



Energy for
generations

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Public consultation on proposed amendments to the Access to Information on the Environment (AIE) Regulations 2007-2018

To whom it may concern,

The Department of the Environment, Climate and Communications (“**the Department**”) invited submissions on proposed amendments to the Access to Information on the Environment (“**AIE**”) Regulations 2007-2018 on 14 November 2023.

In 2020, Ireland committed to amending the AIE Regulations in response to findings of non-compliance by the Aarhus Convention Compliance Committee (“**ACCC**”). A public consultation on the AIE Regulations occurred between February and April 2021 (“**2021 Public Consultation**”). ESB made a submission during the 2021 Public Consultation. Following that consultation, the regulations were reviewed and updated, and the Department has published draft AIE Regulations. These draft AIE Regulations are the subject matter of the current public consultation upon which stakeholders have been invited to make submissions.

ESB welcomes this public consultation and the opportunity to provide feedback on the draft AIE Regulations. Our observations and recommendations in response to this request are outlined below.

In providing this submission, ESB has considered the guidance provided by the Minister for the Environment, Community and Local Government (as he then was) on the implementation of the AIE Regulations (the “**Ministerial Guidelines**”); the Explanatory Memorandum attached to the draft Access to Information Directive (COM (2000) 402 final 2000/0169 (COD)); Directive 2003/4/EC (the “**AIE Directive**”); the Aarhus Convention: An Implementation Guide (June 2014 edition) (the “**Aarhus Guide**”) relating to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the “**Aarhus Convention**”); Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to Community institutions and bodies and, where appropriate, judicial interpretation of the Regulations.

ESB considers the following matters to be worthy of review:

- 1) Regulation 4(2) – Typographical Error
- 2) Calculation of Time Limits
- 3) Regulation 6(10) & 6(12) – Third Party Consultation Procedure
- 4) Regulation 6(10) – Personal Information / Personal Data
- 5) Regulation 7(1)(d)(i) – Grounds for refusal of environmental information: Manifestly Unreasonable Requests
- 6) Regulation 8(3) - Incidental provisions relating to refusal of information – Separate Out
- 7) Regulation 10(4) – Appeal to Commissioner for Environmental Information: Settlement Powers
- 8) Regulation 10(6) – Appeal to Commissioner for Environmental Information: Refund
- 9) Regulations 10(11) & 11(2)- Appeal to Commissioner for Environmental Information & Appeal to the High Court on a point of law: Time Limits
- 10) Processing of Appeals

These are considered in turn below.

1. Regulation 4(2) – Typographical Error

1.1 There appears to be a typographical error in Regulation 4(2)(f), and it would appear that paragraph (f) ought to refer to Regulation 2(1)(a) rather than paragraph (a). For illustration, see suggested addition and deletion with red underline:

(f) environmental impact studies and risk assessments concerning the elements of the environment, referred to in Regulation 2(1)(a) ~~paragraph (a)~~ in the definition of environmental information, or a reference to the place where the information can be requested or found;

2. Calculation of Time Limits.

2.1. Time limits under the draft AIE Regulation refer in many instances to time running from the date “of receipt” by the public authority (see: Reg 6(4)(a), 6(4)(b), 9(2), 9(3)(a)). Public authorities will, in the vast majority of cases, be closed on public holidays and between 24 December and 1 January each year.

2.2. ESB submits that the Regulations would benefit from further clarity in respect of the ‘date of receipt’ by a public authority in the context of (i) business hours, (ii) working

days, and (iii) public holidays. Additionally, ESB submits that time should not run against a public authority during the Christmas break.

- 2.3. ESB refers to the recent decision of the Commissioner (Mr. F and Coillte - OCE-130454-P8G5D2) wherein it was held in the context of when a request is received by a public authority:

“16. A “month” is not defined in the AIE Regulations and in those circumstances, I will rely on the definition of “month” contained in the Interpretation Act 2005 which is a “calendar month”. The obligation in article 7(2) is therefore to provide the appellant with a decision not later than one calendar month from the date of receipt of the request or, to provide them with notice in writing of the reasons it is not possible to provide a decision along with a date by which a decision will be issued which is no later than two calendar months from the date of the request.”

