Coimisinéir um Fhaisnéis Comhshaoil
Commissioner for Environmental Information

Public Consultation: Review of the European Communities (Access to Information on the Environment) Regulations 2011 to 2018

SUBMISSION OF THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION
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INTRODUCTION

1. The Office of the Commissioner for Environmental Information (OCEI) welcomes the opportunity to make a submission in response to the public consultation on the review of the European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the Regulations). The OCEI was established under article 12 of the Regulations for the purpose of providing an external administrative review procedure in accordance with Article 6(2) of Directive 2003/4/EC on public access to environmental information (the Directive) and Article 9(1) of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Convention).

EXECUTIVE SUMMARY

2. We welcome the Department's decision to conduct a full review of the Regulations and we are grateful for this opportunity to make a submission as part of the consultation process. The review provides an opportunity to improve the operation of the access to information on the environment (AIE) regime, taking into account the experience of all parties over the last decade, to clarify outstanding matters of interpretation and to bring the Regulations within one consolidated piece of legislation.

3. When considering the opportunity for reform, we have identified four key themes. We firmly believe that reforms in line with these themes will further the objectives of the Directive and the Convention, as set out in Article 1 of each of those instruments.

4. In light of the recent findings of the Aarhus Convention Compliance Committee (the ACCC), reform is essential to achieve **timeliness of review**. We consider that achieving timeliness of review is the highest priority, both in terms of urgency and importance. We are proposing a package of measures to achieve this, including provisions designed to ensure that public authorities give *adequate reasons for their decisions*, to *improve public authority engagement* with the OCEI, to *clarify who is a public authority,* to provide for a *duty of timeliness* for resolution of appeals to the OCEI, and to *reduce OCEI participation in court appeals*.

5. **Effective investigation and enforcement** is crucial to the smooth and timely operation of the AIE regime. Our key proposals under this theme include *empowering the Commissioner to delegate to staff* and *broadening the Commissioner's powers to obtain information* from public authorities.

6. **Fair procedures** are central to the maintenance of an effective and defensible AIE regime. Our key proposals include measures to ensure *appropriate involvement of third parties*, to *clarify matters which constitute a refusal of access to information* and to *clarify the procedures of the Commissioner* on appeal.

7. As well as being requirements of EU law, **legal clarity and compliance with the Directive** are vital to ensuring efficient use of the resources of public authorities and the OCEI. Lack of clarity and inconsistency in the Regulations causes confusion for both applicants and public authorities, resulting in poor decision-making and unnecessary appeals to the Commissioner. Our key proposals under this theme include providing for an express *duty to disseminate environmental information*, *reconsidering the exception in article 9(2)(a)* and reviewing the Regulations to *ensure compliance with the GDPR*.

8. Under article 12(2) of the Regulations, the Commissioner holds office by virtue of his appointment as Information Commissioner. As such, the Commissioner is well placed to compare and contrast the AIE and the Freedom of Information (FOI) regimes. The AIE regime is somewhat similar to the FOI regime but it operates in Ireland as a separate system of access. Unlike FOI law, which is purely national law, AIE law is European and international. This has important implications for how it is interpreted and for any reform of the regime; any changes to the AIE regime must remain consistent with the European and international instruments on which it is based. There are some fundamental differences between the regimes, for example the difference between the definition of public authorities under the AIE regime and the definition of public bodies under the FOI regime. However, other differences between the regimes are not fundamental, but nonetheless cause confusion for public authorities tasked with applying both regimes in parallel, often in relation to requests for identical information. We consider that greater alignment of the two access regimes, as is the case in some other jurisdictions, would provide easier access to information for those using the AIE regime and simplify the processing of requests by public authorities and reviews by the OCEI. Many of the proposals for reform suggested in this submission draw on the Commissioner's experience of the FOI regime, but the Government is also invited to review both the Regulations and the Freedom of Information Act 2014 with a view to achieving greater alignment between the regimes.

9. While amendments to the Regulations are of course a matter for the Minister for the Environment, Communications and Climate, the proposals below include illustrative drafting to aid the Department in understanding the OCEI's proposals. These proposals are informed by the technical and administrative difficulties that the OCEI encounters in dealing with appeals from decisions made under the current statutory provisions.

A: TIMELINESS OF REVIEW

10. Following a complaint about Ireland's compliance with the Convention in August 2016, the ACCC adopted its findings and recommendations on 9 November 2020. Among other matters, the ACCC found a failure on Ireland's part to comply with the requirements of the Convention by an absence of measures to ensure that appeals to the OCEI are resolved in a timely manner. We take the findings and recommendations of the ACCC very seriously. We are committed to improving the efficiency of the practices and procedures of the OCEI. This is particularly the case in circumstances where an appeal involves participation in environmental decision-making.

11. Progress has been made in recent years. The dedicated staffing resources of the OCEI have been increased. The time taken to accept appeals reduced from 1-2 months in 2016 to 3 weeks or less in 2020. The average number of days taken for a case to be closed has been progressively reduced from 316 days in 2016 to 248 days in 2019.

12. However, significant challenges remain. Working on AIE appeals is often difficult and time-consuming, due to factors such as the volume of records involved, the complexity of the subject matter, a lack of clarity on how the law should be interpreted, delays in receipt of information from the parties, strongly contested disputes as to whether information is environmental information and whether the person or body to whom the request has been made is a public authority, and the frequent requirement to consult third parties. In addition, a growing number of the Commissioner's decisions have been appealed to the courts. For example, this number increased from 12.5% of decisions made in 2018 to 19% of decisions made in 2019. Responding to these appeals diverts resources away from our core mission. While we are committed to improving the efficiency of practices and procedures within the OCEI, improvements in the timeliness of the review process cannot be achieved by the OCEI alone and will, in particular, require the cooperation of public authorities. For this reason, we include suggestions below for amendment which will provide further clarity for those authorities as to the importance of their role in the AIE process.

13. We consider that a number of changes to the AIE Regulations are needed in order to ensure prompt resolution of appeals.

1. ENSURE THAT PUBLIC AUTHORITIES GIVE ADEQUATE REASONS FOR DECISIONS

14. In the OCEI's experience, in a substantial number of appeals under article 12, the public authority:

    (a) Gives no explanation as to why access is being refused (no articles cited or reasons given);

(b) States that the person or body is not a public authority, that the information is not held by or for the public authority, or that the information is not environmental information, without giving any reasons for this conclusion;

(c) Cites an exception for refusal but does not explain why the exception is relevant based on the contents of the records or how disclosure would adversely affect the matter protected by the exception;

(d) Makes no reference to the public interest test mandated by article 10(3) and (4) having being carried out;

(e) Merely asserts that the public interest test was carried out, but fails to state what factors were considered in carrying out that test and why the public interest served by refusal outweighs the public interest served by disclosure; and/or

(f) Does not state whether it considered if some of the information in the withheld record could be separated from the information in respect of which it is claiming the exception, as required by article 10(5).

15. The failure to give adequate reasons for decisions is a significant cause of delays in dealing with appeals in a timely manner. Up to a month of the initial investigation can often be spent seeking a clear statement of the reasons for refusal of a request, with further time spent conveying those reasons to the appellant so that those reasons can be considered. The OCEI becomes, in effect, the communicant of the public authority's first instance decision. If adequate reasons were provided by the public authority at decision and internal review stage, it is our view that some appeals would not be brought at all.

16. Public authorities are required as a matter of law to provide adequate reasons. Articles 7(3)(b) and (4) and article 11(4)(a) of the Regulations require a public authority to give reasons for decisions, consistent with Article 4(5) of the Directive. Both Irish and European case law has confirmed the extent of the duty to give reasons. In *Right to Know v. An Taoiseach* [2018] IEHC 372, the High Court held that a public authority may refuse access to environmental information only where the requirements of the Regulations have been substantively and procedurally adhered to. The Court held that if an AIE request is to be refused on the grounds permitted in the Directive, it must be justified via the processes set out in the Directive, as replicated in the Regulations. The Court made it clear that "*the mere invoking of the statutory ground upon which disclosure of environmental information may be exempted cannot … constitute a sufficient reason for the refusal*". The CJEU's case law on the Directive and on the EU Aarhus Regulation[1] also confirm the duty to give reasons for decisions refusing information.[2]

17. However, the Regulations as currently drafted allow a public authority to refrain from providing adequate reasons for its decision, with little or no consequences. In addition, the

[1] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies available here

[2] See, for example, Case C-619/19 *Land Baden-Württemberg*; T-649/17 *ViaSat v Commission*; and T-701/18 *Campbell v Commission*.

deeming provision in article 10(7) enables public authorities to avoid the requirement in article 7(4)(c) to specify reasons for the refusal altogether.

