauged by reference to the prevailing commercial rates for materials, see case ACCC/C/2008/24 concerning compliance by Spain<sup>5</sup>.

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<sup>3</sup> Freedom of Information Act (Fees) (No 2) Regulations 2014 SI 531 of 2014

<sup>4</sup> [https://unece.org/sites/default/files/2021-09/ece\\_mp.pp\\_c.1\\_2021\\_30\\_eng.pdf](https://unece.org/sites/default/files/2021-09/ece_mp.pp_c.1_2021_30_eng.pdf)

<sup>5</sup> [https://unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece\\_mp.pp\\_c.1\\_2009\\_8\\_add.1\\_e.pdf](https://unece.org/fileadmin/DAM/env/pp/compliance/CC-26/ece_mp.pp_c.1_2009_8_add.1_e.pdf)

In light of the above it is clear that search and retrieval costs are indirect costs not associated with the costs of materials, and therefore cannot be charged.

In addition, the material costs charged by public authorities are generally set at many times the actual costs of materials. For example, the cost to this firm of producing a single A4 copy is €0.007 for printing (which includes consumables, maintenance and VAT) and approximately €0.01 for paper<sup>6</sup>. Therefore, the costs for printing should not exceed €0.012 per double-sided page, yet most public authorities charge more than three times this rate without justification and many charge far more. A pack of 50 CDs can be purchased for €14.08 including VAT<sup>7</sup> i.e. €0.28 per disc, yet most public authorities charge 35 times this cost for CDs.

In terms of safeguards virtually none of the public authorities which R2K examined provided for waiver of costs. In several cases applications for waivers required an invasive documentation of means which is disproportionate and would deter many applicants. Equally, there appear to be no provisions in place for waivers for members of the public which are legal persons such as R2K, or groups, organisations and associations.

Bizarrely, several public authorities, only provide waivers when charges are below a certain amount, an approach which seems to be aimed at their own administrative convenience rather than safeguarding against an interference with the right of access due to high costs. None provided for a waiver if the charge exceeded a certain amount and many emphasise on their websites that “full costs” will be charged if costs exceed €700.

In light of the above it is clear that Ireland’s system for charging for the supply of environmental information is not in compliance with Article 4(8) of the Aarhus Convention and urgent remedial action is required.

In addition, the failure of Ireland to take steps to give effect in its own system to the non-compliance identified in Moldova in ACCC/C/2017/147 breaches Article 1 and/or Article 3(1) of the Convention since the obligation in these articles for Ireland to guarantee the right of access to environmental information by taking the necessary legislative, regulatory and other measures to implement the Convention consistently requires it to give effect to findings of non-compliance by the Compliance Committee in communications concerning other Parties where the same non-compliance exists in its own jurisdiction.

#### **Access to Justice – Commissioner for Environmental Information – Article 9(4)**

In R2K’s view Ireland has not adopted measures to ensure that appeals to the Commissioner are not-prohibitively expensive and therefore Ireland has failed to comply with Article 9(4) of the Convention. R2K notes that in case ACCC/C/2016/141<sup>8</sup> the Compliance Committee held that the Commissioner’s jurisdiction is derived from the first paragraph of Article 9(1) of the Convention, which also applies to litigation, however Ireland has not adopted uniform costs rules in relation to appeals to the Commissioner on the one hand and court procedures on the other.

#### Appeal fee

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<sup>6</sup> <https://www.huntoffice.ie/5-star-office-value-copier-paper-80gsm-500-sheets-per-ream-a4-white-5-reams-397921.html>

<sup>7</sup> <https://www.huntoffice.ie/hp-cd-r-52x-700mb-wrap-pack-of-50-69300-hp69300.html>

<sup>8</sup> [https://unece.org/sites/default/files/2021-04/ece\\_mp.pp\\_c.1\\_2021\\_8\\_eng.pdf](https://unece.org/sites/default/files/2021-04/ece_mp.pp_c.1_2021_8_eng.pdf)

There is a charge of €50 for making an appeal to the Commissioner. This is reduced to €15 for persons with a medical card or their dependants and for third parties making an appeal<sup>9</sup>.

This fee structure is inconsistent since natural persons and third party appellants are treated differently from other categories of the public. Put simply, natural persons and third party appellants can benefit from a reduced fee whereas first party appellants which are legal persons, or groups, organisation and associations have no possibility of paying a reduced fee. This is not a consistent implementation as required by Article 3(1) of the Convention.