17. I accept that the appellant’s request was sent to Coillte on 9 July 2022. However, as is evident from the provisions of article 7(2) I have referred to above, the relevant date for the purpose of the AIE Regulations is the date on which the request is received. I also accept that the response sent by Coillte’s staff member to the appellant states that the request was “received on 09.07.2022”. This is unfortunate. However, in circumstances where the acknowledgment was in fact sent on 11 July 2022, which was the first working day after the appellant sent his request, on Saturday 9 July 2022, and where the AIE Regulations clearly envisage that a public authority should only be required to commence dealing with a request on the date received (as opposed to the date sent), I think it would be unduly onerous to hold Coillte to a timeline commencing on 9 July 2022 which was clearly outside of its working hours. I therefore consider the request to have been “received” for the purposes of article 7(2) of the Regulations, on 11 July 2022.”

- 2.4. This decision of the Commissioner supports the position that a request is only received when the public authority is open (i.e., during working hours and during a working day). ESB submits that greater clarity can be provided for under the Regulations to requesters if it was made clear that a request will only be ‘received’ by a public authority for the purposes of the Regulations where it is sent during working hours and on a working day.
- 2.5. The Interpretation Act 2005, as amended, defines a “working day” as “*a day which is not a Saturday, Sunday or public holiday*”.
- 2.6. ESB suggests that it is expressed in the Regulations that where a request is made outside of working hours and / or not on a working day that such request will be deemed to be received on the next working day.
- 2.7. It is also suggested that a provision akin to section 251 of the Planning and Development Act 2000, as amended would be of assistance in clarifying that the Christmas period from 24 December – 1 January (some of which but not all of which



are public holidays) is excluded from the calculation of any time period under the Regulations.

- 2.8. Section 251 provides that when calculating any time limit provided for in the 2000 Act that the period between 24 December and 1 January, both days inclusive, shall be disregarded. ESB submits that a similar provision should be included in the Regulations.

3. Regulation 6(10) & 6(12) – Third Party Consultation Procedure

- 3.1. Regulation 6(10) places an obligation on Public Authorities to make reasonable efforts to contact Third Parties in certain circumstances (defined in Regulation 6(10)(a)-(c)) to seek consent to the release of the information or submissions setting out why the release of the information requested would adversely affect their interests in light of Regulation 7(1)(a), (b) or (d), taking account the provisions of Regulation 8.
- 3.2. Regulation 6(11) states that the Public Authority must notify said Third Party of its intended decision and their right to appeal under Regulation 10(1). Following such notification, regulation 6(12) requires that where a Third Party submits that the release of environmental information would, in its opinion, adversely affect its interests, the information in question shall not be released until (i) the Third Party confirms that it does not intend to appeal, (ii) the time limit for an appeal has expired, or (iii) any appeal has been exhausted to finality (including an appeal to the High Court).
- 3.3. The above provisions must be seen in light of Regulation 6(2)(a), which requires that a decision is made on a request and release of information the subject of that request within one month and Regulation 6(13) which provides for a default refusal where a decision is not notified to an applicant within the one month period.
- 3.4. ESB is of the view that given the requirement to make reasonable efforts to contact Third Parties within the one month period that this will result in an increase in the number of deemed refusals. Furthermore, there does not appear to be any express provision indicating that the one month time period is paused to allow for such Third Party consultation either before the one month period expires or after the decision is made to release information. There appears to ESB to be inconsistency in respect of how the one month time limit is to operate in the circumstances.
- 3.5. ESB has concerns regarding the practicality of, on the one hand, engaging in the proposed Third Party Consultation Procedure and at the same time meeting their requirements to process the request within the one month time limit set out in Regulation 6(2)(a). ESB submits that it would be appropriate that the one month time period is paused while the Third Party consultation occurs.