18. We consider that a number of changes could be made to the Regulations to ensure that public authorities give adequate reasons for decisions, resulting in speedier consideration of appeals.

Proposals:

- Provide that the duty to give reasons applies to threshold jurisdictional questions of whether information is held by or for the public authority, whether the person or body is a public authority and whether the information is environmental information.
- Where a public authority relies on an exception, require the authority to specify why the exception applies and how the public interest has been balanced.
- Confine the provision deeming a refusal of access, so that it applies only for the purpose of making application for an internal review and does not remove the duty on the public authority to make a decision specifying reasons.
- Make provision for deemed affirmation of the original decision for the purpose of appeal to the Commissioner and the waiver of appeal fees in such cases.
- Empower the Commissioner to require a public authority to provide a statement of reasons for its decision, where the statement of reasons given by the public authority at first instance was not adequate.[3]
- Provide for adverse inferences to be drawn from a public authority's failure to give reasons at internal review stage which it seeks to rely on at appeal stage to the Commissioner.[4]

Illustrative drafting

Article 7(4) is amended:

(a) by the substitution of "a request made in accordance with article 6" for "for environmental information"; and

(b) in paragraph (c), by the insertion of the following after "refusal":

"including:

(i) reasons for a conclusion that the information is not environmental information, that the body or person concerned is not a public authority or that the information is not held by or for the public authority;

(ii) reasons for reliance on any exception under article 8 or 9, including the applicability of article 10(1); and

(iii) the matters the public authority considered in reaching its decision with respect to the public interest under article 10(3).".

Article 10(7) is amended by the insertion of the words "For the purpose of requesting a review under article 11(1) only," at the beginning of the sub-article.

Article 11 is amended:

(a) by the insertion after sub-article (1) of the following sub-article:

[3] This could mirror the provision in section 23 of the Freedom of Information Act 2014 and regulation 13 of the European Communities (Re-Use of Public Sector Information) Regulations 2005.

[4] Adverse inferences are used in some quasi-judicial bodies such as the Workplace Relations Commission as is evident from the WRC's "Procedures in the Investigation of Adjudication and Equality Complaints" available here.

"(1A) Where a decision under article 7 is notified to the applicant after a decision has been deemed to have been made under article 10(7), the public authority may treat the later decision as having been made on the date of the deemed decision.";

(b) in sub-article (4)(a), by the insertion of the following after "sub-article (2)":

"including:

(i) reasons for a conclusion that the information is not environmental information, that the body or person concerned is not a public authority or that the information is not held by or for the public authority;

(ii) reasons for reliance on any exception under article 8 or 9, including the applicability of article 10(1); and

(iii) the matters the public authority considered in reaching its decision with respect to the public interest under article 10(3)."; and

(b) by the insertion of the following sub-articles after sub-article (5):

"(6) For the purpose of appeal to the Commissioner under article 12(3)(a) only, where a decision under sub-article (2) is not notified to the applicant within the period specified in sub-article (3), a decision affirming the original decision shall be deemed to have been made by the public authority concerned on the date of expiry of such period.

(7) Where a decision under sub-article (2) is notified to the applicant after a decision has been deemed to have been made under sub-article (6), the Commissioner may treat the later decision as having been made on the date of the deemed decision.".

Article 12 is amended:

(a) by the insertion of the following sub-articles after sub-article (4):

"(4A) Following receipt of an appeal under this article, where the Commissioner considers that the statement of the reasons for the decision referred to in article 11(4)(a) is not adequate, the Commissioner shall direct the public authority to provide to the requester concerned and the Commissioner a statement, in writing or such other form as may be determined, containing a statement of reasons which complies with article 11(4)(a).

(4B) The public authority shall comply with a direction under sub-article (4A) as soon as may be, but not later than 3 weeks, after its receipt.";

(b) by the insertion of the following sub-article after sub-article (6):

"(6A) In a review under this article, where a public authority seeks to rely on matters which it failed to notify to the appellant in accordance with article 7(4) or 11(4), the Commissioner may draw such inferences from the failure as appear proper.".

Article 15(6) is amended by the insertion of "or article 11(6)" after "article 10(7)".

2. IMPROVE PUBLIC AUTHORITY ENGAGEMENT WITH THE OCEI

19. A cause of delay in dealing with appeals to the OCEI in a timely manner is the failure of public authorities to engage properly with the OCEI. As the Commissioner conducts a *de novo* review in line with his inquisitorial remit, OCEI investigators expend a significant amount of time seeking additional information from public authorities in order to ensure that a thorough investigation has been carried out. Where public authorities do not engage fully with the requester and the OCEI, this can cause delay and entrench the divide between the parties.

20. Recital (16) to the Directive makes clear that the right to information means that the disclosure of information should be the general rule, and the scheme of the Directive supports this. The Regulations should provide for a presumption of disclosure on appeal, so that where public authorities fail to properly engage with the OCEI a decision may nonetheless be made in a timely manner.

21. In our experience, public authorities find the drafting of article 8, and in particular the reference to grounds which 'mandate' a refusal, to be confusing and misleading, resulting in a failure to engage with the OCEI on this point. Public authorities assume that the reference

to 'mandatory' in the heading to article 8 means that the requirements of article 10 do not apply. It is clear from the text of Article 4 of the Directive and the case law of the Irish courts[5], that the exceptions in article 8 are subject to both the public interest test in article 10(3) of the Regulations and the duty to interpret the exceptions restrictively in article 10(4) of the Regulations. The OCEI's investigative time is often taken up explaining the legal position to public authorities and seeking further engagement from public authorities on the balance of the public interest. It is our firm view that the Regulations should be re-drafted to make the legal position clearer.

22. We have put forward amendments in relation to the duty to give reasons above which might lead to significant improvements in engagement with the OCEI, including the ability of the Commissioner to draw inferences from a public authority's failure to notify the requester of a matter which it later seeks to rely on before the Commissioner. The Department may also wish to consider amending the Regulations to expressly provide for adverse inferences to be drawn by the High Court where a public authority seeks to rely on arguments before the Court, which it did not draw to the attention of the Commissioner. We believe that this would encourage greater compliance with articles 7(4) and 11(4) of the Regulations.

23. The Department may also wish to consider whether an offence of altering or destroying information requested under the Regulations is merited.

Proposal:

- Provide for the Commissioner to apply an express presumption that disclosure of the information is justified.[6]
- Re-draft article 8 so that it better reflects the relationship with article 10.
- Consider providing for adverse inferences to be drawn by the High Court for failure to raise all relevant matters before the Commissioner.
- Consider whether an offence of altering or destroying information is merited.[7]

Illustrative drafting:

The heading to article 8 is amended by the substitution of "may require" for "mandate".

Article 8 is amended by the substitution of "Subject to article 10, a public authority may refuse to" for "A public authority shall not".

Article 12 is amended by the insertion of the following sub-article after sub-article [(6A)]:

"(6B) In a review under this article, a decision to refuse a request, in whole or in part, shall be presumed not to have been justified unless the public authority demonstrates to the satisfaction of the Commissioner that the decision was justified.".

Article 13 is amended by the insertion of the following sub-article after sub-article (2):

"(2A) In an appeal under this article, where a public authority seeks on rely on a matter which it failed to rely on in an appeal under article 12, the Court may draw such inferences from the failure as appear proper.".

[5] See, for example, *Right to Know CLG v An Taoiseach* [2018] IEHC 372.
[6] Similar to that in section 22(12)(b) of the Freedom of Information Act 2014.
[7] This could be similar to that in section 52 of the Freedom of Information Act 2014.

3. CLARIFY WHO IS A PUBLIC AUTHORITY

24. The question of who is a public authority under the Regulations has taken up a significant amount of resources, both of the OCEI and of the courts. Two issues cause particular uncertainty. First, the scope of paragraphs (b) and (c) of the definition, relating to persons performing public administrative functions under national law and persons under the control of another public authority, has been the subject of litigation, both in the Irish and the European courts.[8] In some cases, public authorities have found it surprising that they are included in the definition under these paragraphs as they are 'private' bodies in all other senses. Second, the interaction between the Freedom of Information Act 2014 and the Regulations, and in particular the reference in article 8(a)(iv), has resulted in confusion about the application of the Regulations to certain public authorities.

