

Sunday 14 January 2024

Re: ACCC/C/2016/141 : Complaint by Right to Know

Dear Ms Marshall,

Thank you for your invitation to comment. I refer primarily to Decision VII/8i paragraph 4(b)(i) and how the proposed new regulations<sup>1</sup> address the problems identified.

### **The 4 month aspirational deadline and suspensions**

The 4 month aspirational deadline at 10(8)(a) is moderated by the proposal at 10(8)(b) to mandate suspension of the appeal timeline when awaiting compliance by public authorities with a direction of OCEI, or while OCEI awaits information from a third party. OCEI's proposed 4 month deadline is presumably met, or not, net of the suspension periods.

This arrangement excuses OCEI for delays created by others but it skirts the objective to consider *"the system as a whole and in a systemic manner"*

For the requester/applicant timeliness is experienced as the gross delay including suspensions.

### **The 4 month aspirational deadline and remittals**

An annulment or variation involving a remittal to the PA is counted as a decision and a case closure by OCEI. Causes for remittal include inadequate searches, inadequate reasoning and unsuitable formats. In 2023 it appears 56 of 83 formal decisions were remitted.

### **Enforceability of directions by OCEI to provide reasons**

OCEI identified inadequate reasoning by PAs at request stage as being generative of appeals<sup>2</sup> and thereafter of delays at appeal. The proposed power to direct the provision of reasoning at 10(3)(b) does not appear to be explicitly enforceable by court order in the same way that an OCEI direction to release information is enforceable at 10(12)

It is difficult to know whether the respective 3 week deadline at 10(3)(b) would be strictly applied and what action could follow in default.

### **Factors increasing OCEI workload**

The proposed duty of PAs to consult 3rd parties at 6(10)(b) and the broadening of the scope of "manifestly unreasonable" requests at 7(1)(d)(i) would tend to increase the number of refusals at PA stage and consequently appeals to OCEI.

Additionally the proposed increase in scope of "interests [of third parties]" at 10(1)(b) could be expected to increase third party appeals to OCEI.

Leaving aside the current backlog, the extra workload from the proposed changes above would require matching resources or increased efficiency. Otherwise, timeliness could be expected to deteriorate.

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<sup>1</sup>Updated Access to Information on the Environment Regulations  
<https://assets.gov.ie/276559/c3a77cd8-7a90-4344-9cba-b9dc2dc1030c.pdf>

<sup>2</sup> See OCEI annual report 2022 p.21  
<https://www.ocei.ie/publications/annual-reports/>

## **The Guidelines**

The current guidelines<sup>3</sup> for PAs pre-date most of the relevant court judgements, and also the Commissioner's consequent change of stance to the definitions in the Convention. They are the responsibility of the Minister for the Environment and are 10 years old.

It might therefore be more appropriate for the Commissioner, rather than the Minister, to draft the new guidelines in light of the challenge that he faces from the proposed 4 month deadline. It might also help the Commissioner if a higher obligation was placed on PAs to observe them, such as a requirement at 12(3) to pay them 'substantial regard' or 'utmost regard'

The Commissioner should be able to recognise, or not, PA decision makers dependent on their attendance at training courses, along with some evidence that they had read the then current guidelines. The burden would then be on the heads of PAs to ensure that sufficient staff had adequate training.

Given that Commissioner has set out his analysis of the problems in recent reports and submissions he may not need the full 12 months allowed to the Minister.

## **Measurement**

The case status categories, such as decisions, suspensions, remittals, directions, discontinuations and settlements should be amenable to measurement to allow for monitoring of progress of the system against the findings of the Committee. Clearly court delays are also a relevant.

To simply sub-divide and re-categorise known problems, primarily the behaviour of PAs, and then exclude those problematic elements from measurement, is hard to understand.

The operative measure is the gross time experienced by the requester in obtaining the environmental information that they requested. The Committee is correct to take a systemic approach.

## **The Courts.**

The clearer remit proposed for the High Court at 11(4) and the new Environmental and Planning List and its specific goals<sup>4</sup> look like good news. However the obligation at 11(6) does not raise the urgency of Aarhus obligations above the general run, or set any kind of timeline.

## **Non legislative measures**

Ireland's government ministers could set out their own stance by writing to the heads of all the public authorities that they oversee to outline their commitment to the Convention, proactive publication, timeliness, training, and good faith engagement with OCEI.

Nominees to the boards of public authorities could be required to make similar commitments.

## **Conclusion**

The four month aspirational deadline proposed for OCEI is at present an un-resourced mandate.

Yours sincerely,

Stephen Minch

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<sup>3</sup> <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the-environment-aie/#guidelines>

<sup>4</sup> [https://www.courts.ie/content/planning-environment-list#\\_Toc151326906](https://www.courts.ie/content/planning-environment-list#_Toc151326906)