

NON-CONFIDENTIAL.

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

Body: Department of the Environment, Climate and Communications

Submitted by: [REDACTED]

Submitted to: aarhus@decc.gov.ie

Deadline: 8 January 2024 17:30

AIE_2023_draft_regs

reference	Text 2014, extra Text 2023	Comment, Suggested change
2(1)	“ electronic means ” means through such electronic systems as a public authority have available for the purposes of these Regulations	Typo: “as a public authority has available”
2(1)	” public authority ”, subject to paragraph (2), means—	See below 2(1)(c)
2(1)(c)	any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within paragraph (a) or (b), and includes the following :	<p>“the following” is not noted in the listing of changes. https://www.gov.ie/pdf/?file=https://assets.gov.ie/276943/3f9fcd11-f7bf-4a90-b1d1-340a3309f1bb.pdf#page=null</p> <p>“the following” potentially restricts the meaning of “includes” Remove: “the following”</p>
2(1)(c)(vii)	a company, established under the Companies Acts or the Companies Act 2014 , in which all the shares are held—	<p>The convention anticipates modern holding structures. Regs should also try and anticipate contrived and evasive devices (e.g. investment trusts, convertible loans etc). Power of veto is also a type of control but does not require 100% share ownership</p> <p>Change to: “a company over which any combination of 2(1)(i) - (vi), or their appointees, have effective control or veto.”</p>
2(3)	A word or expression that is used in these Regulations and that is also used in the Directive has, unless the context otherwise requires , the same meaning in these Regulations as it has in the Directive	<p>Is the phrase “unless the context otherwise requires” obligatory ?. The words ‘context’, ‘otherwise’ and ‘requires’ are all contestable. Possible grey area created at R.6(1)</p>
4(1)	A public authority shall-	<p>Possibly better to include R.4(1)(b)-(f),(h) in a schedule (minimal requirements) and guidelines (best practice). Otherwise regs get clogged up with lists. Substantial account to be taken of the guidelines. See R.12(3)</p>
4(1)(b)	inform the public where authorisations with a significant impact on the environment and environmental agreements may be requested	What does “significant” mean? How is the threshold met ? Who decides?
4(1)(c)	inform the public where authorisations with a significant impact on the environment and environmental agreements may be located for review	What does “significant” mean? How is the threshold met ? Who decides?
4(1)(d)	inform the public where environmental impact studies and risk assessments concerning elements of the environment may be requested	<p>“factors” and “measures” should be included. Change to: “inform the public where environmental impact studies and risk assessments concerning elements of the environment, or concerning factors or measures affecting the environment, may be requested.”</p>
4(1)(e)	inform the public where environmental impact studies and risk assessments concerning elements of the environment may be located for review	<p>“factors” and “measures” should be included. Change to: “inform the public where environmental impact studies and risk assessments concerning elements of the environment, or concerning factors or measures affecting the environment, may be located for review.”</p>

reference	Text 2014, extra Text 2023	Comment, Suggested change
4(1)(h)	provide assistance to the public in exercising the right of access to environmental information by means which may include one, or more, of the following:	R.4(1)h is mandatory but all its enclosed provisions, i.e. R.4(1)h (i)-(iv), are individually optional. Change to: "provide assistance to the public in exercising the right of access to environmental information. The means should include one, or more, of the following:"
4(2)	Environmental information mentioned in paragraph (1)(f) shall include at least the following:	Include all extra elements e.g., 4(2)(e)-(f), in an extensible schedule ?
4(2)(e)	authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found in the framework of Article 3 of the Directive	See above R.4(2) What does "significant" mean? How is the threshold met ? Who decides?
4(2)(f)	environmental impact studies and risk assessments concerning the elements of the environment, referred to in paragraph (a) in the definition of environmental information, or a reference to the place where the information can be requested or found	See above R.4(2) "factors" and "measures" should be included. Change to: "referred to in paragraphs (a), (b) and (c) in the definition of environmental information," Add: "4(2)(g) Procurement scoring schemes for measures subject to assessments referred to in paragraph 4(2)f."
6(1)	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	"subject only to these Regulations" - Grey area with R.2(3) ? Add: R.6(1)(A) "Decision makers shall have been recognised by the Commissioner and shall have substantial regard to the latest guidelines to these regulations."
6(5)	Where a request is made to a public authority and the environmental information requested is not held by, or for, the authority concerned, the authority shall as soon as possible refuse the request in accordance with paragraph (4).	"as soon as possible"? Is more than two weeks necessary? Some PAs have an observable policy of releasing decisions/information on the last day of the month.
6(6)	Where paragraph (5) applies and the public authority concerned is aware that the information requested is held by another public authority, it shall as soon as possible, inform the applicant of the public authority to whom it believes the request should be directed.	"as soon as possible"? Is more than two weeks necessary? Some PAs have an observable policy of releasing decisions/information on the last day of the month.
6(8)(a)	Where a request is made by the applicant in too general a manner, the public authority concerned shall, as soon as possible and, in any case, not later than one month after the date of receipt of the request, invite the applicant to make a more specific request and offer assistance to the applicant in the preparation of such a request.	Is more than two weeks necessary? (see also below R.6(8)b)
6(8)(b)	Where subparagraph (a) applies and a more specific request is made by the applicant, the request is treated for the purpose of paragraph (2)(a) as having been made on the date on which the more specific request was made.	A similar provision is being abused under FOI. Decision-makers seeking a trivial "clarification", late in the month, triggering a clock reset.
6(10)(a)	the confidentiality of personal information relating to a natural person who has not consented to the disclosure of the information and where that confidentiality is otherwise protected by law,	Does "personal information" have the same meaning as "personal data" ? (see R.2(1))