25. If requesters do not have clarity about who is a public authority, they cannot effectively exercise their rights to access environmental information, as they may be unaware that they are entitled to ask a particular person or body for information under the AIE regime. Similarly, public authorities may wrongly refuse to provide information where they consider, due to the lack of clarity, that they do not meet the definition.

26. The lack of clarity about who is a public authority also has a significant impact on timeliness of review, as OCEI investigations of such matters are necessarily lengthier and more complex, and appeals under article 13 on such matters take time to proceed through the courts. The Commissioner's involvement in such matters does not contribute to the Commissioner's adjudication on matters of openness and transparency, as the issue of whether a body is a public authority or not is simply a matter of law.

27. Article 3(5)(b) of the Directive requires Member States to ensure that lists of public authorities are publicly accessible. That provision is currently implemented by article 14(3) of the Regulations, which requires the Minister to ensure that an indicative list of public authorities is publicly available in electronic format. The list currently published by the Minister is short and stated in very general terms[9].

28. We propose that the Regulations could be amended to remedy this issue. The definition of a public authority in article 3(1) of the Regulations repeats the definition in the Directive, but it provides some clarity by listing certain bodies included in that definition. We consider that the Regulations should provide further clarity as to the meaning of 'public authority' by including a Schedule to the Regulations specifically listing the bodies, or categories of bodies, that are included in the definition, similar to the approach under the FOI regime.[10] Such a list would, of course, be inclusive rather than exhaustive and may need to be updated periodically by the Minister. When formulating the list of authorities included in paragraphs (b) and (c) of the definition, the Department should apply the test in C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*, as considered by the High Court in *Right to Know CLG v. Commissioner for Environmental Information* [2021] IEHC 46. The remedy of judicial review would be available to any person who is concerned about consistency between the Regulations and the Directive.

[8] See, in particular, *Right to Know CLG -v- Commissioner for Environmental Information* [2021] IEHC 46 and C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*.
[9] See https://www.gov.ie/en/organisation-information/f69d0b-access-to-information-on-the-environment/
[10] See section 2(1) of, and the First Schedule to, the Freedom of Information Act 2014.

29. We acknowledge that the formulation of an inclusive schedule of public authorities would be a challenging task for the Department. However, the Government is better placed than members of the public to apply the guidance provided by the courts on the definition. We firmly believe that clarifying the definition of what is a public authority is essential to achieving timely reviews of decisions under the AIE, as well as the wider objectives of the Directive. We believe that our proposed approach would provide much needed clarity for the OCEI, public authorities and members of the public, consistent with the purpose of the Directive, and would reduce substantially the amount of time spent by the Commissioner determining this complex issue, with more time for the Commissioner to determine appeals of decisions on access to environmental information.

Proposal

- Provide an expanded and specific list, as a Schedule to the Regulations, of the persons or bodies included in the definition of public authorities.

4. PROVIDE FOR A DUTY OF TIMELINESS

30. The findings and recommendations of the ACCC criticise the absence of any requirement in Irish law for the Commissioner to take a decision within a certain timeframe or to act in a timely manner. The ACCC contrasts the position of the Commissioner with that of the Information Commissioner under the Freedom of Information Act 2014. We note that consideration of appeals under the AIE regime is often more time consuming than reviews under the FOI regime, for example due to the complexities of whether a person or body is a public authority and whether information is environmental information. The differences between the nature of the regimes mean that, in our view, mirroring the approach of the FOI regime in respect of timeliness is not appropriate.

31. Article 12 of the Regulations gives the Commissioner extensive powers for the purpose of reviewing the decision of a public authority. In addition, third parties impacted by the decision of a public authority can appeal to the Commissioner, decisions of the Commissioner are final and the Commissioner has authority to enforce decisions through the Courts. These are the requisite features of a body properly constituted under article 6(2) of the Directive. As such, it remains our firm view that the requirement that should be placed on the Commissioner is one of timeliness in line with the wording of the Directive. This would provide flexibility in relation to complex investigations which may take longer than usual, for example where they raise novel legal issues or involve large amounts of complex information.

32. We emphasise that any timeliness provision will only be effective in practice if the key proposals outlined in this part of the submission are implemented in tandem.

33. As the Department is aware, the OCEI continues to work to reduce the number of appeal cases on hand. Should the Department decide to impose a specific timeframe for the Commissioner's review, consideration should be given to transitional provision to deal with any backlog of appeals that may exist at the time.

Proposals

- The Commissioner should be under a duty to make a decision in a timely manner.

Illustrative drafting

Article 12 is amended by the insertion of the following sub-article after sub-article (5): *"(5A) A decision under sub-article (5) shall be made in a timely manner.".*

5. REDUCE THE COMMISSIONER'S PARTICIPATION IN HIGH COURT APPEALS

34. While we welcome the clarity that court judgments, both domestically and in Europe, can bring, both to questions of interpretation and to the approach that the Commissioner should take when conducting reviews, it must also be acknowledged that court appeals consume a substantial amount of resources, both in terms of legal costs and staff time. Each court appeal takes a considerable amount of time to manage and requires the diversion of resources from day-to-day casework. As a result, court appeals divert the OCEI's resources from progressing appeals under article 12 of the Regulations.

35. Appeals by a requester or another person affected by the decision under article 13 are subject to the "special costs rules" under the Environment (Miscellaneous Provisions) Act 2011, which serve to limit the financial risk to parties bringing appeals against a decision of the Commissioner.[11] Rules limiting the costs of litigation are important, particularly where such rules facilitate the access to justice mechanisms envisaged by the Convention. However, the application of those rules in appeals under article 13 results in costs being awarded against the Commissioner (a quasi-judicial body with no vested interest in the outcome of the case), rather than against the public authority (the decision-maker with a vested interest in the outcome of the case). In such cases, the defence of appeals by the Commissioner results in the resources of the Commissioner's small office being used to defend a decision based on a particular set of facts, with all the costs implications which accompany that. Even though the vested interest in withholding the information lies with the public authority, the potential resource and costs detriment to the public authority is generally limited to cases where the point of law is of exceptional public importance.

36. We strongly believe that, in relation to the majority of appeals by a requester or another person affected by the decision, the staffing and financial resources of the OCEI would be better used progressing appeals under article 12, rather than defending appeals under article 13. The Commissioner, as an independent and impartial decision-maker under the Regulations, has no vested interest in the outcome of the request at the centre of an appeal. An appeal under article 13 is on a point of law only, so the Court is not concerned with fact-finding. The Commissioner's decisions are in writing and fully reasoned, with any relevant factual findings clearly set out, so it should not be necessary for the Commissioner to appear on appeal to explain the rationale for decision-making. In many cases, the points of law relate to complex issues such as the definitions of a 'public authority' or 'environmental information', so the purpose of the appeal is to seek clarity in the law rather than to challenge the findings of the Commissioner as such. The dispute as to the subject matter of the litigation - access to information - is between the requester or the person affected by disclosure and the public authority holding the information, so it is appropriate that those

[11] Note that there is a lack of clarity about the applicability of the special costs rules in circumstances where the Court finds that the information was not environmental information and/or the body is not a public authority for the purposes of the AIE Regulations.

parties are represented and that the costs of litigation fall to those parties (subject, of course, to the special costs rules).

37. The situation is different where an appeal under article 13 is brought by a public authority. First, the Commissioner firmly believes that access to environmental information should be the general rule, consistent with the purpose of the Directive and the Convention, and in line with the requirement to interpret exceptions restrictively. Where the Commissioner directs release of information by public authorities in line with that general rule, the Commissioner should defend that position in any appeal from a public authority. Second, it would not be reasonable to require the requester to be a respondent to an appeal brought by a public authority against the Commissioner's decision, as to do so could have a freezing effect on the access regime.

38. We propose that provision should be made to significantly reduce the Commissioner's participation in proceedings on appeal brought by requesters and other persons affected by the decision and to limit the Commissioner's liability for costs in cases where the Commissioner does not participate.

39. We propose that, where an appeal is brought by a requester or other person affected by the decision:

    a. The public authority shall be the respondent in the appeal, with the Commissioner as a notice party; and

    b. Where the Commissioner does not participate in the appeal, the special costs rules in the Environment (Miscellaneous Provisions) Act 2011 shall not apply against the Commissioner.

Proposals

- Provide that, where an appeal is brought by a requester or other person affected by the decision: (a) the public authority shall be the respondent in the appeal, with the Commissioner as a notice party; and (b) where the Commissioner does not participate in the appeal, the special costs rules in the Environment (Miscellaneous Provisions) Act 2011 shall not apply against the Commissioner.