While the legislation acknowledges that the €50 may be prohibitive for natural persons with limited means, and a reduced fee is applicable, there is no safeguard in place for legal persons, groups, organisations or associations (who by definition cannot hold a medical card) to ensure that the fee is not prohibitive for them. There is no express provisions for the fee to be waived or reduced for these categories of the public and there is no assistance mechanism in place to cover this cost for those of them who cannot pay.

In fact, R2K has spent thousands of Euro on application fees in recent years including in the many cases where the public authority decision was reversed and has in fact been forced to pay a high cost to exercise its right of access to environmental information. In many cases repeat offenders continue to refuse requests even though the issues have already been decided or the information is required to be actively disseminated on the internet, forcing R2K to continue to incur costs to access information that should be automatically available. These costs are a considerable drain on its resources and have a disproportionate impact on its ability to carry out its activities. Even in terms of the appeals that are still pending, R2K has already paid approximately €1,300 in appeal fees which it can never recover.

#### Own costs

Ireland has not put in place any system to ensure that an appellant's own costs are not prohibitively expensive. Unlike court procedures, there are no provisions in place either for an award of costs to be made to a successful appellant or for an assistance scheme to help pay for the appellants' own costs.

While Ireland may argue that it is not necessary to engage lawyers to bring appeals to the Commissioner, many public authorities do engage lawyers to respond to appeals, and in any event have dedicated resources funded by the state for the purpose of responding to appeals. Therefore, it is not unreasonable, in the interests of a fair and equitable procedure (also required under Article 9(4) of the Convention), for R2K to require legal assistance to handle appeals before the Commissioner to ensure equality of arms.

In the absence of any rules on costs recovery or a scheme of legal assistance, it has fallen to this firm to act pro-bono for R2K. We estimate that in addition to the appeal fee, it costs approximately €3,000 ex VAT for the work involved in a typical appeal. Clearly there are cases which are more complex and others that require several appeals to the Commissioner when threshold issues are raised.

The situation is to be contrasted with litigation (which also derives from Article 9(1) first paragraph). Court procedures come within the provisions of Section 5 of the Environment (Miscellaneous Provisions) Act 2011 (the **2011 Act**) where an applicant is entitled to recover costs to the extent that

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<sup>9</sup> European Communities (Access to Information on the Environment) Regulations 2007 to 2018, Regulation 15

it succeeds. The courts have found this form of costs protection to comply with Article 9(4) since it provides a way of financing legal representation at a non-prohibitive cost<sup>10</sup>. It is therefore inconsistent for Ireland not to have a similar costs regime for Commissioner appeals given that both types of procedure are derived from the same provision of the Convention.

The possibility of a costs award against an unsuccessful public authority would have a collateral benefit since it would have a disciplining effect on public authorities introducing a financial incentive to make better decisions. It would also moderate the potential for public authorities to abuse the system by repeatedly refusing requests which manifestly should be granted or which concern information which should be actively disseminated.

At the moment, in fact, it is more expensive for the appellant to bring an appeal than for the public authority to respond to one. This situation is patently at odds with both the letter and spirit of the Convention.

### Costs Generally

In R2K's view, the costs of appeals to the Commissioner must be non-prohibitive - objectively and subjectively. Therefore, the lack of any mechanism to waive or reduce the appeal fee or for appellants to recover costs of appealing to the Commissioner; or to otherwise assist in paying the appellant's own legal costs constitutes non-compliance with Article 9(4) of the Convention.

### **Domestic Remedies**

R2K is unaware of any domestic remedies that it can use to bring Ireland into compliance with the Convention obligations detailed in this letter.

First, it is well settled under Irish and EU law that the provisions of the Aarhus Convention identified in this letter are not directly applicable by the Commissioner or the Courts.

Second, the findings and recommendations of the Compliance Committee are not binding on the Commissioner or the Courts and therefore cannot be definitively relied on by R2K in a domestic context. Relatedly, neither the Commissioner nor the Courts can grant a remedy which finds that Ireland is not in compliance with the Aarhus Convention, nor can they order Ireland to adopt measures to bring it into compliance. It is also notable that Ireland is aware of or ought to be aware of the findings in cases such as ACCC/C/2017/147 yet has not taken any steps to implement these findings in this jurisdiction. R2K has no domestic legal mechanism to compel Ireland to act upon Compliance Committee findings.

