Avosetta Annual Meeting on 29/30 May 2015 in Bremen

Free Access to Environmental Information

NATIONAL REPORT: IRELAND

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1) Constitutional frame, constitutionally guaranteed right of access to (environmental) information? Access to information as a fundamental (democratic) right?

Bunreacht na nÉireann/the Constitution of Ireland (1937) does not guarantee a right of access to (environmental) information. Over the years, the Irish courts have recognised certain "unspecified" or "unenumerated" personal rights, including, for example, the right to bodily integrity, the right to litigate and the right to have access to the courts. So it is possible that the Superior Courts may add the right of access to (environmental) information to the existing catalogue of "unspecified" constitutional rights at some point in the future.

2) Other (national) legal acts providing access to information held by public authorities. Relationship with laws transposing Dir 2003/98 on re-use of public sector information

There is a wide range of legislative measures providing for access to information held by public authorities. The most significant piece of legislation is the **Freedom of Information Act 2014** (FOI Act 2014) which repealed and replaced the Freedom of Information Acts 1997 and 2003.[1] The FOI Act 2014, enacted on 14 October 2014, strengthened the Irish FOI regime. It extended the range of public bodies that are subject to FOI and removed a number of regressive measures introduced in 2003, including the (highly controversial) FOI application fee (€15). There are already indications that removal of this fee has led to a sharp increase in FOI requests to Government Departments, in particular.[2]

The **Office of the Information Commissioner** was first established under the Freedom of Information Act 1997. The Commissioner has a number of functions under FOI including: reviewing (on appeal) decisions of public authorities in relation to FOI requests; reviewing the operation of the FOI legislation; and preparing and publishing commentaries on the practical operation of FOI.

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[1] The (original) Freedom of Information Act 1997 came into effect for Government Departments and a number of other public bodies (including *An Bord Pleanála*/the Planning Appeals Board and the Environmental Protection Agency) on 21 April 1998. It applied to local authorities from 21 October 1998.

[2] "Freedom of Information requests soar after fee falls" *Irish Times* 11 May 2015: http://www.irishtimes.com/news/politics/freedom-of-information-requests-soar-after-fee-falls-1.2207222.

The **European Communities (Access to Information on the Environment) Regulations 2007 to 2014** (the AIE regulations)[3] are designed to implement the obligations arising under the Aarhus Convention and Directive 2003/4/EC on public access to environmental information. It is notable that the European Communities (Access to Information on the Environment) Regulations 2007 entered into force on 1 May 2007, over two years after the deadline for implementation of Directive 2003/4/EC.

The FOI Act 2014 and the AIE regulations provide two separate, but overlapping regimes for public access to information. This state of affairs generates considerable confusion in practice.[4] The right of access under AIE only applies to "environmental information". Where a request is made under AIE and the public authority determines that the information sought is not "environmental information", there is no default mechanism for the request to be dealt with under FOI.[5] Consideration should be given to integrating the FOI and AIE systems as is the case in the United Kingdom.

There are important differences between FOI and AIE. The AIE regime generally covers a wider range of public authorities, there is a stronger presumption of disclosure and there is less scope for authorities to rely on exceptions to the right of access, particularly in the case of information on emissions into the environment. There are also different appeal mechanisms under FOI and AIE.

Beyond FOI legislation and the AIE regulations, planning and environmental legislation provides for extensive rights of access to environmental information. The most significant examples in practice include: information rights in relation to applications for various types of development consent and the rights arising under the Environmental Impact Assessment (EIA) directive and the Industrial Emissions Directive.

Specific rights of access to information also arise under the **Data Protection Acts 1988 and 2003**.

As regards the interaction with legislation transposing Directive 2003/98 on re-use of public sector information, the FOI Act 2014[6] provides that a public authority, having examined a request made under FOI, may advise the requester as to whether the information may be accessed under the European Communities (Re-use of Public Sector Information) Regulations 2005 instead.[7]

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[3] SI No 133 of 2007 as amended by SI No 662 of 2011 and SI No 615 of 2014. An unofficial consolidated text of the AIE regulations (as amended) is available here: http://environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,30002,en.pdf.

[4] Office of the Commissioner for Environmental Information, *Annual Report 2013* p.74: http://www.oic.gov.ie/en/publications/annual-reports/2013-annual-report/online/media/oic_ar_2013_english_updated.pdf.

[5] FOI Act 2014, s.12(7)(b) provides that a public authority, having examined a request made under FOI, may advise the requester as to whether the information may be accessed under AIE instead.

[6] Section 12(7)(a).

[7] SI No 279 of 2005.

It is also important to mention Ireland's first **Open Government Partnership (OGP) National Action Plan**, published in July 2014.[8] The Plan sets out 26 actions across three main areas: promoting open data and transparency; building citizen participation; and strengthening governance and accountability. Specific commitments include: establishing an Open Data Portal; building capacity to provide access to information under the Aarhus Convention; and implementation of a Code of Practice for FOI. The Code of Practice for FOI was published in December 2014[9] and the Open Data Portal is up and running at: http://data.gov.ie/. A training workshop on AIE and the Aarhus Convention was held for public authority personnel in September 2014.

3) National legal situation before Dir 90/313/EC: has the EC/EU legislation had a major impact on the national law on access to information?