Illustrative drafting

Article 13 is amended by the insertion of the following sub-articles after sub-article [(2A)]:

"(2B) Subject to sub-article (2D), in an appeal under sub-article (1) the public authority shall be the respondent and the Commissioner shall be a notice party.

(2C) Where the Commissioner does not participate in an appeal under sub-article (1), the Commissioner shall not be treated as a respondent or a notice party for the purpose of section 3(2) of the Environment (Miscellaneous Provisions) Act 2011.

(2D) Sub-articles (2B) and (2C) shall not apply to proceedings instituted by a public authority.".

6. CLARIFY POWER TO EFFECT SETTLEMENT OF APPEALS

40. The OCEI Procedures Manual makes it clear that the Commissioner may seek to effect a settlement between the parties to an appeal. The objective of this is to fulfil the general purpose of the Regulations by getting access to the environmental information in the most

effective way possible. In the Commissioner's experience, doing so can expedite the conclusion of a case by avoiding a full investigation and decision. The power to do so should be expressly acknowledged in the Regulations.

41. If it is considered necessary to impose a time limit for completion of appeals by the Commissioner, any such time limit should be suspended in circumstances where the Commissioner is actively pursuing a settlement between the parties.

Proposals:

- Clarify that the Commissioner may endeavour to effect a settlement between the parties to an appeal.
- Suspend any time limit for review by the Commissioner when settlement is pursued.[12]

Illustrative drafting

> *Article 12 is amended by the insertion of the following sub-article after sub-article (10):*
>
> *"(11) The Commissioner may at any time endeavour to effect a settlement between the parties concerned of the matter concerned and may for that purpose suspend, for such period as may be agreed with the parties concerned, and if appropriate discontinue, the review concerned.".*

7. CONSIDER THE IMPLEMENTATION OF A TRIBUNAL SYSTEM FOR THE AIE REGIME

42. The findings and recommendations of the ACCC criticise the length of time taken to conclude appeals under article 13 to the superior courts. We note that in other jurisdictions, such as the UK, appeals against decisions under the AIE regime are brought before administrative tribunals rather than superior courts. Were such a system to be implemented in Ireland, it would have the potential to be more cost-effective and less resource-intensive than the current process under article 13 of the Regulations. The Information Commissioner has called for the development of a Tribunal to consider appeals brought under Freedom of Information legislation. If such a Tribunal were to be formed, it would preferably also consider appeals brought against the Commissioner under article 13 of the Regulations. We note that the Law Reform Commission is considering the issue of creation of a single tribunal structure as part of its work on reform of non-court adjudicative bodies and appeals to courts[13]. While such an option is still in the very early stages of consideration, we would encourage the Department to consider carefully the benefit of providing for the inclusion of the AIE regime into any future administrative tribunal structure.

Proposal

- Provide for the creation of an Information Tribunal to deal with appeals under FOI and AIE legislation.
- As an alternative, provision could be made for the inclusion of such appeals against the decisions of the Commissioner into any future administrative tribunal structure.

[12] This is similar to the approach taken in regulation 12(6) of the European Communities (Re-Use of Public Sector Information) Regulations 2005.

[13] https://www.lawreform.ie/welcome/1-legal-system-and-public-law.378.html

B. EFFECTIVE INVESTIGATION AND ENFORCEMENT

43. There is a duty on Member States, deriving from the duty of cooperation under Article 4(3) of the Treaty on European Union[14], to provide for proper enforcement of EU law provisions. Examples of such provisions include the creation of sanctions for breaches of the law and powers of entry and inspection to facilitate enforcement. Effective powers of investigation and enforcement are crucial to the effective and efficient operation of the AIE regime. We believe that the proposals below are key to ensuring proper enforcement of the Directive.

1. EMPOWER THE COMMISSIONER TO DELEGATE TO STAFF

44. The Regulations do not make specific provision for the delegation of the Commissioner's powers to staff. The Commissioner has, to date, approved and signed all appeal decisions. In straightforward cases, this is an inefficient use of the OCEI's resources, as a senior investigator could make a decision on a delegated basis for the Commissioner, who holds several additional statutory appointments. Similarly, in many cases it will be appropriate for the Commissioner's powers of investigation to be exercised by the OCEI's investigators carrying out the investigation for the purpose of making a recommendation to the Commissioner. The *Carltona* principle may enable delegation in some circumstances, but the precise scope of application of that principle is uncertain.

45. Article 12(10) provides for the Commissioner to be assisted by staff of the office of the Information Commissioner and the resources of that office. Since 2015, the OCEI has been provided with specific resources for the purpose of processing appeals under article 12. This has resulted in the creation of a dedicated team who work exclusively on such appeals. The Commissioner should be empowered to delegate to those members of staff.

Proposal

- Specific provision should be made for a power of delegation by the Commissioner to staff assisting the Commissioner.

Illustrative drafting

Article 12 is amended by the insertion of the following sub-articles after sub-article [(11)]:

"(12) The Commissioner may delegate in writing any of the functions of the Commissioner to a member of staff of the Information Commissioner, to the extent that such member of staff assists the Commissioner under sub-article (10).

(13) A delegation under sub-article (12) ("a delegation") may—

(a) relate to functions generally or specified functions, and

(b) be to a specified member or specified members of the Information Commissioner's staff or to such members who are of a specified rank or grade or of a rank or grade not lower than a specified rank or grade,

and may delegate different functions or classes of function to different such members or classes of members.

(14) A delegation may be revoked in whole or in part or amended in writing by the Commissioner.

(15) A delegation shall operate, so long as it continues in force, to confer on and vest in the person concerned the function or functions delegated by the delegation.

[14] See Case 68/88 *Commission v Greece (Greek Maize)*, paragraphs 23-25.

(16) References in these Regulations to the Commissioner shall be construed, where appropriate having regard to the context and any delegation under this section, as including references to any person to whom functions stand delegated by the delegation.".

2. BROADEN THE COMMISSIONER'S POWERS TO OBTAIN INFORMATION

46. The Commissioner's powers of investigation under article 12(6) are to obtain "environmental information" from a public authority. These powers are inadequate to enable the proper investigation of appeals. First, the issue in dispute may be whether the information requested constitutes "environmental information", in which case the Commissioner could not properly exercise his powers to obtain the information before deciding that it is environmental information. The High Court in *Electricity Supply Board v Commissioner for Environmental Information* [2020] IEHC 190 made it clear that the Commissioner must consider the content of the requested information before deciding whether it is "environmental information". Second, in order to conduct a proper investigation, the OCEI may need to obtain information other than the environmental information itself, for example information which is relevant to the application of an exception under the Regulations.

Proposal

- Provide that the Commissioner's powers to obtain information from public authorities apply in respect of information that, in the opinion of the Commissioner, is relevant to the determination of an appeal under article 12.[15]

Illustrative drafting

Article 12 is amended:

(a) in sub-article (6)(a), (b) and (c), by the substitution of "relevant information" for "environmental information" wherever it occurs; and

(b) by the insertion of the following sub-article after sub-article [(6B)]:

"(6C) In sub-article (6), "relevant information" means information that, in the opinion of the Commissioner, is relevant to the determination of an appeal under this article.".

3. PROVIDE EXPRESS POWERS TO PROVIDE INFORMATION TO THE COMMISSIONER

47. Public bodies sometimes express concerns about providing the OCEI with a copy of the main records at issue in an appeal. While the Commissioner has powers to require public authorities to provide a copy, express provision that it is lawful in all circumstances for public authorities to provide the Commissioner with a copy of the records would reassure public authorities without requiring the Commissioner to resort to the exercise of coercive powers.

Proposal

[15] This is similar to the approach under section 45(1) of the Freedom of Information Act 2014.

- Make express provision to ensure that public authorities are not prevented from providing information to the Commissioner.[16]

Illustrative drafting

> *Article 12 is amended by the insertion of the following sub-articles after sub-article [(6C)]:*
>
> *"(6D) No enactment or rule of law prohibiting or restricting the disclosure or communication of information shall preclude a person from furnishing to the Commissioner any information or record to which sub-article (6) relates.*
>
> *(6E) A person to whom a requirement is addressed under this article is entitled to the same immunities and privileges as a witness in court.".*

4. ENABLE FORMAL REMISSION OF DECISIONS TO PUBLIC AUTHORITIES

48. Article 12(5) empowers the Commissioner to annul or vary a public authority's decision. The Commissioner may exercise this power to remit the matter for the public authority to consider whether any exceptions apply. For example, the Commissioner may vary or annul the public authority's decision that the information is not environmental information so that the matter is remitted for the public authority to consider whether exceptions apply and the application of the public interest test.

