Introduction

1. Right to Know (**R2K**) makes this submission in response to the public consultation on the Review of the Access to Environmental Information (AIE) Regulations 2007 to 2018. It seems that this review is motivated, at least partially, by the findings and recommendations of the Aarhus Convention Compliance Committee (**ACCC**) in case C/141 which found that Ireland was not in compliance with the Aarhus Convention. It is also stated that the review will also consider updating the Regulations to ensure continued compatibility with EU law.
2. The consultation document does not say why "continued compatibility" with EU law cannot be ensured without this review. It would have been helpful if the current incompatibilities were highlighted to the public in the consultation documents.
3. In its findings and recommendations adopted on 9 November 2020, the ACCC reported the following main findings with regard to non-compliance:
   (a) By failing to put in place measures to ensure that the OCEI and the courts decide appeals regarding environmental information requests in a timely manner, the Party concerned fails to comply with the requirement in article 9(4) of the Convention to ensure timely procedures for the review of environmental information requests;
   (b) 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.

4. The ACCC recommended that Ireland take the necessary regulatory and legislative measures to ensure that:
   (a) Appeals under the AIE Regulations to the OCEI or the courts, whether commenced by the applicant or any other person, are required to be decided in a timely manner, for instance by setting a specified deadline;
   (b) There are mandatory directions in place to ensure that, should a court rule that a public authority or an information request falls within the scope of the AIE Regulations, the underlying information request is thereafter resolved in an adequate and effective manner.
5. It is regrettable that R2K was not consulted in relation to the scoping of this review given that it arises directly from R2K's communication to the ACCC. R2K has unique experience in the application of the AIE Regulations at all levels and could have added valuable insight in terms of scoping the review. As it is, the review is not well scoped, and lacks any form of analysis of the current operation of the Regulations, which critically weakens the effectiveness of the review.
6. In R2K's experience there is a serious issue with lack of widespread adoption of AIE in public authorities, particularly those authorities with primary environmental responsibilities such as local authorities, consent authorities, and government departments having environmental responsibilities and utilities.
7. Some of the issues identified by R2K include:

- Having a parallel national FOI regime, which is less favourable compared with AIE
- Lack of training of officials and lack of guidance on AIE.
- Difficulty in identifying AIE Officers in many public authorities.
- Overly formal and legalistic handling of requests.
- No regard to timeliness in answering requests.
- Weak OCEI procedures.
- Confusion over what bodies and which information is within the scope of the Regulations.

Parallel FOI/AIE regime is a major issue

8. Ireland operates parallel FOI and AIE regimes which are radically different. In R2K's view this seriously undermines the right of access to environmental information because the Freedom of Information Act 2014 provides for a greater number of exceptions, some of which are not harm-based, a lower threshold to engage harm-based exceptions ("could" vs "would"), and no public interest balancing test for some exceptions. The FOI Act does not contain an overriding public interest in accessing information relating to emissions into the environment.
9. The limitation period for administrative appeals under the FOI Act is six months while it is only one month under AIE.
10. In terms of access to justice, the AIE Directive specifies access to particular justice provisions which must conform with Article 9(4), the decisions of the CJEU are relevant and applicants taking court appeals have protection against prohibitive costs. None of these apply to requests handled under FOI.
11. On the other hand, the Information Commissioner has broader powers when compared with the Commissioner for Environmental Information. The Information Commissioner, unlike the Commissioner for Environmental Information, must keep the FOI Act under review, can investigate the practices and procedures of FOI Bodies and publish reports on such investigations, and can issue guidance and commentaries.
12. It is well established under the principle of equivalence that domestic procedural law must operate in the same way for rights derived from domestic law and their EU law equivalents. Therefore, in principle FOI bodies should either automatically treat requests for environmental information made under the FOI Act as AIE Requests and disapply the FOI Act based on the WRC decision of the CJEU (Case C-378/17, *Minister for Justice and Equality and Commissioner of the Garda Síochána*[1]).
13. However the statistics for FOI and AIE usage paint a very disturbing picture indicating that up to 90% of requests for access to environmental information are handled as FOI requests (a procedure that is less favourable than the equivalent EU law right)[2]. See table 1 for a selected comparison between the number of non-personal FOI requests and AIE requests for 2019, the last year for which full statistics are available.

