

Submission to AIE Regulations Public Consultation 2021

Link to AIE Regulations: [link](#)

“1. What, in your opinion, are the positive benefits of the AIE Regulations?”

The environment cannot speak for itself. It follows that others must speak on its behalf if it is to be protected, which means that effective and timely access to information is vital.

Environmental information is also of grave importance to humans and our own rights and interests. Humans are wholly intertwined with the natural world. Our natural home supports and sustains us, and any degradation of nature is a degradation of human interests and rights, such as the rights to life, to dignity, and to bodily integrity. It follows that in order to best vindicate and protect these rights, all the people in Ireland need to have access to any and all information on the environment.

My hope is that this consultation process will make it easier to request information, but also simply make information more freely available, with the aim of providing easy and timely access to environmental information so that people can participate in decision-making. It is not a question of the public in opposition to the public authorities, but of working together to help protect the natural and human environment.

“2. Should any specific part of the Regulations be amended?”

- **Article 5**
- **Paragraph 5(1)(b)**
 - Delete the words "make all reasonable efforts to"

Rationale: Public authorities should be unconditionally obliged to hold information in accessible formats.

- **Paragraph 5(1)(d)**
 - Amend 5(1)(d) and add 5(1)(e) to read:

“(d) maintain registers or lists of the environmental information held by the authority, with archives open to the public when possible, with clear information as to where such information may be found, and shall ensure that such registers, lists and archives are publicly accessible on the internet, and

(e) designate an information officer for such purposes, who will make environmental information publicly available and accessible, and deal with information requests.”

Rationale: If information is publicly accessible, it will reduce the need for time-consuming information requests. Public availability of information held by authorities will make finding information easier for both the person seeking information and the various authorities who might hold it. Public authorities will need to have an environmental information officer, if they are to deal with requests, which they must do. Their role is also to simply make the information accessible. The former final point of 5(1)(d) has now become redundant.

- **Sub-article 5(3)**

- Delete and replace with:
- “(3) In the event of a threat to human health or the environment, whether caused by human activities or due to natural causes, a public authority shall ensure that all relevant information held by or for it is, immediately and without delay,
 - (a) disseminated to the general public, and
 - (b) directly communicated/delivered to any affected group or individual”

Rationale: Any risk to the environment or human health is a matter which ought to be published as a matter of urgency. The decision as to what information could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is one for the public concerned to make.

- **Article 6**

- **Paragraph 6(1)(a)**

- Delete the words "writing or electronic" and insert "any".

Rationale: The requirement that applications be in writing is exclusive. It risks undermining the information-rights of groups such as people with literacy problems and certain persons with disabilities. Áine Ryall notes that "a request may be made orally under the equivalent measures in England, Wales and Northern Ireland and in Scotland" (Ryall 2011, 53).

- **Paragraph 6(1)(b)**

- Delete this provision.

Rationale: The burden should not be on the applicant to know the details of the AIE Regulations or FOI Act. If the information requested is not environmental information, and does not fall under these Regulations, the person requesting can be informed of that at that moment.

- **Paragraph 6(1)(c)**

- Delete and replace with "(c) state the name and any relevant contact details of the applicant,"

Rationale: Requiring an applicant to provide an address risks excluding various groups from accessing information. For example: homeless people, certain members of the Traveller community, asylum seekers, and students.

Article 7

- **Insert paragraph 7(1)(b):**

- "The public authority shall establish an online log to enable applicants to track the processing of requests for information."

- **Insert paragraph 7(1)(c):**

- "The public authority shall inform applicants of the status of their request for information within 10 days of the receipt of the request."

- **Paragraph 7(6)(a)**

- Amend to:

- “Where sub-article (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible, and within 5 days of receipt of the request —
 - (a) transfer the request to the other public authority and inform the applicant accordingly.
 - (b) This shall not extend the 1-month deadline for responding to the request.”
- **Sub-article 7(8):**
 - After “a manner” insert “or is unreasonable having regard to the volume or range of information sought”
 - After “such a request” insert “e.g. by providing information on the use of the public registers, lists and archives referred to in paragraph 5(1)(d).”
- **Insert sub-article 7(11)**

A public authority shall put in place systems to collate appropriate annual statistics, including the following:

 - the number of requests for information received relating to access to information on the environment,
 - the number of cases under which the information was either fully disclosed, partially disclosed or refused in full,
 - the number of cases referred for internal review, and
 - in cases where access to information was refused, the reasons for refusal or the exceptions under which it was refused.
 - The above information shall be collated and forwarded to the Office of the Commissioner for Environmental Information on an annual basis.

Rationale:

- These amendments would promote better administrative practices within public authorities.
- If there is a clear publicly-accessible register of information held, the need to transfer the request should be a rare occurrence.

- The collation of information on requests will help improve the operation of the access to environmental information.

