

Draft of
REGULATIONS
entitled
European Communities (Access to Information on the Environment) Regulations 2023
<https://assets.gov.ie/276559/c3a77cd8-7a90-4344-9cba-b9dc2dc1030c.pdf>

Please note:

Purple text = comments

Red text = draft REGULATIONS

Green text = Council Directive 2003/4/EC

Blue text = Wildlife (Amendment) Act, 2023

Introduction

The tree pillars of the Aarhus Convention, which Ireland ratified in June 2012, guarantees the public three key rights on environmental issues:

- Access to information
- Public participation
- Access to justice

In the preamble to Council Directive 2003/4/EC, which the draft REGULATIONS here aim to transpose into Irish Law, the following is stated:

(5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.

*(11) To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. **The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.***

*(12) Environmental information **which is physically held by other bodies on behalf of public authorities should also fall within the scope of this Directive.***

*(13) Environmental information should be made available to applicants as soon as possible and within a reasonable time **and having regard to any timescale specified by the applicant.** Public authorities should make environmental information available **in the form or format requested by an applicant unless it is already publicly available in another form or format or it is reasonable to make it available in another form or format.** In addition, public authorities should be required to make all reasonable efforts to maintain the environmental information held by or for them in forms or formats that are readily reproducible and accessible by electronic means.*

*(16) The right to information **means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases.** Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by*

the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive

(18) Public authorities should be able to make a charge for supplying environmental information but such a charge should be reasonable. This implies that, **as a general rule, charges may not exceed actual costs of producing the material in question. Instances where advance payment will be required should be limited.** In particular cases, where public authorities make available environmental information on a commercial basis, and where this is necessary in order to guarantee the continuation of collecting and publishing such information, a market-based charge is considered to be reasonable; an advance payment may be required. A schedule of charges should be published and made available to applicants together with information on the **circumstances in which a charge may be levied or waived.**

Comments follow here - referenced by the relevant page number in the draft REGULATIONS.

On Page 8:

“public authority”, subject to paragraph (2), means—

(a) government or other public administration, including public advisory bodies, at national, regional or local level,

(b) any natural **or legal person** performing public administrative functions under national law, including specific duties, activities or services in relation to the environment, and

(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:

(i) a Minister of the Government;

(ii) the Commissioners of Public Works in Ireland;

(iii) a local authority for the purposes of the Local Government Act 2001 (No. 37 of 2001);

(iv) a harbour authority within the meaning of the Harbours Act 1946 (No. 9 of 1946);

(v) the Health Service Executive established under the Health Act 2004 (No. 42 of 2004);

(vi) a board or other body (other than a company established under the Companies Acts or the Companies Act 2014 (No. 38 of 2014)) established by or under statute;

(vii) a company, established under the Companies Acts or the Companies Act 2014, in which all the shares are held—

(I) by or on behalf of a Minister of the Government,

(II) by directors appointed by a Minister of the Government,

(III) by a board or other body within the meaning of paragraph (vi), or

(IV) by a company to which subparagraph (I) or (II) applies, having public administrative functions and responsibilities, and possessing environmental information;

Page 8 Please remove the bracketed section of point “(vi) Please NOTE: The bracketed section of point “(vi)” above contravenes the legal principle that:

“Member States must not adopt or allow national institutions with a legislative power to adopt a measure by which the Community nature of a legal rule and the consequences which arise from it are *obscured*.”

and particularly – as is the case here – where the terms of 2003/4 EC itself, are so capable of being directly applied.

Pt 328 of Maher v. Minister for Agriculture, Food and Rural Development [2001] IESC 32; [2001] 2 IR 139; [2001] 2 ILRM 481 (30 March 2001) by Denham J.

In the **definitions** provided in **Article 2 of Council Directive 2003/4/EC**, the following is provided (without examples given), and this is reproduced in Paragraph 2 of the DRAFT REGULATIONS (above) - with the addition of examples.

Council Directive 2003/4/EC *states*:

Article 2 - *For the purposes of this Directive:*

2. 'Public authority' shall mean:

- (a) government or other public administration, including public advisory bodies, at national, regional or local level;
- (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
- (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 (a) or (b).

Additionally, the following is included in the Directive **definitions** (with slight rewording in the draft REGULATIONS)

Article 2 - *For the purposes of this Directive:*

- 3. 'Information held by a public authority' shall mean environmental information in its possession which has been produced or received by that authority.

Article 2 - *For the purposes of this Directive:*

- 4. 'Information held for a public authority' shall mean environmental information which is physically held by a natural or legal person on behalf of a public authority.