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[1] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0378

[2] 2019 Data: FOI statistics from Information Commissioner's 2019 Annual Report (non-personal requests), AIE statistics from https://www.gov.ie/en/collection/257c4-national-aie-statistics/

Table 1 - Comparing numbers of requests for selected public bodies for 2019 (NR - not reported)

Public Authority/FOI Body	FOI	AIE
Local Authorities	4425	464
D/Transport	501	7
D/Communications, Climate Action and the Environment	456	46
D/Agriculture	265	69
D/Housing Planning and Local Government	305	14
D/Heritage (includes NPWS)	217	34
OPW	150	7
NTA	196	3
Irish Water	101	20
TII	92	5
ESBN	52	NR
Inland Fisheries	60	8
Bord Pleanála	20	14
Eirgrid	30	7
Land Development Agency	NR	0
Bord na Móna	NR	6
EPA	61	84
Office of Planning Regulator	NR	0

14. The data shows that key government Departments with environmental responsibilities such as Housing, Environment, Transport, Heritage (including NPWS) handled vastly more non-personal FOI requests than AIE requests during 2019. Similarly, agencies with significant environmental responsibilities such as OPW, TII, and the National Transport Authority are receiving negligible numbers of AIE requests.

15. This situation should set alarm bells sounding across the public service in Ireland since it indicates a widespread failure to properly implement an important EU law right. The Government should urgently investigate this issue and provide updated legislation to ensure that all requests for access to environmental information, however made, are handled correctly and lawfully.

16. It is R2K's experience that very often public authorities will try and steer requests into FOI, even when specifically asked to handle a request as AIE. AIE requests are routinely answered using FOI templates and refused based on provisions of the FOI Act 2014. If public authorities themselves are confused and ill-equipped to handle requests then it is doubtful whether the public can be assisted with their access requests.

17. While it is acknowledged that at a very basic level FOI officers may inform requesters that information is accessible under AIE (section 12(7)(b)) this rarely happens and in any event the data shows that this provision is ineffective.

Adequate training for Public Authorities and officials

18. The Government should carry out a detailed review of AIE training and invest heavily in this aspect and develop a set of KPIs so that the adequacy of the training can be reviewed.

19. It seems to be the case that there is a lack of training for public-facing officials and a lack of buy-in at senior level in public authorities. The intent of the Aarhus Convention and the AIE Directive is to make it everybody's job in a public authority to provide access to environmental information. This is reflected in article 3(5)(a) of the Directive which requires officials to be trained.

20. The intent of the Aarhus Convention and the AIE Directive is to provide an informal right of access to information which can be invoked in person, with a phone call or a very simple email or letter to a public authority. There should be no need to be aware of the legislation to make a request. The onus is on the public authority and all of the officials to identify requests and make sure they are handled efficiently with the least amount of formality needed. However, AIE in Ireland, as reflected in the very small number of recorded requests, has become dysfunctional, overly technical and virtually impossible to navigate without significant expertise and experience. Our environment and our decision making is all the poorer for this.

21. On a related note, it can be very difficult to identify an official with responsibility for AIE within public authorities and the use of foi@ email addresses often ends in confusion.

22. In a similar vein, we have encountered public authorities that have refused to validate requests unless sent to a specific email address, even where the addressee is well aware that a request has been made. Examples such as this serve to highlight that there are no internal procedures within many public authorities to ensure and facilitate access to environmental information.

Timeliness

23. At the outset, the AIE Directive and Aarhus Convention expressly recognise that there is an important time element associated with the right of access. Under Article 4(2) of the Convention, information must be made available "as soon as possible". For that reason, a public authority must have regard to the timeframe specified by the requestor. The second paragraph of Article 9(1) specifies that there must be an alternative non-judicial review procedure which is "expeditious". Article 9(4) places an overriding obligation to provide "timely" remedies.

24. Similarly in the AIE Directive article 3(2) requires regard to be had to any timescale specified by the applicant and that information must be made available as soon as possible. Under Article 6(1) the administrative review procedure must be expeditious.

