

**Submission of An Taisce to the Department of the Environment,  
Climate and Communications**

*Public Consultation on the Review of the Access to Information on the Environment  
Regulations 2007-2018*

An Taisce makes this submission in response to the public consultation on the Review of the Access to Environmental Information (AIE) Regulations 2007 to 2018.

On 9 November 2020, the Aarhus Convention Compliance Committee (ACCC) made a number of recommendations and findings on foot of case C/141, in which they determined that Ireland was not in compliance with the Aarhus Convention. In particular, the ACCC issued two main findings with regard to non-compliance:

- a. Failure to enact measures to ensure timely decision-making on appeals in relation to environmental information by the OCEI and the courts placed Ireland in a position of non-compliance with Article 9(4) of the Convention, which concerns timely procedures for review of environmental information requests
- b. Maintaining a system whereby courts can rule that certain information falls within the remit of the Regulations without consequent issuing of directions for the adequate and effective resolution thereof, is not compliant with the Article 9(4) requirement to ensure adequate and effective remedies.

The ACCC also recommended that Ireland, through whatever regulatory and legislative measures may be necessary, 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.

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This submission will identify and consider three key issues with respect to the AIE Regulations:

1. The difficulties created by a parallel FOI regime, which is less favourable than the AIE Regime,
2. The obligation of timeliness in granting access to information
3. The need for active dissemination of environmental information

## **1. Parallel FOI/AIE Regime**

The operation of parallel, fundamentally divergent FOI and AIE regimes in Ireland causes major difficulties for meaningful vindication of the right of access to environmental information.

At present, the vast majority of information requests are processed through the FOI regime, even in circumstances where the AIE Regulations may be applicable or more appropriate. The FOI regime is comparably disadvantageous in a number of respects. The Freedom of Information Act 2014 is more accommodating to exceptions: some of the FOI exceptions are not harm based, for example, and there is a significantly lower threshold applied in the FOI regime for engaging harm-based exceptions. Further, the absence of a public interest balancing test in the case of some exceptions is comparably less favourable than the AIE equivalent.

There is also an issue with regard to access to justice. The Freedom of Information Act does not specify or require justice provisions that would conform with Article 9(4) of the Convention, whereas this obligation is included in the AIE regime. Specifically, decisions of the CJEU and protections against prohibitive costs for applicants taking court appeals are included in the AIE Regulations, but absent in the FOI regime.

In general, and subject to the Information Commissioner's Annual Report for 2019, the vast preponderance of information access requests handled by government departments and state agencies with significant environmental responsibilities are conducted through FOI, rather than AIE. This disparity is an indictment of the domestic implementation of the fundamental EU legal right to access to the environment. This issue should be urgently investigated, and updated legislation should be enacted to ensure that all requests for access to environmental information (however made) are handled correctly and lawfully.

## **2. Timeliness**

Timely access to information granted under AIE Regulations is a core aspect of both the AIE Directive and the Aarhus Convention. Article 4(2) of the Convention stipulates that information must be made available "as soon as possible." Article 9(1) states that a non-judicial review process must be made available, and that the process should be "expeditious". Article 9(4) includes an overriding obligation to provide "timely" remedies.

The timing and punctuality of access is as central to the purpose and object of the Directive and Convention as the principle of access itself. Access to information is only valuable insofar as the issue to which that information pertains continues to be relevant. It is regrettable that Ireland has, to date, failed to legislatively specify the exact nature of the obligations. In effect, the legislature has chosen to leave the timing element of access requests at the discretion of individual public authorities. An Taisce is therefore recommending that detailed legislation and guidance are introduced that clarify what the obligations are for public authorities.

## **3. Active Dissemination**

Ensuring timely access to environmental information is underpinned by protocols ensuring active dissemination of environmental information. This point is clearly confirmed in *Commission v Germany* (Case C-217/97), in which AG Farrelly identified that the legislative intent behind the previous Directive is that AIE Requests should only be required on points of detail, while the bulk of environmental information should be actively disseminated to the public.

Unfortunately, this principle has not translated into the Irish system effectively. Ireland has failed to introduce any detailed or meaningful legislation give fully implement this obligation. An Taisce supports the following measures:

- All Public Authorities should be obliged to develop and publish an Active Dissemination Plan, prepared in consultation with the public and stakeholders. Such plans should be mandatory, and regularly reviewable, with appropriate oversight thereof undertaken by the OCEI.
- The websites of all Public Authorities should be maintained and updated regularly, such that active facilitation of access to information is ensured in a meaningful and intuitive way for all members of the public.
- All public bodies, including An Bórd Pleanála, should be required to upload all relevant files to a public portal within three working days of receipt

- The obligation to actively disseminate should in all instances be carried by the Public Authority. This work should never fall to the applicant in any procedure.
- All public authorities should be required to harmonise the format of digital files, such that they are easily downloadable and do not require specialist software. Downloadable PDF formatting should be the standard practice.
- All online information should be readily searchable.

#### **4. Conclusions**

Recital 1 of the AIE Directive states:

*"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."*

At this juncture, Ireland's regulatory landscape fails to give meaningful effect to the objective outlined in the first recital. Instead, there is a prevailing regime of uncertainty, lack of clarity, and poor implantation. The shortcomings of the AIE system block the majority of the public from access to information to which they are entitled. As result, the system is further stagnated by disputes, litigation and complaints.

Revision of the AIE Regulations, taking into account the shortcoming raised in this submission, would contribute greatly to the resolution of the roadblock that is presented by the current regime, and would place Ireland on a path to meaningful vindication of the fundamental EU right of access to information.