- **Article 8**
 - Change the title of the article to “Grounds that, subject to article 10, allow for a refusal.”
 - Delete the words "shall not make" and insert the words, "subject to article 10, may refuse to make"

Rationale: As Ryall notes, this regulation is more restrictive than the AIE Directive requires and should be relaxed to ensure wider access to information. Mandatory grounds for refusal are not permissible under the Directive 2003/4/EC. (Ryall 2011, 53)

- **Article 9**
 - Change title of the article to “Other grounds on which a request for environmental information may be refused”

- **Paragraph 9(2)(a)**
 - After “information sought” insert “taking into account article 7(8)”

- **Insert paragraph 9(2)(e)**
 - “Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.”

- **Article 12**
 - **Delete sub-article 12(2)** and renumber other sub-articles appropriately.

 - **Insert sub-article 12(6)** and renumber other sub-articles appropriately:

- (a) “A decision under subsection (5) shall be made as soon as may be and, insofar as practicable, not later than 4 months after the receipt by the Commissioner of the application for the review concerned.
- (b) The Commissioner for Environmental Information shall, in the performance of her or his functions under this article, have regard to any timescale specified by the applicant.
- (c) An appeal may be prioritized if the person submitting the appeal can show that the information is required for a specific process in which she/he wishes to participate.”

Rationale (sub-art. 12(2) deletion): Freedom of Information and Access to Information on the Environment are disparate schemes, and the Aarhus Convention Compliance Committee found that “the disparity between the two schemes means that, by definition, the person who exercises the two functions is under pressure to give priority to appeals lodged under the FOI Act” (§108). This is having a detrimental effect on the timely resolution of AIE appeals.

Rationale (sub-art. 12(6) insertion): The aim of these regulations providing access to environmental information is that people be able to participate in decision-making.

The Aarhus Convention Compliance Committee states that “the average time taken by the OCEI in 2018 and 2019 to publish decisions on appeals (279 and 249 days, respectively) far exceeds the deadlines set for public participation in decision-making procedures or commencing court proceedings.” (§105)

They also note that “this figure is only an average, so a significant proportion of the appeals decided by the OCEI take longer.” (§106)

The Committee also states that, the “OCEI carries out a full review of the facts and the law, but that cannot justify systemic delays that prevent members of the public from exercising their rights under the Convention to participate in decision-making or seek access to justice regarding the environment.” (§106)

A four-month period is still far outside the timelines for many of the deadlines set for public participation in decision-making procedures, either within the initial planning processes or within judicial review procedures, but brings AIE Appeals within the timeframe of FOI requests in

S22(3) of the FOI Act 2014. As the Aarhus Convention Compliance Committee states also, “It is difficult to see why, if it was feasible for the Party concerned to establish a clear deadline for FOI appeals, there should not also be one set for appeals under the AIE Regulations.” (§108)

- **Article 13**
- **Sub-article 13(4)**
 - After “shall, where appropriate,” substitute with:
 - “... issue directions for the adequate and effective resolution of its order, and specify the period within which effect shall be given to its order.”

Rationale: The Aarhus Convention Compliance Committee states that:

“By maintaining a system whereby courts may rule that information requests fall within the scope of the AIE Regulations without issuing any directions for their adequate and effective resolution thereafter, the Party concerned fails to comply with the requirement in article 9 (4) of the Convention to ensure adequate and effective remedies for the review of environmental information requests.” (§133)

- **Article 15**
- **Sub-article 15(3)**
 - Substitute with: “Subject to sub-article (4), a fee of €25 shall be charged for making an appeal to the Commissioner under article 12.”

Rationale: a charge of €50 inhibits many from appealing a decision. The OCEI should be as widely accessible as possible. In contrast to the Irish position, no equivalent appeal fee has been payable under the regulations transposing Directive 2003/4/EC in England, Wales and Northern Ireland or in Scotland.

“3. Any other comments on the existing AIE Regulations and their implementation of the AIE Directive 2003/4/EC?”

A significant problem remains with regard to timely access to the courts, which we have not been able to address within the ambit of these suggested amendments. The Aarhus Compliance Committee commented that in no sense can the review procedures before the Irish courts be considered timely (§116). As was pointed out by one of the participants in that hearing, the delay in reaching the courts is of particular concern for those seeking to participate in time-limited consultation processes or when deciding whether to apply for judicial review of decisions, acts or omissions within the time limit imposed for that (§81).

Sources

- Aarhus Convention Compliance Committee. “Findings and recommendations with regard to communication ACCC/C/2016/141 concerning compliance by Ireland Adopted by the Compliance Committee on 9 November 2020”, ECE/MP.PP/C.1/2021/8
- Michael Ewing, Alison Hough and Magnus Amajirionwu (2011) “[Assessing Access To Information, Participation, and Justice in Environmental Decision Making in Ireland](#)”, EPA Strive Series No. 86.
- Aine Ryall (2011) ‘Access to Environmental Information in Ireland: Implementation Challenges’ *Journal of Environmental Law*, Vol. 23, No. 1, pp. 45-71.