25. It is clear therefore that the timing of access as well as the review of disputes over access is just as important as access itself. It is obvious that access to information after a decision has been taken or after a public consultation period has ended is less effective than access to information during the procedure.

26. Unfortunately, Ireland has chosen not to expand through its legislation on what exactly the obligations are in general. Therefore, the timing aspects of the legislation are by and large left entirely to the discretion of public authorities.

27. Right to Know therefore recommends that detailed legislation and guidance are introduced that clarify what the obligations are for public authorities.

28. In particular, it recommends that where information is sought in a consent procedure, provision is made for dealing with requests for access to environmental information in the course of the procedure. We already have a similar system where a consent authority can ask an applicant to provide further information. The consent authority's procedure is then suspended while the applicant assembles the information. A similar procedure should be introduced into all consent procedures whereby the public can seek access to relevant information from public authorities (for example the EPA or a local authority) with the procedure suspended until the public authority provides the information.

29. As part of the gathering of statistics on AIE, the actual time between registration of a request and the provision of access should be recorded and reported each year to ensure that public authorities are not, as a rule, viewing the one month period as a deadline rather than an outer limit to the timing of access. In addition, a public authority that takes a month to answer a request must give reasons why it hasn't answered a request in less than one month.

Active dissemination

30. In R2K's view the most important measure to ensure timely access to environmental information is through active dissemination. As identified by AG Fennelly in *Commission v Germany*[3] – the legislative intent behind the (previous) Directive is that AIE requests should only be on points of detail with the bulk of environmental information being actively disseminated.

31. However, the duty to actively disseminate environmental information is the poor child of AIE. Ireland has not introduced detailed legislation to give full effect to this obligation. Right to Know recommends the following:

    - All Public Authorities must be under a statutory duty to consult with the public and develop and implement an active dissemination plan which is reviewed regularly. Draft plans should be submitted to the Commissioner for Environmental Information for approval.
    - The Commissioner for Environmental Information should be given the authority to receive complaints and resolve disputes in relation to active dissemination.
    - The Commissioner for Environmental Information should publish in his annual report recommendations on active dissemination based on the appeals handled each year
    - There should be a national standard for active dissemination of information in consent procedures which are open to public participation (e.g. planning, environmental licensing, etc) which at the very least require information to be made permanently available on the internet in a searchable, downloadable electronic format in compliance with the Open Data Directive (2019/1024[4]).
    - Public authorities shall be required to ensure that any website design doesn't interfere with access to information by creating dead links or by removing historic information.

[3] Case C-217/97 para 30

[4] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L1024

- Bodies which do not currently do so, such as An Bord Pleanála, should be required to put all of their files online within three working days of receipt including for live files.
- In no procedure should the applicant be tasked with making the environmental information available (for example under Strategic Housing Development) – the duty of active dissemination should be carried out directly by the public authority
- Consent authorities should be obliged to use downloadable PDF or even open formats and cease using unsupported formats such as DJVU or upload documents as single JPEGs for each page.
- As part of the validation procedure for consent applications, the consent authority must certify its own compliance with active dissemination.
- Public authorities should publish RSS feeds (or APIs) of planning documents, for example this facility is available on EPA licence files and on An Bord Pleanála's website.
- All information published online should be searchable and be capable of being indexed by search engines (i.e. robots.txt should not exclude search engines).
- Procedures should be in place to ensure that unnecessary personal information (for example personal addresses, emails, phone numbers, local needs submissions) and sensitive environmental information is protected.

Scope of the Regulations - Public authority

32. There continue to be numerous disputes over whether certain bodies are public authorities. In many instances, public bodies legally have public functions or responsibilities but as a matter of their own culture or ethos do not identify with the public nature of their activities. This includes entities performing public functions under public private partnership arrangements, subsidiaries of semi-state bodies, publicly owned companies which have dual commercial and public functions, entities which are joint ventures with private entities but nonetheless rely on the use of public law powers for this purpose. Ireland's privatisation/outsourcing model of public service delivery naturally gives rise to a diverse range of public authorities, many of which do not realise they are public authorities.
33. Ireland should carry out a public consultation with a view to defining in legislation a list of public authorities. There are still numerous disputes as to whether bodies are, or are not, public authorities.
34. At the very least the following should be identified in legislation as public authorities:
    - The Government
    - All FOI Bodies including partially included bodies
    - All entities that are owned and/or controlled by the State or other public authorities
    - All entities which are members of semi-state groups
    - All Public Private Partnership companies
    - Partnerships and exotic entities such as fund structures etc