Therefore, this Directive applies to **all legal persons having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).**, and the **example list of inclusions in the draft REGULATIONS** is misleading.

It is noted here that a public authority does not include a number of relevant company types or body corporates (<https://enterprise.gov.ie/en/publications/publication-files/quick-guide-to-the-new-company-types-.pdf>), and this is pertinent in light of the recent **WILDLIFE AMENDMENT ACT 2023**. Under this Act, **the Minister has the power to prescribe a company to be a public body** as follows:

Article 2 of the **WILDLIFE (AMENDMENT) ACT 2023** states:

(2) The Minister may, for the purposes of this Part, prescribe a body, other person, **company**, organisation or group referred to in subsection (3) **to be a public body** where the Minister is of the opinion that the body, other person, **company**, organisation or group has functions that have or may have a bearing on matters concerning biodiversity or is in a position to promote the conservation of biodiversity.

(3) The following may be prescribed under subsection (2):

(a) a body or other person established—

- (i)** by or under an enactment (other than the Companies Act 2014 or a former enactment relating to companies within the meaning of section 5 of that Act) or charter,
- (ii)** by any scheme administered by a Minister of the Government, or

(iii) under the Companies Act 2014 (or a former enactment relating to companies within the meaning of section 5 of that Act) in pursuance of powers conferred by or under another enactment, and financed wholly or partly, whether directly or indirectly, by means of money provided, or loans made or guaranteed, by a Minister of the Government or the issue of shares held by or on behalf of a Minister of the Government;

(b) a company (formed and registered under the Companies Act 2014 or an existing company within the meaning of that Act), a majority of the shares in which are held by or on behalf of a Minister of the Government;

(c) a body, other person, organisation or group established by the Agreement ('Agreement' means the Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing Implementation Bodies done at Dublin on 8 March 1999)

It is quite clear therefore that under the Wildlife Amendment Act 2023, the Minister has the power to prescribe a range of private companies as Public Bodies, while the draft REGULATIONS here fail to make the inclusion of these company types as Public Authorities clear to the general public; and, it might be argued, obscures the fact that private companies are included under these DRAFT REGULATIONS. This is highly relevant given that many State and Local Authority responsibilities are increasingly being contracted to private companies.

The intention of the Directive is quite clear when it refers under Article 2 to any legal person performing specific duties, activities or services in relation to the environment; or providing public services relating to the environment under the control of a body or person falling within, both:

(a) government or other public administration, including public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

The DRAFT REGULATIONS should reflect ALL TYPES OF PUBLIC BODIES that the Minister in the Wildlife Act 2023 is now empowered to prescribe.

Please delete highlighted text "other than a company established under the Companies Acts or the Companies Act 2014 (No. 38 of 2014)" in order to avoid confusion; and make it abundantly clear in the examples provided that all legal persona are included, to avoid unnecessary legal challenges, which will waste public monies such as:

(NAMA vs The Environmental Commissioner (2015) <https://ie.vlex.com/vid/nama-v-commissioner-for-792973913>)

On Page 15:

(2) (a) A public authority shall make a decision on a request and, **where appropriate**, make the information available to the applicant as soon as possible and, in any case, subject to subparagraphs (b) and (c), not later than one month after the date on which such request is received by the public authority concerned.

(b) A public authority shall, in the performance of its functions under this Regulation, have regard to any timescale specified by the applicant.

(c) Where a public authority is unable, because of the volume or complexity of the environmental information requested, to make a decision within one month after the date on which such request is received, it shall, as soon as possible and at the latest, before the expiry of that month—

Council Directive 2003/4/EC states:

Article 3.2. Subject to Article 4 and having regard to any timescale specified by the applicant, environmental information shall be made available to an applicant:

(a) as soon as possible or, at the latest, within one month after the receipt by the public authority referred to in paragraph 1 of the applicant's request; or

“where appropriate” is too subjective in this context.

Delete “where appropriate” – and replace with “where it has the requested information in its possession”.

On Page 17:

(4) (b) in a case to which paragraph (2)(c) applies, notify the applicant in writing as soon as possible but **not later than two months after the date of receipt of the request,**

Council Directive 2003/4/EC states:

*Article 3.2 (b) within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to in (a) cannot be complied with. In such cases, the applicant shall be informed as soon as possible, **and in any case before the end of that one-month period,** of any such extension and of the reasons for it.*

Please amend the highlighted section – the applicant should be informed at the latest before the end of the one-month period.