49. However, the procedure and time limits that apply on such consideration are not clear. The Regulations should make specific provision for the process to be followed when a matter is remitted to a public authority, including in relation to timeliness, right to internal review and right of appeal.

50. If the public authority refuses access to the information on the ground that an exception applies, the applicant may appeal that decision to the Commissioner. The applicant should not have to pay a further fee to the Commissioner for an appeal in those circumstances.

Proposal

- Make express provision for the Commissioner to remit matters to the public authority for re-consideration, including applying duties of public authorities and waiving fees for further appeal.

Illustrative drafting

> *Article 12 is amended by the insertion of the following sub-articles after sub-article [(5A)]:*
>
> *"(5B) Where the Commissioner varies or annuls the decision under sub-article (5)(b), the Commissioner may remit the decision to the public authority.*
>
> *(5C) Articles 7, 8, 9, 10, 11 and 12 shall apply to a remitted decision as they apply to a request for information under article 6."*
>
> *Article 15 is amended by the insertion of the following sub-article after sub-article (4):*
>
> *"(4A) Where an appeal is made under article 12 in respect of a request for information which was previously the subject of an appeal and was remitted to the public authority under article 12(5B), the Commissioner may waive or refund all or part of the appeal fee.".*

[16] This is similar to the approach under regulation 14(3) and (4) of the European Communities (Re-Use of Public Sector Information) Regulations 2005.

C. FAIR PROCEDURES

51. The overarching principles of fair procedures are a necessary feature of investigations carried out by quasi-judicial bodies in common law jurisdictions. Among other things, the requirements of fair procedures enshrine the common law right to be notified of all relevant matters and to be heard, which, in the case of the OCEI, necessitates that adequate time and opportunity are afforded to the parties to an appeal, at each stage of the investigation process. Crucially, under the Regulations, the right to be heard also extends to third parties whose rights may be affected by the release of the environmental information the subject matter of an appeal. Where an appeal concerns third party rights, it is therefore necessary to request submissions from that third party to ensure that all relevant factors are considered in the investigation. Although fair procedures can at times prove time consuming, such procedures are crucial to the maintenance of an effective and defensible AIE regime. We believe that the following proposals will contribute to the fairness of the AIE regime as a whole.

1. ENSURE APPROPRIATE INVOLVEMENT OF THIRD PARTIES

52. Public authorities often hold information that has been provided to them by another person or body. The public authority may not have sufficient knowledge of the context of the information to know whether one of the exceptions in article 8 or 9 applies. The public authority may not be aware that disclosure could adversely affect the interests of another person or body, including by incriminating that person or body, meaning that disclosure could take place without that other person being notified that disclosure is possible. This renders the person's right of appeal under article 12(3)(b) academic. Consultation of third parties at the decision-making stage would provide the public authority with sufficient information to make defensible decisions and would enable third parties to exercise their right of appeal to the Commissioner against the disclosure of information under article 12(3)(b). It would also save the resources of the OCEI, which spends a considerable amount of time consulting third parties to ensure fair procedures.

53. Article 13(1) provides for a right of appeal to the High Court by "any other person affected by the decision". Although the Commissioner, as a matter of practice, publishes decisions, there is no duty in the Regulations to publish decisions. Similarly, there is no duty on public authorities to notify persons who may be affected by the Commissioner's decision of that decision. Even where decisions are published, in the absence of a provision requiring public authorities to consult with potentially affected third parties at the stage of first decision or at internal review, and to notify such persons of the Commissioner's decision, it is difficult to see how such third parties would become aware of the release of environmental information, which may affect their interests. The time limit in article 13(2) may expire, and the information may be released, before a person affected by the decision becomes aware of its existence.

54. Article 12(3)(b) confines appeal by third parties to cases where the person would be incriminated by the disclosure of information. However, as explained in the OCEI's Annual Report for 2019, "This Office accepts that article 12(3)(b) applies where a third party believes that their interests would be affected by the disclosure concerned." This is because, although the concept of "incrimination" appears to be narrow, the same meaning must be

applied to the word 'incriminate' in article 12(3)(b) of the Regulations as it bears in article 6(2) of the Directive, which article 12(3)(b) transposes. The French and German versions of article 6(2) use the words 'leser' and 'belasten' in place of incriminate. They translate as 'to harm' and to 'put a strain on/to burden'. The provisions must also be interpreted in light of the overall purpose of the provision and of the Directive. The purpose of Article 12(3)(b) of the Regulations is to establish the qualifying criteria for a third party to appeal a decision to disclose information. As such, it is part of the review procedure. The grounds for review are wide and are in the nature of harms and burdens rather than incriminating factors. The Directive does not identify any policy reason for restricting the right of review to third parties who would be "incriminated" by the disclosure of information. This position should be expressly provided for in the Regulations.

55. In our view, the test should be both subjective and objective, rather than solely objective, by reference to the belief or opinion of the third party. A solely objective test, as now, requires the Commissioner to determine as a matter of fact whether the information *would* affect the person before the appeal can be accepted, which requires consideration of the requested information. As the decision to accept an appeal is a preliminary question for the Commissioner, a lower threshold would be a more effective use of the Commissioner's resources. A test of reasonable belief that the person's interests would be affected would require the person to state their belief on appeal and would only require the Commissioner to consider whether that belief is reasonable in the circumstances.

Proposals

- Widen the circumstances in which public authorities must consult third parties.[17]
- Require the Commissioner to publish decisions.
- Provide that the public authority must notify persons who it considers may be affected by the decision of the decision as soon as practicable.
- Provide for appeal to the Commissioner by a person who reasonably believes that their interests would be affected by the disclosure of information.

Illustrative drafting

Article 7 is amended by the substitution of the following sub-articles for sub-article (11):

"(11) Sub-article (12) applies where a request is made for environmental information and, in the opinion of the public authority, release of the information may adversely affect the interests of a person other than the applicant.

(12) The public authority shall make all reasonable efforts to contact the person concerned and to consult the person about the release of the information in accordance with these Regulations.".

Article 12 is amended:

(a) in sub-article (3), by the substitution of the following paragraph for paragraph (b):

"(b) a person other than the applicant reasonably believes that their interests would be affected by the disclosure of the environmental information concerned,"; and

(b) by the insertion of the following sub-articles after sub-article (7):

"(7A) The Commissioner shall publish any decision in relation to an appeal under this article.

[17] Consultation on personal data for the purpose of the GDPR is dealt with separately below.

(7B) Where a public authority considers that a decision of the Commissioner may affect the interests of another person, the public authority shall, as soon as practicable, notify that person of the Commissioner's decision.".

2. CLARIFY MATTERS WHICH CONSTITUTE A REFUSAL OF ACCESS TO INFORMATION

56. Article 7(1) of the Regulations provides: "A public authority shall, notwithstanding any other statutory provision and subject only to these Regulations, make available to the applicant any environmental information, the subject of the request, held by, or for, the public authority."

57. It is implicit in this provision that the duty to provide information only arises where: (a) the request is made to a public authority; (b) the information requested is environmental information; and (c) the information is held by or for the public authority. However, the fact that these matters are not expressly stated on the face of the Regulations is, in our experience, the cause of much confusion for applicants and public authorities.

58. As a result, public authorities often dispute whether the public authority "decides" that it is not a public authority, that information is not environmental information, or that information is not held by or for it, such that the remaining requirements of the Regulations such as internal review or appeal apply to that decision. Similarly, public authorities often fail to give reasons for their decisions on these matters (see further above, under the proposals to ensure that public authorities give adequate reasons for decisions). In our experience, these threshold issues are often the most complex to investigate and have taken up the most time on appeal to the courts.

59. Similarly, public authorities often dispute whether failure to give reasons or to meet statutory timescales amounts to a decision in accordance with article 11(5)(c).

Proposal

- Make express provision, for the avoidance of doubt, that the duty in article 7(1) does not apply where the person who receives the request is not a public authority, the information is not environmental information or the information is not held by or for the public authority. As part of this change, provide a pointer to the grounds for refusal under articles 8 to 10.
- Consistent with the existing provision in article 11(5)(a), clarify that the right of internal review and appeal apply to decisions that the information is not held by or for the public authority and that the information is not environmental information.
- Clarify that the right of internal review and appeal apply to the failure of a public authority to give reasons or to meet statutory timescales.

