ALLONE
CORPORATE SOLUTIONS LTD

About us

AllOne Ltd. provide training to public bodies across the country; our specialist area is the Freedom of Information Act (FOI) and in recent years, we have broadened our offering to include AIE training. In the last couple of years, we have noticed a significant increase in the numbers of AIE requests and also, in the complexity and volume of information sought. This is reflected in the 2022 Statistics available on the DECC website, particularly noticeable for DAFM at almost 2,700 requests and Coillte with 655 request that year.

As the Regulations are currently operating, we would have significant concerns about increased usage of AIE rather than the FOI Act as there appears to be few options open to public authorities to reduce the administrative burden of large and complex requests and no provision for Requesters who abuse the access process.

With this in mind, we have set out below our proposal to amend the Regulations and bring them back in line with the original Directive (Directive 2003/4/EC of the European Parliament and of the Council of 28th January 2003).

Our Submission

We are conscious that the Aarhus Agreement is the overarching document on which the Regulations are based and are aware that any Regulation in Ireland cannot "fall short of" the aspirations of that Agreement. However, there are two parts of the Irish Regulations that seem to go well beyond what was envisaged and it is those parts that are proving very problematic for public authorities, namely Article 9(2)(a) and Article 10(5). We have set out our detailed considerations on those below.

Article 9(2)(a)

This provides that a public authority may refuse an AIE request where the request "is manifestly unreasonable having regard to the volume or range of information sought". This means that any consideration of an unreasonable request is confined to consideration of the volume or range of records – it is not open to consider the behaviour of the requester, as in for example, Section 15(1)(g) of the FOI Act.

The wording in Article 4 of the Directive is different – it simply states that Member States may provide for a request to be refused where "the request is manifestly unreasonable" – no reference to volume or range.

In OCEI decision, https://www.ocei.ie/decisions/mr-d-and-department-of-ag-1/index.xml it states…

29. The European Commission's First Proposal for the AIE Directive (COM/2000/0402 final - COD 2000/0169) envisaged that the exception in article 4(1)(b) of the Directive would cover requests "variously described in national legal systems as vexatious or amounting to an abus de droit". It went on to acknowledge that "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" before noting that "authorities should be able to refuse access in such cases in order to ensure their proper functioning". The interest which the "manifestly unreasonable" exception seeks to protect therefore is the interest in ensuring a public authority is not overburdened by a request, to the extent that this significantly interferes with its ability to perform its other tasks and duties.

In the Guidance issued by the Information Commissioner's office in the UK, it states…

"The EIR allow public authorities to refuse a request for information that is manifestly unreasonable. The inclusion of the word "manifestly" means that there must be an obvious or clear quality to the unreasonableness.

The purpose of the exception is to protect public authorities from exposure to a disproportionate burden or an unjustified level of distress, disruption or irritation, in handling information requests.

The exception can be used:
• when the request is vexatious; or
• when the cost of compliance with the request is too great."

To us, this means that the intention of this provision in the original Directive is to protect public authorities when an individual or group abuse the request process. Under the FOI Act, Section 15(1)(g) recognises frivolous or vexatious behaviour and the Office of the Information Commissioner (OIC) provide guidance on measuring such behaviour to include where a request is:-

- Made in bad faith, or
- Forms part of a pattern of conduct that amounts to an abuse of process or an abuse of the right of access.

OIC goes on to further consider these factors as being relevant to the overall decision-making process:-

1. The actual number of requests filed: are they considered excessive by reasonable standards?
2. The nature and scope of the requests: for example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?
3. The purpose of the requests: for example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?
4. The sequencing of the requests: does the volume of requests or appeals increase following the initiation of court proceedings or the institution or the occurrence of some other related event?
5. The intent of the requester: is the requester's aim to harass government or to break or burden the system?

We acknowledge that the number of requesters who abuse the process are small but it essential to have the tools in the Regulations to allow public authorities to protect themselves from such abuse. We believe the removal of the words "having regard to the volume or range of the information sought" would sufficiently address this issue.

Article 10(5)

This relates to the part-granting of records by separating out any exempt material; OCEI also interpret this provision to require that, for any request, some records must be provided. Whilst this appears a reasonable requirement, it is proving very problematic when either Article 9(2)(a) or (b)

applies. In cases where these provisions apply, it is often very difficult to provide access to some records. For example, if a request is too broad or general, how can a Decision Maker determine what, if any records, should be released?

In the Directive, Article 4(4) is worded differently and expressly excludes manifestly unreasonable and requests that are too broad. The provisions of what is Article 10(5) of our Regulations only apply where exemptions are being used to part-grant or refuse records or for material in the course of completion and internal communications.

If Articles 9(2)(a) and (b) were excluded from Article 10(5), it would mean that these requests can be properly refused, particularly if the Requester fails to engage in meaningful dialogue. The provisions of Article 10(5) could read as follows:-

"Nothing in article 8, 9(1) or 9(2)(c) or (d) shall authorise a public authority not to make available environmental information…"

This would mean that a vexatious request (where the thresholds are met) and a request that remains too broad can be fully refused by the public authority. It would make both these provisions much more meaningful and place important boundaries on the behaviour of a very small number of requesters.

Further Submission

Article 8(a)(iv) provides for the protection of the "confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law" including the FOI Act. However, many of the public authorities in receipt of AIE requests are either excluded or partially included agencies under the FOI Act. This is one of the reasons that AIE is used – it is the only legal route of access to those public authority's records.

For example, Coillte is not an FOI body for the purposes of Section 6 of the Act; they are one of a number of bodies listed in Section 1 Part 2 Exempt Agencies. Because of this status under the FOI Act, the Office of the Commissioner for Environmental Information (OCEI) has determined that they cannot rely on Article 8(a)(iv) at all.

OCEI have stated that this matter has been referred to the High Court for clarification; that clarification would be most welcome. If it is found that Article 8(a)(iv) cannot apply to public authorities that are not FOI bodies, then further provisions to exempt information may be required in the Regulations.

Consultative Forum/Group

We would be happy to participate in a consultative forum or group if this is part of the plan for consultation. Thank you for the opportunity to make our submissions and if you require any clarification, please contact me (details below).

Signed: **Date:** 15th December 2023.

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