reference	Text 2014, extra Text 2023	Comment, Suggested change
7(1)(a)(iv)	without prejudice to subparagraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law	“proceedings” still not clearly defined, but relevant guidance in Aarhus Implementation Guide should be included in proposed AIE guidelines. Relevant FOI exemptions not identified. IC/CEI has previously taken a very broad view of LPP.
7(1)(a)(v)	commercial or industrial confidentiality, where such confidentiality is provided for in national, or European Union, law to protect a legitimate economic interest,	“legitimate economic interest” should not be available to PAs where environmental costs/benefits are present but unquantified.
7(1)(d)(iv)	concerns unfinished documents or data, or	Difference between “unfinished documents” and “ material in the course of completion” ? (see 7(1)(d)(v)) “Unfinished documents” is not a stand-alone exemption - see Directive, also AIG.
7(3)	Where environmental information is refused under paragraph (1)(d)(v), the public authority concerned shall inform the applicant of the name of the authority preparing the material and the estimated time for completion.	Will this be a date ?
10(1)(b)	a person other than the applicant, including a third party, reasonably believes that their interests would be adversely affected,	The provision is optional under the Directive and the draft wording is very broad. The interests are not required to be ‘legitimate’ interests. (cf. R.7(1)(a)(v)) CEI’s powers to investigate general claims of harm made by non-PAs might be limited. (cf. R(10)) The domain of possible interests would be infinite. The provision is likely intended to prevent harm at 7(1)(b)(ii) only. At most to protect 3rd parties from legal and reputational harm.
10(3)(a)	Following receipt of an appeal under this Regulation, where the Commissioner considers that the reasons for the decision provided in accordance with Regulation 9(4) (a), or in the case of Regulation 6(4)(c), are not adequate, the Commissioner shall direct the public authority concerned to provide to the requester and to the Commissioner, in writing or such other form as may be determined by the Commissioner, a statement of reasons which complies with Regulation 9(4)(a) or 6(4)(c), as the case may be.	“not adequate” can mean both the absence of reasons, and their lack of substance. “adequate” reasons, once provided, would presumably meet the test for refusal of information. Change to: “...reasons for the decision have not been provided in accordance with Regulation 9(4)(a) or Regulation 6(4)(c) as the case may be, the Commissioner shall direct...” Does the appeal resume on receipt of “[adequate] reasons” ? Is the appeal fee refundable in these circumstances ?
10(3)(b)	The public authority shall comply with a direction under subparagraph (a) as soon as may be, but not later than 3 weeks, after the date of its receipt.	What procedure would apply to entities that claim not to be a ‘public authority’ ? (See also below 10(12)) Are late submissions (> 3 weeks) ignored by CEI in all circumstances ?
10(4)	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.	Is CEI obliged to report/publish discontinued reviews and respective reasons ?

reference	Text 2014, extra Text 2023	Comment, Suggested change
10(8)(b)	The timeline in paragraph (8)(a) shall be suspended—	OCEI loses incentive to chase-up PAs. Foreseeable result is that overall (gross) timelines at OCEI might lengthen.
10(8)(b)(i)	where paragraph (3) applies, until such time as the public authority complies with the direction under paragraph (3)(a),	Open-ended ? (See also below R.10(12))
10(8)(b)(iii)	where further information is requested by the Commissioner from the applicant or a third party to the appeal, until such time as the information requested is provided.	Open-ended ?
10(10)(a)	require a public authority to make available such information as may be necessary for the Commissioner to determine the appeal, and where appropriate—	Within what time ? Consequences for failure to comply promptly or at all ?
10(11)	Subject to Regulation 11, a public authority shall comply with a decision of the Commissioner under paragraph (5) not later than 3 weeks after the date of its receipt.	Conflict with R.11(2) ? - 2 months
10(12)	Where a public authority fails to comply with a decision of the Commissioner within the period specified in paragraph (11), the Commissioner may apply to the High Court for an order directing the public authority to comply with that decision and, on the hearing of such an application, the High Court may grant such relief accordingly.	Conflict with R.11(2) ? - 2 months Does this also apply to a “direction” under R.10(3)(b) ?
11(2)	An appeal under paragraph (1) shall be initiated not later than 2 months after the date on which a notice of the decision under Regulation10(5) was given to the party to the appeal or other person affected by the decision.	Conflict with R.10(1) - 3 weeks
12(1)	The Minister shall publish guidelines in relation to the implementation and operation of these Regulations by public authorities, not later than 12 months after the date of their coming into operation.	Replace Minister with “Commissioner”. Replace 12 months with “3 months” Aarhus Implementation Guide should apply in default.
12(2)	The Minister shall review any guidelines published under paragraph (1) at regular intervals not exceeding 5years.	Replace Minister with “Commissioner”
12(3)	A public authority shall, in the performance of its functions under these Regulations, have regard to any guidelines published by the Minister under paragraph (1)	Replace Minister with “Commissioner”. “have substantial regard”
12(4)	In addition to the guidelines referred to in paragraph(1), the Minister shall ensure that an indicative list of public authorities is publicly available in electronic format on a website maintained by the Minister.	There are several similar websites already. CSO, DPER, DETA