Illustrative drafting

Article 7 is amended by the insertion of the following sub-articles after sub-article (1):

"(1A) For the avoidance of doubt, the duty in sub-article (1) shall not apply where:

(a) the body or person to whom the request is made is not a public authority;

(b) the information requested is not environmental information;

(c) subject to the requirements of sub-articles (5) and (6), the information requested is not held by or for the public authority; or

(d) subject to article 10, a ground for refusal under article 8 or 9 applies.".

Article 11(5) is amended by the insertion of the following paragraphs after paragraph (a):

"(aa) has been refused on the ground that the information requested is not held by or for the public authority,

(ab) has been refused on the ground that the information requested is not environmental information,

(ac) has been refused without providing adequate reasons,

(ad) has not been dealt with in accordance with article 7(2) or, as the case may be, article 11(3),".

3. CLARIFY THE PROCEDURES OF THE COMMISSIONER ON APPEAL UNDER ARTICLE 12

60. As recognised by the High Court in *Electricity Supply Board v. Commissioner for Environmental Information* [2020] IEHC 190, the OCEI's procedures are informal in nature, but in our experience this has been a matter of some dispute with both appellants and public authorities. This should be made clear in the Regulations by providing that the procedure for conducting a review under article 12 shall be such as the Commissioner considers appropriate in all the circumstances of the case.

Proposals

- Clarify that the Commissioner may determine his own procedures for investigations.[18]

Illustrative drafting

Article 12 is amended by the insertion of the following sub-article after sub-article [(16)]:

"(17) Subject to these Regulations, the procedure for conducting an appeal under this article shall be such as the Commissioner considers appropriate in all the circumstances of the case.".

4. REQUIRE PUBLIC AUTHORITIES TO PROVIDE A LIST OF INFORMATION HELD

61. There is no specific duty on a public authority to provide applicants with a list, schedule or description of the information that it holds when notifying an applicant of its decision, although many public authorities do so in practice. In case T-701/18 *Campbell v Commission*, the Court held that the European Commission erred in not carrying out a specific and individual examination of the content of each requested document as it permitted it to apply presumption that an exception to disclosure applied. The Court stated that the Commission failed to identify the documents and to provide the requester with the list of those documents, with no justification for why access was being refused. This failure meant he was unable to rebut the presumption of confidentiality.

62. We consider that it is currently best practice to provide a list of documents and that public authorities should be under a statutory duty to do so. A narrow exception to this general rule could be provided for circumstances in which scheduling or listing of documents would, of itself, involve the disclosure of information which would adversely affect the interests in article 8(a), 8(b) or 9(1).

Proposal

[18] This is similar to the provision in section 8(3) of the Ombudsman Act 1980.

- Require public authorities to include a list of information held by it with its decision on a request.

Illustrative drafting

> *Article 7 is amended:*
>
> *(a) by the insertion of the following paragraph after paragraph (b) of sub-article (4):*
>
> *"(ba) provide the applicant with a list of the information held by or for the public authority;"; and*
>
> *(b) by the insertion of the following sub-article after sub-article (4):*
>
> *"(4A) The public authority is not required by sub-article (4)(ba) to provide a list of the information held to the extent that such a list would involve the disclosure of information which would adversely affect any of the interests in article 8(a) or (b) or article 9(1).".*

5. RATIONALISE THE TIMEFRAME FOR DEALING WITH GENERAL REQUESTS

63. The effect of articles 7(8) and 9(2)(b), read together, is that where a public authority receives a request which is too general, it must assist in refining the request but may refuse to provide the information if, after such assistance, the request remains too general. No provision is made for the time under article 7(2)(a) to be extended where the public authority has provided such assistance, so the timescales in articles 7(2)(a) and 7(8) are inconsistent. This could be rectified by treating the request, for the purpose of article 7(2)(a), as having been made on the date that the more specific request was received by the public authority.

Proposal

- Clarify the timeframe for dealing with a request where the public authority has assisted the requestor to specify a request made in too general a manner.

Illustrative drafting

> *Article 7 is amended by the insertion of the following provision after sub-article (8):*
>
> *"(8A) Where sub-article (8) applies and a more specific request is made by the applicant, the request is treated for the purpose of sub-article (2)(b) as having been made on the date on which the more specific request was made."*

6. REMOVE REQUIREMENT TO IDENTIFY REQUEST AS AN AIE REQUEST

64. The Directive does not include any requirement for an applicant for information to refer to the Directive or the national legislation implementing it.[19] Public authorities should be sufficiently familiar with the legislative framework that they can recognise an AIE request without an applicant being required to state it. In any event, where an applicant failed to state that request is made under the AIE Regulations, the public authority would be required under article 7(7) to offer assistance to the applicant by explaining that the request must state this matter, resulting in needless bureaucracy.

[19] In *Right To Know CLG v An Taoiseach & Ors* [2020] IEHC 228, the High Court found that this provision represents a lawful transposition of the Directive, but the Directive does not require its inclusion.

65. Removing the requirement to state that the request is made under the Regulations would be consistent with the objectives of the Directive and with other EU law obligations, for example Directive 2019/1024/EU on open data and the re-use of public sector information.

Proposal

- Remove the requirement to state that the request is made under the Regulations.

Illustrative drafting

Article 6(1) is amended by the omission of paragraph (b).

D. LEGAL CLARITY AND COMPLIANCE WITH THE DIRECTIVE

66. CJEU case law has consistently found that the provisions of directives must be implemented with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty[20]. The CJEU is particularly concerned to ensure that implementation is clear and transparent where the directive gives rights to individuals.[21] The combination of national legislation and domestic case law may be enough to implement a directive[22], but it will often be difficult to show that case law transposes a directive with sufficient clarity and precision[23]. If national legislation is on its face inconsistent with the directive, it will not help that national courts have interpreted it consistently with EU law, because the requirements of legal certainty will not be met[24].

67. In addition to the need to meet the requirements of EU law, legal clarity and faithfulness to the Directive are important to ensure efficient use of the resources of public authorities and the Commissioner. Lack of clarity and inconsistency in the Regulations causes confusion for both applicants and public authorities, resulting in poor decision-making and unnecessary appeals to the Commissioner. The OCEI's limited investigatory resources are often used explaining the effect of unclear provisions to applicants and public authorities.

68. The Department is invited to review the Regulations as a whole for clarity, internal consistency and compliance with EU law, but we highlight the following issues as causing particular concern.

1. PROVIDE FOR AN EXPRESS DUTY TO DISSEMINATE ENVIRONMENTAL INFORMATION

69. Article 7 of the Directive requires Member States to ensure that public authorities organise environmental information "with a view to its active and systematic dissemination to the public". It also requires Member States to ensure that environmental information "progressively becomes available in electronic databases". The recitals to the Directive make clear that the purpose of these provisions is to ensure that "public authorities make

[20] See, for example, Case C-159/99 *Commission v Italy*, paragraph 32; Case 102/79 *Commission v Belgium*, paragraph 11; Case 96/81 *Commission v Netherlands*, paragraph 12.
[21] Case C-236/95 *Commission* v *Greece*, paragraph 13.
[22] Case C-530/11 *Commission v UK (Aarhus Convention)*, paragraph 36.
[23] C-144/99 *Commission v Netherlands*, paragraph 21.
[24] C-236/95 *Commission v Greece*

available and disseminate environmental information to the general public to the widest extent possible". Other Member States have transposed these obligations by placing a specific duty on public authorities to progressively disseminate information (for example, the UK and Italy).

70. Article 5 of the Regulations places duties on public authorities to maintain environmental information, but falls short of requiring them to take steps to actively disseminate the information. In addition, the list of information that is required to be maintained under sub-article (2) does not faithfully reproduce the list in Article 7(2) of the Directive. Regulation 5 should be amended so that public authorities are under a duty to progressively make environmental information available to the public by electronic means which are easily accessible, including at least the information referred to in Article 7(2) of the Directive. Such a change would mean that individual requests for environmental information under the Regulations would be confined to matters of detail (see paragraph 30, Opinion of Advocate General Fennelly, C-217-97 *Commission v. Germany*), ensuring that the resources of the Commissioner are focused on matters of detail.

Proposal

- Provide for a duty on public authorities to disseminate environmental information, in accordance with Article 7(1) and (2) of the Directive.