Scope of the Regulations - Environmental Information

35. There is still huge confusion within public authorities as to what constitutes environmental information. Disputes over the scope of the AIE Regulations are still a feature of this legislation despite it being almost thirty years old at this stage.
36. Ireland needs to publish detailed and helpful guidelines to assist public authorities with identifying environmental information based on the considerable amount of case law which has developed in this area and to make public authorities aware that the legal definition covers information that may not appear intrinsically environmental.
37. Public authorities should have a statutory obligation to publish lists of the environmental information which they hold. Such lists should be developed following public consultation and should be capable of review by the Commissioner for Environmental Information

Remove the internal review step

38. In R2K's experience the internal review step serves no real purpose and only serves to delay almost all disputed requests by a month. Most internal reviews that R2K receives are pro-forma decisions upholding the initial refusal. They rarely change the outcome and rarely add or expand on reasoning.
39. A major aspect of delay could be achieved by removing the internal review process entirely without having any negative effect overall.

Office of the Commissioner for Environmental Information

40. R2K recognises the important role played by the Office of the Commissioner for Environmental Information (**OCEI**) in ensuring the proper functioning of the AIE system in Ireland. The administrative appeal mechanism is the primary route through which the law and practice of AIE is clarified.
41. While we recognise that there have been improvements in the resourcing and organisation of the OCEI we believe that this crucial office needs to be reformed significantly.
42. At the outset, the legislation must identify whether the OCEI is intended to fulfill the review mechanism under Article 6(1) or 6(2) of the Directive. In R2K's view the OCEI was intended to provide an administrative review as an independent impartial body.
43. In the alternative if the OCEI is intended to be "a court of law or another independent and impartial body established by law" then its procedures must be compatible with the Constitution and the Charter of Fundamental Rights since article 6(2) is intended to provide a judicial remedy as opposed to an administrative remedy.
44. In particular the following is needed:
    - The application fee to the OCEI should be abolished. It is a disproportionate interference with the right of access and serves no real purpose
    - The power to deem an appeal withdrawn should be abolished, by definition if a public body makes information available following an appeal to the OCEI it has failed to comply with its legal obligations.

- Evidence from public authorities must be given on oath with penalties for giving false evidence.
- There should be a statutory duty of candour imposed on public authorities responding to an OCEI appeal with penalties for failure to disclose relevant information.
- Oral hearings and cross examination must be possible at least where there are disputed facts.
- All written submissions must be furnished to the appellant and where a submission would reveal disputed information this part should be provided separately in a closed submission.
- The Commissioner must adjudicate on complaints that requests have been inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3 and 4 of the directive - even where information has been released. This would include complaints that decisions were not made as soon as possible, regard was not had to the timeframe specified by the requestor, and so on.

45. As things stand the Commissioner is the primary (and indeed only) fact finder with virtually no possibility of a judicial appeal against findings of fact. However these findings are not based on sworn evidence and an appellant does not have the opportunity to test the facts in an oral hearing and through cross examination. It is doubtful that the OCEI's procedures are compatible with the Constitution or the Charter of Fundamental Rights in this regard.

Next steps

46. The Department should publish all submissions received on this consultation
47. Primary legislation is required to address the serious deficiencies that we have detailed in this submission. In fact, since the Directive gives discretion over how certain aspects are transposed it is arguable that much of the current AIE Regulations are invalid since they are not necessitated by Ireland's membership of the EU. For example, there is no requirement to implement any exceptions to AIE.
48. Ireland has a choice. It can recognise and embrace the purpose of the AIE Directive embodied in recital 1:

    > *"Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."*

    or it can continue with a poorly implemented system which blocks most members of the public from accessing information which they have a right to access and which leads to protracted disputes, litigation and complaints at the expense of good decision making and environmental protection.
49. R2K hopes that Ireland chooses the former over the latter.
50. We remain available to the Department to meet to discuss how best to implement C/141.