Theoretically, R2K could challenge actual charges for supplying information before the Commissioner on a case-by-case basis but this would do nothing to deal with the systematic non-compliance and in any event the cases where charges have been appealed have taken many months to be decided<sup>11</sup>. Serial appeals in individual cases would therefore introduce a disproportionate delay without actually dealing with the root cause.

In relation to the appeal fee, the Commissioner appears to have no general discretion to waive the fee which is set out in legislation, R2K cannot identify any remedy to challenge the levying of this fee.

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<sup>10</sup> *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 19

<sup>11</sup> Case CEI/18/0038, eight months, Case OCE-105379, seven months, Case C-OCE-110723, five months

In addition, several precedential decisions of the Courts confirm the lack of domestic remedies. R2K is aware of the decision in Case C-71/14 *East Sussex* (which predates the ACCC findings in ACCC/C/2017/147) that confirms the lawfulness as a matter of EU law of the charging of indirect costs for supplying environmental information, this case appears to have been overtaken by the more recent findings of the Compliance Committee but is nonetheless binding on the Commissioner and all instances of the Irish Courts. Therefore, any challenge to the levying of indirect costs such as search and retrieval costs would automatically fail, based on this judgment.

The Commissioner, as a creature of statute, has no power to award costs. Therefore, R2K has no legal mechanism through which it can recover its costs in an appeal to the Commissioner. R2K is also aware of the decision of the Court of Appeal in *Friends of the Irish Environment v Legal Aid Board* [2023] IECA 13 which held that legal persons may not apply for civil legal aid. R2K is unaware of any other published legal aid scheme which would cover the costs of an appeal to the Commissioner.

There is no appropriate domestic remedy available to R2K and it must therefore rely on the voluntary action of the State to bring Ireland into compliance with the Convention, or else make a communication to the Compliance Committee.

### **Conclusion and next steps**

This letter sets out Ireland's non-compliance with Articles 1, 3(1), 4(8) and 9(4) of the Convention. R2K formally requests that you take the following actions to bring Ireland into compliance:

1. Immediately issue a circular to all public authorities directing them to cease charging for the supply of environmental information. As set out above, the Aarhus Convention prohibits the charging of indirect costs such as search and retrieval costs and, given the low costs of materials, Ireland should default to a position of supplying information free of charge as suggested by the Compliance Committee.
2. In the short term put in place a system where the appeal fee payable to the Commissioner is not charged, for example the fee could be deferred, or paid out of your Department's resources. In parallel, amendments to the AIE Regulations should be prepared to remove the appeal fee entirely and be in place no later than the end of the current parliamentary year.
3. Make a proposal and commit to a timetable to introduce measures to ensure that the procedure for appealing public authority decisions to the Commissioner is not prohibitively expensive. This should include giving the Commissioner the power to award costs to an appellant similar to the provisions of Sections 3 and 5 of the 2011 Act, supplemented by a system of legal aid for Commissioner appeals. In the interim an *ad hoc* assistance scheme should be put in place within the same time frame requested in point 2 above.
4. If you don't agree with R2K's analysis of domestic remedies to set out specifically what remedies you consider are available, their costs, duration and how they would effectively deal with the non-compliance, particularly systemic non-compliance.

R2K is well aware of the speed at which the Irish authorities can move to legislate in the planning sphere and expects that the same urgency will be applied in this instance. We therefore request a substantive response to this letter within one month. The response should include concrete time-limited proposals to bring Ireland into compliance with the Convention. The response should also

include immediate administrative measures to be followed up with legislative amendments by the end of the current parliamentary year.

If an adequate response is not received within one month, R2K will make a communication to the Compliance Committee concerning the subject matter of this letter and will include any response you wish to make in that communication. If you require more time to consider the issues raised in this letter our client will refrain from making the intended communication only if the possibility for public authorities to charge for supplying environmental information and the obligation to pay the Commissioner appeal fee are suspended while you are considering how to respond.

We look forward to hearing from you no later than **28 April 2023**.

Yours faithfully

A solid black rectangular box used to redact the signature of the sender.

**FP LOGUE LLP**

**Cc: Commissioner for Environmental Information, DECC Aarhus Unit**