

Submission by the Environmental Protection Agency **Draft AIE Regulations 2023**

General

Similar to other public bodies, the EPA has seen a significant increase in the number of AIE requests it has received, with some public bodies receiving unprecedented numbers compared to previous years. For example, from 2021 to 2023, the EPA saw a 57% increase in AIE requests. (94 in 2023 compared to 52 in 2021).

There also appears to be an increased use by requesters of the AIE Regulations compared to the FOI Act and an increase in repeat AIE requesters.

Charging fees for supply of information

As part of the Department's drafting of Guidelines, the EPA would welcome structured guidance on the application of charges. The AIE Regulations state that charges must be "reasonable". We can assume that FOI charges outlined in the FOI Act are deemed "reasonable". Therefore, it should be reasonable to apply the same methodology to AIE charges as FOI. For example, it would be helpful if a public body could request a deposit in advance of commencing work on a large request and that the request could be put on hold until the deposit is paid. This would ensure there is no waste of public resources in processing requests that are ultimately not released due to overdue fees. We note the Department of Environment, Climate and Communications, who have oversight of the implementation of the AIE Regulations in Ireland, outline fees for AIE requests on their website similar to FOI <https://www.gov.ie/en/organisation-information/1e52cb-access-to-information-on-the-environment-aie/> Clear guidance would be very helpful.

Appeals to the Office of the Information Commissioner

It would be helpful if it was provided for in the new AIE Regulations, that appellants include grounds of appeal when initially submitting an appeal to the Commissioner.

Article 9(2)(a) of current AIE Regulations

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". We welcome the proposed amendment in the draft regulations to remove the words "having regard to the volume or range of information sought". It is currently not open to public bodies to consider if the AIE process is being abused or to consider the behaviour of the applicant.

We note that Article 4 of the AIE Directive states that that Member States may provide for a request to be refused where "the request is manifestly unreasonable". There is no reference to volume or range of information sought. This would appear to indicate that the original Directive wording was providing to protect public bodies from abuse of the AIE request process.

Article 10(5) of current AIE Regulations

Article 4(4) of the AIE Directive states "*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.*".

Article 4(4) of the Directive appears to have been transposed incorrectly in the current AIE Regulations i.e. Article 10(5). Article 10(5) refers to all the provisions of Article 8 and 9. But Article 4(4) of the Directive appears to expressly exclude the provisions of the current Article 9(a) and (b) of the AIE Regulations i.e. manifestly unreasonable and requests that are too general i.e. Article 4(4) of the Directive refers to paragraphs 1(d) and (e) and Article 2 only.

In light of this, it is proposed to exclude the current Articles 9(2)(a) and (b) from Article 10(5). E.g. *“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 greatly assist public bodies where a request is manifestly unreasonable for various reasons or is too general.

Article 5(1)(c) of Draft AIE Regs

Article 5(1)(c) provides that a request “.....shall state the name of the applicant. Article 2(1) defines “applicant” as “any natural or legal person.....”. “Shall” is mandatory. In light of this, it is reasonable to expect that a public body only accepts requests from a natural person or legal entity. There is no provision in the current or draft regulations or indeed the AIE Directive, that allows Public Bodies to accept anonymous requests.

Proposed amendment to Article 4(1)(g) of Draft AIE Regs

We propose the following insertion **in red**:

“ensure that environmental information compiled by, or for, the public authority concerned, is up-to-date, **as is reasonably practicable**, accurate and comparable, and.....”

Article 6(10) of Draft AIE Regs re 3rd Party consultation

Where the public body must consult with a 3rd party under Article 6(10), it should be given a timeframe within which to do so (similar to FOI where there is a set period). The normal one month timeframe is too short within which to carry out 3rd party consultation.

Article 10(3)(b) of new Draft Regs

The current Article 13 of the AIE Regulations provides for an appeal of the Commissioner’s decision to the High Court on a point of law. Each party needs time to consider their options and has no more than two months to initiate such an appeal. The timeline set out in Article 10(3)(b) does not have regard to this.

Where a public body is considering its options i.e. go to High Court or follow the direction of the Commissioner, we propose both timelines be 2 months.

Article 10(6) of Draft AIE Regs

This appears to be requesting that the public body refund an appeal fee that has been paid to the Commissioner as there is no fee for requesting an internal review. It would seem more appropriate that the Commissioner would refund a fee that was paid to them in such instances if required.

The Department might check if there is a provision in planning law for county councils to refund appeal fees paid by appellants to An Bord Pleanála by applicants for planning appeals in such instances.

Article 12(1) of new Draft AIE Regs

We propose that the Guidelines be available as soon as possible but at least within 6 months of the new AIE Regulations being published, rather than the proposed 12 months to assist public bodies in implementing the new Regulations.

In addition to the General Guidelines, a manual for Information Officers would be very helpful. For example, the Department of Public Expenditure and Reform have published a manual for Decision Makers under the FOI Regime. This gives clear guidance on the procedures, timeframes and exemptions to Decision Makers. A similar manual for AIE Information Officers would assist public bodies to make correct and consistent decisions under the AIE Regulations. The rate of OCEI decisions annulling public bodies original decisions indicates that such guidance would be beneficial.

Article 12(2) of new Draft AIE Regs

We propose that the new Guidelines be reviewed no later than 3 years of publication of the new AIE Regulations so that any unforeseen problems can be addressed as soon as possible and then at regular intervals thereafter.

Additional Comments

- With regard to **statutory timeframes** for processing requests/internal reviews, we would welcome if the Department could investigate if days for bank/public holidays where public bodies are closed, could be discounted by public bodies from timeframes in the new Regulations for processing requests. (similar to FOI re working days as opposed to the 1 month AIE timeframe where there is no regard given to bank/public holidays). This is particularly problematic at times where there are a number of public holidays within a short timeframe such as Christmas.
- Ensure that page numbering is included in the new AIE Regulations. (Current Regulations have no page numbering).
- **Bolded Headings** against each Article in the new draft Regulations are welcomed.