Illustrative drafting

Article 5 is amended:

(a) in sub-article (1), by the substitution of the following paragraphs for paragraph (b):

"(b) progressively make environmental information which is held by or for it available to the public by electronic means which are easily accessible;

(ba) make all reasonable efforts to organise environmental information which is held by or for it and is relevant to its functions, with a view to its active and systematic dissemination to the public,";

(b) by the substitution of the following sub-article for sub-article (2):

"(2) The environmental information specified in sub-article (1)(b) and (ba) shall include at least the information referred to in Article 7(2) of the Directive."; and

(c) by the insertion of the following sub-article after sub-article (2):

"(2A) A public authority is not required to use electronic means to make available, or to organise, information which was collected before 1st January 2005 in non-electronic form.".

2. RECONSIDER THE EXCEPTION IN ARTICLE 9(2)(A)

71. Article 9(2)(a) of the Regulations provides for an exception only where the request is manifestly unreasonable *having regard to the volume or range of information sought*. The Directive does not refer to the volume or range of the information sought. When considering the application of this exception in appeals under article 12, the Commissioner has taken the view that the volume or range of information requested alone is not a sufficient reason for refusing a request. Rather, the volume or range is a consideration to be taken into account when determining if a request is manifestly unreasonable where, for example, processing the request places an unreasonable administrative burden on the relevant public authority, diverting it away from its core work.

72. In the Proposal for a Directive of the European Parliament and of the Council on public access to environmental information (COM(2000) 402 final 2000/0169(COD), the Commission stated that:

> "Public authorities should also be entitled to refuse access to environmental information when requests are manifestly unreasonable or formulated in too general a manner. Manifestly unreasonable requests would include those, variously described in national legal systems as *vexatious* or amounting to an *abus de droit*. Moreover, compliance with certain requests could involve the public authority in disproportionate cost or effort or would obstruct or significantly interfere with the normal course of its activities. Authorities should be able to refuse access in such cases in order to ensure their proper functioning."

73. Similarly, in a report adopted by the ACCC on 18 June 2017, on a request for advice by Belarus, ACCC/A/2014/1, the ACCC expressly acknowledged at paragraph 28 that volume and complexity are among the relevant factors to consider in relation to whether or not a request is manifestly unreasonable. However, the ACCC emphasised that it is the nature of the request which may be manifestly unreasonable, rather than the reason for the request, which is not required to be stated.

74. The Regulations should be amended to ensure that the language is faithful to the Directive, taking into account the Directive's preparatory documents and the views of the ACCC on the equivalent provision in the Convention. We have suggested two possible approaches that the Department could take below. The first option would provide greater clarity in the Regulations for requesters, public authorities and for the OCEI.

Proposal

- Article 9(2)(a) should be reconsidered to ensure that the language is faithful to Article 4(1)(b) of the Directive.

Illustrative drafting

Option 1:

Article 9 is amended:

(a) by the omission in sub-article (2)(a) of "having regard to the volume or range of information sought"; and

(b) by the insertion of the following sub-article after sub-article (3):

"(4) For the purpose of sub-article (2)(a), a request may be manifestly unreasonable:

(a) having regard to the volume or range of information sought;

(b) where the request is frivolous or vexatious; or

(c) where the request forms part of a pattern of requests falling within paragraph (a) or (b) from the same requester or from different requesters who appear to have made the requests acting in concert."

Option 2:

Article 9(2)(a) is amended by the omission of "having regard to the volume or range of information sought".

3. REVIEW THE REGULATIONS TO ENSURE COMPLIANCE WITH THE GDPR

75. The Regulations need to be updated and amended to ensure compliance with Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the

protection of natural persons with regard to the processing of personal data and on the free movement of such data (the GDPR). The following matters are of particular note, but we have not conducted an exhaustive review of compliance with the GDPR.

(a) Article 8(a)(i) should deal with personal data, not personal 'information', consistent with Article 4(2)(f) of the Directive. The Regulations should also clearly set out the approach that public authorities should take to ensure compliance with the GDPR where information requested includes personal data, including express provision for the consultation of data subjects.[25]

(b) If the information requested relates to the requester's personal data the Department may wish to consider a provision dis-applying the obligation on the public authority in article 7(1) to make available the environmental information. This would be on the basis that any request for personal data must be treated as a subject access request under the GDPR.[26]

(c) The Regulations should provide that where a public authority or the Commissioner on appeal finds that disclosure would adversely affect the confidentiality of personal data but that the public interest served by the disclosure outweighs the interest served by the confidentiality of personal data, or where article 10(1) applies to the data, it must notify the Data Protection Commission of its intention of disclosing personal data to the requester, or refer the matter to the Data Protection Commission. This is consistent with the position envisaged by the Commission in its Explanatory Memorandum when proposing Directive 2003/4/EC. Procedural provisions setting how such a notification or consultation between the Data Protection Commission and public authority, or the Data Protection Commission and the Commissioner, would operate in practice should be included in the Regulations.

(d) In light of the third paragraph of Article 4(2) of the Directive, clarify the extent to which the emissions 'override' in article 10(1) applies to article 8(a)(i), insofar as it relates to personal data within the meaning of the GDPR.

Proposal

- The Regulations need to be updated and amended to ensure compliance with the GDPR.

4. ENABLE THE COMMISSIONER TO PUBLISH COMMENTARY AND RECOMMENDATIONS

76. Since its establishment in 2007, the OCEI has developed substantial expertise on the operation of the Regulations and on the AIE regime at European and international level. The OCEI is uniquely placed to provide commentary on the operation of the AIE regime and to make recommendations for its reform, in a manner consistent with the Commissioner's role as an impartial decision-maker. Such commentary is often included in the OCEI's annual reports.

77. We believe that the Commissioner should be given a specific role in monitoring the operation of the Regulations, providing commentary for public authorities and members of

[25] See, for example, regulation 13 of the UK Environmental Information Regulations 2004.
[26] See for example regulation 5(3) of the UK Environmental Information Regulations 2004.

the public and making recommendations for reform, in a manner consistent with the Commissioner's independence.

Proposal

- Provide for an express power for the Commissioner to prepare and publish commentary, and make recommendations, on the operation of the Regulations.

Illustrative drafting

> *Article 12 is amended by the insertion of the following sub-article after sub-article [(17)]:*
>
> *(18) The Commissioner may prepare and publish commentaries, and make recommendations, on the practical application and operation of the provisions, or any particular provisions, of these Regulations, including based on the experience of holders of the office of Commissioner in relation to appeals under article 12.*

5. RECONSIDER THE EXCEPTION IN ARTICLE 8(A)(IV)

78. Article 4(2)(a) of the Directive enables Member States to provide for a request for environmental information to be refused if disclosure of the information "would adversely affect the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law". Article 8(a)(iv) of the Regulations uses different language, which causes confusion and may result in the exception being used in a manner inconsistent with the Directive.

79. The Regulations should, however, clarify the meaning of "proceedings". In Case C-204/09 *Flachglas Torgau GmbH v Federal Republic of Germany*, paragraph 65, the CJEU stated that national law must clearly define the concept of "proceedings" in Article 4(2)(a) of the Directive. Although the Irish courts have given some guidance as to the meaning of this term, uncertainty remains.

Proposals

- Article 8(a)(iv) should be reconsidered to ensure that the language is faithful to Article 4(2)(a) of the Directive.
- The term "proceedings" should be clearly defined.

6. ENSURE THAT THE REGULATIONS ARE OTHERWISE CLEAR AND CONSISTENT

80. We also highlight the following miscellaneous issues.

81. Article 4(2) of the Directive provides that Member States may not, by virtue of Article 4(2)(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment. Articles 8, 9(1)(c) and 10(1) should be re-drafted to make it clear that the 'override' provision in article 10(1) in relation to emissions only applies with regard to articles 8 and 9(1)(c), preferably by way of express reference to the override in those articles.

82. Article 7(3)(a) enables public authorities to provide access to environmental information in a form or manner other than that requested if the information is already available to the

public in another form or manner that is easily accessible. The Regulations should clarify that the public authority may do so by providing the applicant with an electronic link to the information.

83. Article 12(6) provides for the Commissioner's coercive powers to obtain information. Paragraph (b) provides for information to be retained "for a reasonable period", but no provision is made for the length of time for which information may be retained under paragraph (a) or (c). Consistent provision about retention of information should be made in respect of all information obtained by the Commissioner using coercive powers.