On Page 18:

(10) Where a request is made for environmental information and in the opinion of the public authority release of the information may adversely affect—

(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,

(b) **the interests of a person** who, voluntarily and without being under, or capable of being under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information, or

(c) commercial or industrial confidentiality, where such confidentiality is provided for in national, or European Union, law to protect a legitimate economic interest,

the 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.

Council Directive 2003/4/EC states:

*Article 4.1 (g) the **interests or protection of any person** who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;*

Please amend the highlighted section, and replace with “**interests or protection of any person**” as per the Directive.

On Page 20:

Grounds for refusal of environmental information

7. (1) Subject to Regulation 8, a public authority may refuse to make available environmental information in accordance with Regulation 6—

(a) subject to paragraph (2), where disclosure of the information requested would adversely affect one, or more, of the following:

- (i) the confidentiality of personal data relating to a natural person where that person has not consented to the disclosure of the information to the public where such confidentiality is provided for by national, or European Union, law;
- (ii) the interests or protection of any person who, voluntarily and without being under, or capable of being put under, a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information;
- (iii) the protection of the environment to which that information relates;**
- (iv) without prejudice to subparagraph (b), the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
- (v) commercial or industrial confidentiality, where such confidentiality is provided for in national, or European Union, law to protect a legitimate economic interest,

Council Directive 2003/4/EC states:

Article 4.1 (h) - the protection of the environment to which such information relates, such as the location of rare species.

In the interest of clarity “such as the location of rare species” should be inserted after the highlighted text above as per the Directive.

This would make it explicit that any such data which are now held in companies, such as the National Biodiversity Data Centre (NBDC) [a Company Limited by Guarantee (CLG)], or Compass Bioinformatics the data handling element of NBDC and a Private Company Limited by Shares (LTD), are not released into the hands of unscrupulous individuals.

On Page 27:

(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.**

For clarity, please insert the following in the highlighted section.

and if appropriate, **with the agreement of parties concerned**, discontinue, the review concerned.

On Page 28:

(7) (a) Where the Commissioner varies or annuls the decision under paragraph (5)(b), the Commissioner shall remit the decision to the public authority, **or where appropriate**, require the public authority to make available environmental information to the applicant.

Council Directive 2003/4/EC states:

Member States shall ensure that any applicant who considers that his request for Article 6.1. information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be

reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

Please replace the highlighted text “**or where appropriate,**” with the word “**and**”

To allow for an expeditious release of the environmental information requested, as per the Directive.

On Page 33

Fees of public authorities

13. (1) A public authority may levy a charge when it supplies environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under Regulation 10), provided that such charge shall be reasonable **having regard to the provisions of the Directive.**

(2) Notwithstanding paragraph (1), a public authority shall not charge a fee for—

(a) access to any public registers or lists of environmental information pursuant to Regulation 4(1)(f), or

(b) the examination of information, supplied in accordance these Regulations, in the premises of the authority concerned.

(3) Where an applicant examines information, in accordance with paragraph (2)(b), and wishes to obtain copies of that information, **a public authority may charge a fee, consistent with the list of fees specified under Regulation 14, for the provision of such copies.**

(4) Where a public authority levies charges pursuant to this Regulation, it shall make available on a website maintained by the authority concerned, a schedule of such charges, information on how they are calculated and the circumstances under which they may be levied or waived.

Fees for appeals

14. (1) Subject to paragraph (2), a fee of €50 shall be charged for making an appeal to the Commissioner under Regulation 10.

(2) A fee of €15 shall be charged in respect of an appeal pursuant to Regulation 10 by—

(a) a holder of a medical card,

(b) a recipient of a social welfare payment **that is subject to a means test,**

(c) a dependant of a person referred to in subparagraph (a) or (b), or

(d) a person referred to in Regulation 10(1)(b).

As outlined in the above Article from the Directive and **restated here:**

Any such procedure shall be expeditious and either free of charge or inexpensive.

A charge of €50 is prohibitively expensive for many people in Ireland today and the addition of “**that is subject to a means test**” in this iteration of the REGULATIONS is particularly abhorrent. **Please remove this addition; and additionally, provide for people who simply do not have €50 to exercise their rights under the Directive.**

References:

- DIRECTIVE 2003/4/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC
<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:041:0026:0032:EN:PDF>
- WILDLIFE (AMENDMENT) ACT 2023
<https://www.irishstatutebook.ie/eli/2023/act/25/enacted/en/print?printonload=true#:~:text=An%20Act%20to%20provide%20for,to%20provide%20for%20related%20matters.>

- DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC
https://eur-lex.europa.eu/resource.html?uri=cellar:4a80a6c9-cdb3-4e27-a721-d5df1a0535bc.0004.02/DOC_1&format=PDF