4. Regulation 6(10) – Personal Information / Personal Data

- 4.1. Regulation 6(10) makes reference to the concept of ‘personal information’. The term ‘personal information’ is not defined in the draft Regulations; however, the term ‘personal data’ is defined in Regulation (EU) 2016/679.

- 4.2. The term ‘personal information’ is not referred to in the AIE Directive; however, the term ‘personal data’ is referred to in Articles 4(2)(f).
- 4.3. Regulation 6(10) requires that a “*public authority shall make all reasonable efforts to contact the third party concerned to seek consent or submissions setting out why the release of the information requested would adversely affect their interests pursuant to subparagraph (a), (b) or(d) of Regulation 7(1), taking into account the provisions of Regulation 8*”. Regulation 7(1)(a)(i) refers to ‘personal data’ rather than ‘personal information’.
- 4.4. It is not apparent why reference is made to ‘personal information’ in Regulation 6(10). By way of visual representation, a table contrasting Regulation 6(10) and Regulation 7(1)(a)(i) is set out below:

Regulation 6(10)	Regulation 7(1)(a)(i)
<p>the confidentiality of <u>personal information</u> relating to a natural person who has not consented to the disclosure of the information and where that confidentiality is otherwise <u>protected by law</u>,</p> <p style="text-align: right;">[Emphasis Added]</p>	<p>the confidentiality of <u>personal data</u> relating to a natural person where that person has not consented to the disclosure of the information to the public where such confidentiality is <u>provided for by national, or European Union, law</u>;</p> <p style="text-align: right;">[Emphasis Added]</p>

- 4.5. It appears to ESB that the reference to ‘personal information’ in Regulation 6(10) should be replaced with reference to ‘personal data’.
- 4.6. It also appears to ESB that for consistency either the phrase ‘protected by law’ or ‘provided for by national, or European Union, law’ should be used. By including alternative wording it may cause confusion for members of the public as to whether the phrase ‘protected by law’ is the same as ‘provided for by national, or European Union, law’.
- 5. Regulation 7(1)(d)(i) – Grounds for refusal of environmental information: Manifestly Unreasonable Requests**

- 5.1. ESB welcomes the expansion of the ‘manifestly unreasonable ground’ for refusal of environmental information in Regulation 7(1)(d)(i) of the draft AIE Regulations. Under Regulation 7(1)(d)(i), it is proposed to no longer limit this ground on the basis of (i) volume or (ii) complexity.
- 5.2. While ESB welcomes this positive change, it is submitted that the regulation ought to be further clarified to make it clear that this ground of refusal also captures frivolous and / or vexatious matters.

5.3. Article 4(1)(b) of the AIE Directive provides that “*Member States may provide for a request for environmental information to be refused if the request is manifestly unreasonable*”.

5.4. The Explanatory Memorandum attached to the draft AIE Directive (COM (2000) 402 final 2000/0169 (COD)) explains 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."

5.5. It is apparent from the Explanatory Memorandum that the ground of ‘manifestly unreasonable’ provided for in Article 4(1)(b) of the AIE Directive (proposed to be provided for under Regulation 7(1)(d)(i)) includes requests “*variously described in national legal systems as vexatious or amounting to an abus de droit*”.

5.6. ESB also refer to the UK Court of Appeal decision in **Dransfield v Information Commissioner and Craven v Information Commissioner** [2015] EWCA Civ 454 at §§78-79, which states that the “manifestly unreasonable” exception provided for in the UK Environmental Information Regulations encompasses vexatious requests.

5.7. Similarly, in FER0824381 (31 October 2019), the UK Information Commissioner held at §34 that a request can be refused as manifestly unreasonable under the UK Environmental Information Regulations “*either as it is considered vexatious, or on the basis of the burden that it would cause to the public authority*”.

5.8. Consequently, ESB submits that it should be made clear that Regulation 7(1)(d)(i) encompasses requests which are frivolous or vexatious (i.e. that a request may be manifestly unreasonable where the request is frivolous or vexatious).