84. Article 12(7) provides that a public authority must comply with the Commissioner's decision on appeal within 3 weeks of the decision, and not within 3 weeks of the expiry of the time for appeal under article 13(2). If a public authority fails to comply within 3 weeks of a decision, the Commissioner has the power under article 12(8) to apply to the High Court for an order directing compliance. Article 12(7) should be amended so that the period for compliance under article 12(7) begins after the time for lodging an appeal under article 13(2) has expired. However, in cases where the Commissioner's decision is that information should be partially disclosed, the appellant will need time after disclosure of that information under article 12(7) to consider whether to appeal to the High Court. The period of appeal for the appellant should be extended in cases involving partial disclosure of information for a period of one month after the public authority has complied with the Commissioner's decision in accordance with article 12(7).

85. An appeal fee must be paid as part of the process of making an appeal under article 15(3) and (4). Once paid, the question of waiver does not arise; the only option for the Commissioner is to refund a fee. The reference to waiver should be omitted in article 15(5) and amended to "refund" in article 15(7). More generally, the Department may wish to review article 15 to ensure that the provisions relating to fees are in line with the Directive and the jurisprudence of the courts.

86. The Department may wish to re-consider the drafting of article 4, as in our experience public authorities find the current wording of this article difficult to understand, in particular the meaning of 'Notwithstanding' at the start of article 4(2).

87. The Department may wish to re-consider the drafting of article 8(b).

Proposals

- Re-draft articles 8, 9(1)(c) and 10(1) to make it clear that the 'override' provision in relation to emissions only applies with regard to articles 8 and 9(1)(c).
- Clarify that article 7(3)(a) may be satisfied by providing the applicant with an electronic link to the information.
- Ensure consistency in the provisions about retention of information obtained by the Commissioner using statutory powers.
- Provide for consistency between time for compliance with Commissioner's decision and time for appeal to the High Court, while also ensuring that an appellant has sufficient time to consider the content of any partial disclosure of information.

- The reference to waiver should be omitted in article 15(5) and amended to “refund” in article 15(7).
- Review article 15 to ensure that the provisions relating to fees are in line with the Directive and the jurisprudence of the courts.
- Re-consider the drafting of articles 4 and 8(b).

ANNEX: SUMMARY OF PROPOSALS

THEME A: TIMELINESS OF REVIEW

1. Ensure that public authorities give adequate reasons for decisions:

- Provide that the duty to give reasons applies to threshold jurisdictional questions of whether information is held by or for the public authority, whether the person or body is a public authority and whether the information is environmental information.
- Where a public authority relies on an exception, require the authority to specify why the exception applies and how the public interest has been balanced.
- Confine the provision deeming a refusal of access, so that it applies only for the purpose of making application for an internal review and does not remove the duty on the public authority to make a decision specifying reasons.
- Make provision for deemed affirmation of the original decision for the purpose of appeal to the Commissioner and the waiver of appeal fees in such cases.
- Empower the Commissioner to require a public authority to provide a statement of reasons for its decision, where the statement of reasons given by the public authority at first instance was not adequate.
- Provide for adverse inferences to be drawn from a public authority's failure to give reasons at internal review stage which it seeks to rely on at appeal stage to the Commissioner.

2. Improve public authority engagement with the OCEI:

- Provide for the Commissioner to apply an express presumption that disclosure of the information is justified.
- Re-draft article 8 so that it better reflects the relationship with article 10.
- Consider providing for adverse inferences to be drawn by the High Court for failure to raise all relevant matters before the Commissioner.
- Consider whether an offence of altering or destroying information is merited.

3. Clarify who is a public authority

- Provide an expanded and specific list, as a Schedule to the Regulations, of the persons or bodies included in the definition of public authorities.

4. Provide for a duty of timeliness

- The Commissioner should be under a duty to make a decision in a timely manner.

5. Reduce the Commissioner's participation in High Court appeals:

- Provide that, where an appeal is brought by a requester or other person affected by the decision: (a) the public authority shall be the respondent in the appeal, with the Commissioner as a notice party; and (b) where the Commissioner does not participate in the appeal, the special costs rules in the Environment (Miscellaneous Provisions) Act 2011 shall not apply against the Commissioner.

6. Clarify power to effect settlement of appeals:

- Clarify that the Commissioner may endeavour to effect a settlement between the parties to an appeal.
- Suspend any time limit for review by the Commissioner when settlement is pursued.

7. Consider the implementation of a tribunal system for the AIE regime

- Provide for the creation of an Information Tribunal to deal with appeals under FOI and AIE legislation.
- As an alternative, provision could be made for the inclusion of such appeals against the decisions of the Commissioner into any future administrative tribunal structure.

THEME B: EFFECTIVE INVESTIGATION AND ENFORCEMENT

1. Empower the commissioner to delegate to staff

- Specific provision should be made for a power of delegation by the Commissioner to staff assisting the Commissioner.

2. Broaden the Commissioner's powers to obtain information

- Provide that the Commissioner's powers to obtain information from public authorities apply in respect of information that, in the opinion of the Commissioner, is relevant to the determination of an appeal under article 12.

3. Provide express powers to provide information to the Commissioner

- Make express provision to ensure that public authorities are not prevented from providing information to the Commissioner.

4. Enable formal remission of decisions to public authorities

- Make express provision for the Commissioner to remit matters to the public authority for re-consideration, including applying duties of public authorities and waiving fees for further appeal.

THEME C. FAIR PROCEDURES

1. Ensure appropriate involvement of third parties

- Widen the circumstances in which public authorities must consult third parties.
- Require the Commissioner to publish decisions.
- Provide that the public authority must notify persons who it considers may be affected by the decision of the decision as soon as practicable.
- Provide for appeal to the Commissioner by a person who reasonably believes that their interests would be affected by the disclosure of information.

2. Clarify matters which constitute a refusal of access to information

- Make express provision, for the avoidance of doubt, that the duty in article 7(1) does not apply where the person who receives the request is not a public authority, the information is not environmental information or the information is not held by or for the public authority. As part of this change, provide a pointer to the grounds for refusal under articles 8 to 10.

- Consistent with the existing provision in article 11(5)(a), clarify that the right of internal review and appeal apply to decisions that the information is not held by or for the public authority and that the information is not environmental information.
- Clarify that the right of internal review and appeal apply to the failure of a public authority to give reasons or to meet statutory timescales.

3. Clarify the procedures of the Commissioner on appeal under article 12

- Clarify that the Commissioner may determine his own procedures for investigations.

4. Require public authorities to provide a list of information held

- Require public authorities to include a list of information held by it with its decision on a request.

5. Rationalise the timeframe for dealing with general requests

- Clarify the timeframe for dealing with a request where the public authority has assisted the requestor to specify a request made in too general a manner.

6. Remove requirement to identify request as an AIE request

- Remove the requirement to state that the request is made under the Regulations.

THEME D. LEGAL CLARITY AND COMPLIANCE WITH THE DIRECTIVE

1. Provide for an express duty to disseminate environmental information

- Provide for a duty on public authorities to disseminate environmental information, in accordance with Article 7(1) and (2) of the Directive.

2. Reconsider the exception in article 9(2)(a)

- Article 9(2)(a) should be reconsidered to ensure that the language is faithful to Article 4(1)(b) of the Directive.

3. Review the regulations to ensure compliance with the GDPR

- The Regulations need to be updated and amended to ensure compliance with the GDPR.

4. Enable the Commissioner to publish commentary and recommendations

- Provide for an express power for the Commissioner to prepare and publish commentary, and make recommendations, on the operation of the Regulations.

5. Reconsider the exception in article 8(a)(iv)

- Article 8(a)(iv) should be reconsidered to ensure that the language is faithful to Article 4(2)(a) of the Directive.
- The term “proceedings” should be clearly defined.

6. Ensure that the Regulations are otherwise clear and consistent

- Re-draft articles 8, 9(1)(c) and 10(1) to make it clear that the ‘override’ provision in relation to emissions only applies with regard to articles 8 and 9(1)(c).

- Clarify that article 7(3)(a) may be satisfied by providing the applicant with an electronic link to the information.
- Ensure consistency in the provisions about retention of information obtained by the Commissioner using statutory powers.
- Provide for consistency between time for compliance with Commissioner's decision and time for appeal to the High Court, while also ensuring that an appellant has sufficient time to consider the content of any partial disclosure of information.
- The reference to waiver should be omitted in article 15(5) and amended to "refund" in article 15(7).
- Review article 15 to ensure that the provisions relating to fees are in line with the Directive and the jurisprudence of the courts.
- Re-consider the drafting of articles 4 and 8(b).