5.9. ESB notes the submission made by the Commissioner of Environmental Information dated 16 April 2021 regarding the manifestly unreasonable requests wherein at §§71-74, it addresses the issue and thereafter set out two possible approaches which could be adopted to bring greater clarity to the operation of this ground of refusal. The Commissioner noted that “*[t]he first option would provide greater clarity in the Regulations for requesters, public authorities and for the OCEP*”.

5.10. The options set out by the Commissioner were as follows:

“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”.

5.11. It appears to ESB that option 2 was taken up by the Department and is reflected in the draft AIE Regulations. However, ESB would support and endorse the Commissioner’s position that option 1 would bring greater clarity to the regulations. As such, ESB submits that a provision is included in the Regulations to provide that for the purposes of Regulation 7(1)(d)(i), a request may be manifestly unreasonable where (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 (a) or (b) from the same requester or from different requesters who appear to have made the requests acting in concert.

6. Regulation 8(3) - Incidental provisions relating to refusal of information – Separate Out

6.1. Recital 17 to the AIE Directive states:

“(17) Public authorities should make environmental information available in part where it is possible to separate out any information falling within the scope of the exceptions from the rest of the information requested”.

6.2. Article 4(4) of the AIE Directive provides that:

“Environmental information held by or for public authorities which has been requested by an applicant shall be made available in part where it is possible to separate out any information falling within the scope of paragraphs 1(d) and (e) or 2 from the rest of the information requested.”

- 6.3. Reference in Article 4(4) of the AIE Directive to paragraphs 1(d) corresponds to Regulations 7(1)(d)(iv) and (v) of the draft AIE Regulations and reference to 1(e) corresponds to 7(1)(d)(iii) of the draft AIE Regulations.
- 6.4. Reference in Article 4(4) of the AIE Directive to paragraph 2 corresponds to Regulations 7(1)(a)(i)-(v) and 7(1)(b)(i)-(iii) of the draft AIE Regulations.
- 6.5. Regulation 8(3) of the draft AIE Regulations provides that:

“(3) Environmental information held by, or for ,a public authority which has been requested by an applicant shall be made available in part where it is possible to separate out any information refused under Regulation 7(1), that falls within the scope of—

(a) subparagraph (a)(i), (iv) or (v),

(b) subparagraph (b)(ii) or (iii),

or (c) subparagraph (d)(iii) or (v),

of that Regulation, from the rest of the information requested”.

- 6.6. Regulation 8(3) of the draft AIE Regulations appears to ESB to be an attempt to implement Article 4(4). However, it appears that Regulation 8(3) does not represent a complete implementation of Article 4(4) of the EIA Directive.
- 6.7. On the basis of the corresponding provisions from the AIE Directive to the draft AIE Regulations, it is not apparent why Regulation 8(3) does not also refer to the following provisions of Regulation 7(1) shown in red text:

“(3) Environmental information held by, or for ,a public authority which has been requested by an applicant shall be made available in part where it is possible to separate out any information refused under Regulation 7(1), that falls within the scope of—

(a) subparagraph (a)(i), (ii), (iii), (iv) or (v),

(b) subparagraph (b)(i), (ii) or (iii),

or (c) subparagraph (d)(iii), (iv) or (v),

of that Regulation, from the rest of the information requested”.

7. Regulation 10(4) – Appeal to Commissioner for Environmental Information: Settlement Powers



- 7.1. Regulation 10(4) provides the Commissioner with a new power to endeavour to affect a settlement between parties. This new power does not appear to arise from the AIE Directive and does not appear to ESB to therefore be required under the Regulations.
- 7.2. This new power permits the Commissioner to (i) suspend the review while settlement is attempted to be effected and (ii) discontinue a review if appropriate.
- 7.3. It is ESB's submission that this provision should not be implemented. At present, a similar procedure is provided for in the OCEI Procedures Manual (Part 4, paragraph 20) and it appears to ESB that there is no rationale why this procedure ought to be put on a statutory footing.

8. Regulation 10(6) – Appeal to Commissioner for Environmental Information: Refund

- 8.1. Regulation 10(6) provides that where the Commissioner has varied or annulled a decision of a public authority, the Commissioner may require the public authority to refund the appeal fee to the applicant where appropriate.
- 8.2. It is not apparent from Article 10(6) what circumstances may give rise to this power being considered appropriate by the Commissioner.
- 8.3. It appears to the ESB that where a public authority engages with an AIE request in a reasonable manner that such a penalty would not be appropriate.
- 8.4. This proposed new power does not appear to arise from the AIE Directive. ESB would request that if this power is to be included that it is further refined so as only to be utilised by the Commissioner in limited and exceptional circumstances.
- 8.5. It is suggested by ESB that such a power should only be utilised by the Commissioner where the Commissioner forms the opinion that the public authority has acted *mala fide*.

9. Regulation 10(11) & 11(2)- Appeal to Commissioner for Environmental Information & Appeal to the High Court on a point of law: Time Limits

- 9.1. Under Regulation 10(11) a public authority must comply with a decision of the Commissioner made under Regulation 10(5) within 3 weeks from the date of receipt of the decision. Regulation 10(11) states that it is subject to Regulation 11.
- 9.2. Under Regulation 11(2), a public authority has a period of 2 months within which to appeal to the High Court on a point of law. This 2 month period runs from the date of notice of the decision of the Commissioner.
- 9.3. Under the existing AIE Regulations, these time limits run concurrently and are therefore problematic.



- 9.4. While it is apparent from the wording of Regulation 10(11) that the 3 week time limit to comply with a decision of the Commissioner is subject to Regulation 11, it is submitted that the effect of this provision being ‘subject to Regulation 11’ is not clear.
- 9.5. Where a public authority fails to comply with a decision of the Commissioner within the 3 week period referred to in Regulation 10(11), the Commissioner has the power under Regulation 10(12) to apply to the High Court for an order directing the public authority to comply with the decision.
- 9.6. The operation and interaction of the time limits under Regulation 10(11) and 11(2) ought to be clear to all parties. This is particularly important for public authorities where they are at risk of High Court proceedings being issued against them under Regulation 10(12) were they to fail to comply with a decision of the Commissioner made under Regulation 10(5).
- 9.7. Furthermore, the effect of lodging an appeal by a public authority on its obligation to comply with a decision of the Commissioner is also not clear. ESB suggests that it would be appropriate that where an appeal to the High Court is lodged by a public authority this acts as an automatic stay on the decision of the Commissioner until the final determination of the proceedings or withdrawal of proceedings. Where an appeal is lodged which only affects part of a decision of the Commissioner it should be clear that such stay only affects the aspects of the decision the subject matter of the appeal.
- 9.8. ESB submits that it would be clearer if Regulation 10(11) provided that:
- a public authority must comply with a decision of the Commissioner made under Regulation 10(5) within 3 weeks of the expiry of the 2 month time limit to lodge an appeal to the High Court under Regulation 11, and
 - where an appeal is taken by a public authority under Regulation 11, the obligation to comply with a decision of the Commissioner made under Regulation 10(5), the subject matter of that appeal, is stayed pending final determination of the proceedings or withdrawal of proceedings.

10. Processing of Appeals by the Commissioner

- 10.1. ESB would welcome the inclusion in the Regulations of a requirement on an appellant to outline clearly the basis of their appeal (i.e. which exemption they are appealing the use of).
- 10.2. A requirement to refine the issues in an appeal at the outset would have the benefit of allowing the Public Authority to engage specifically with the issues in the appeal. Decisions under appeal to the Commissioner may involve multiple exemptions, and in the absence of specific issues being identified it is more difficult for the Public Authority to engage meaningfully with the Appeal.



10.3 ESB believes that it would be beneficial for the Regulations to include a requirement that when appealing a decision of a Public Authority to the Commissioner that there is a requirement to set out the grounds for the appeal, and that these grounds are to be communicated by the Commissioner to the Public Authority and that the Public Authority be given an appropriate time period in which to respond prior to the determination of the appeal.

Yours faithfully

A large black rectangular redaction box covers the signature and name of the sender.

AIE Appeals Manager