The EC/EU legislation, and of course the Aarhus Convention, has had a major impact on national law governing access to environmental information. Prior to Directive 90/313/EEC, there was limited access to environmental information in the general sense, except for areas where legislation provided for specific rights of access, for example in the case of planning and pollution control legislation. Ireland responded to Directive 90/313/EEC with the Access to Information on the Environment Regulations 1993,[10] which were repealed and replaced by the Access to Information on the Environment Regulations 1996,[11] which, in turn, were repealed and replaced by the Access to Information on the Environment Regulations 1998.[12] The main problems with these successive sets of regulations included: a persistent lack of clarity around the relationship between AIE and FOI and the absence of an accessible, non-judicial appeals mechanism to enforce the right of access to environmental information.

The AIE Regulations 2007, which aim to transpose Directive 2003/4/EC and the related provisions of the Aarhus Convention, strengthened the right of access to environmental information in Ireland, although the current state of play still falls short of Aarhus and EU law standards.

One of the most significant innovations brought about by the AIE Regulations 2007 was the establishment of the **Office of the Commissioner for Environmental Information**. The Commissioner's role is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their request for access to environmental information. In effect, the Commissioner's office provides an independent, non-judicial appeal mechanism.

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[8] Department of Public Expenditure & Reform, *Open Government Ireland: National Action Plan 2014-2016*: http://www.ogpireland.ie/.
[9] Department of Public Expenditure and Reform, Central Policy Unit, *Code of Practice for Freedom of Information for Public Bodies* (December 2014): http://foi.gov.ie/guidance/code-of-practice/.
[10] SI No 133 of 1993.
[11] SI No 185 of 1996.
[12] SI No 125 of 1998.

There are a number of aspects of the AIE Regulations which are not compatible with Directive 2003/4/EC and/or the Aarhus Convention. These include: the express requirement that a request for access must be made in writing or electronic format; the highly misleading references to "mandatory" exceptions to the right of access; the fact that the AIE regulations do not apply to information that is available under any other statutory provision (i.e. the right of access available under another statutory provision may be less favourable than that guaranteed under Directive 2003/4/EC); and the failure to transpose the obligation to provide a "timely" remedy to enforce the right of access.

4) Statistical information about the use of the access-right including types of users if known (e.g. NGOs, competitive industry, general public, environmental consultants, etc). Difficulties of the administration handling the number and/or the scope of applications.

FOI

A wide range of statistical information on FOI is to be found in the Annual Reports published by the Information Commissioner. In 2014, the total number of FOI requests received by public bodies was 20,224.[13] This was an increase of almost 7% over the 2013 figure.[14] Government Departments/State bodies and the Health Service Executive accounted for more than two thirds of all FOI requests received in 2014.[15]

- ***Who is using FOI?***

The 2014 statistics reveal the following requester types: clients of public bodies (68%); journalists (12%); others (13%); business (4%); staff of public bodies (3%) and members of the *Oireachtas* (Parliament) (.6%).[16] The Information Commissioner reported that these percentages have remained relatively static compared with 2013.

- ***Type of requests?***

Of the 20,244 requests made to public bodies in 2014, 15,548 requests related to personal information, 4,600 requests concerned non-personal information and 96 requests were for mixed information.[17]

- ***Outcomes of FOI requests to public bodies?***

The 2014 statistics reveal the following outcomes:[18]

Granted in full:	62%
Granted in part:	19%
Refused:	10%
Dealt with outside of FOI:	3%
Transferred:	2%
Withdrawn:	4%

[13] Office of the Information Commissioner, *Annual Report 2014* p.17.
[14] ibid.
[15] Office of the Information Commissioner, *Annual Report 2014* p.18.
[16] Office of the Information Commissioner, *Annual Report 2014* p.19.
[17] Office of the Information Commissioner, *Annual Report 2014* p.20.
[18] ibid.

AIE

There is very limited statistical data on AIE activity in Ireland. The *Open Government Partnership (OGP) Ireland: National Action Plan 2014-2016*, published in July 2014, contained a commitment to create a database to record requests under the AIE regulations. During 2014, the Department of Environment, Community and Local Government (DECLG) published some raw data on AIE requests made to Government Departments (including public bodies under their aegis) and local authorities in 2013.[19] This data is of very limited value, however, because it is obviously not complete and is more in the nature of a pilot exercise. It is not possible to identify where public authorities failed to return data or where there are gaps in the data returned. The data published by DECLG indicates that Government Departments (and the public bodies under their aegis) received only 244 requests for access to environmental information in 2013. Of these 244 requests, 111 were granted in full, 40 were granted in part, while 74 were refused. Three requests were transferred and 13 were withdrawn. The incomplete nature of these figures must be emphasised. The 2014 figures were not available at the time of writing (May 2015).

Difficulties of the administration handling the number and/or the scope of applications

The data presented in the Information Commissioner's Annual Report for 2014 reveals that public bodies face significant difficulties in dealing with FOI requests. The Commissioner noted that the number of requests on hand at the end of 2014 had risen to 4,214 from 3,232 at the end of 2013.[20] The Commissioner also pointed out that the number of requests on hand at the end of 2014 represented an increase of almost 71% on the number on hand at the end of 2012. The Commissioner urged public bodies to monitor their processing rates so as to ensure that sufficient resources are allocated to manage the volume of requests received in an efficient manner on an ongoing basis.

There is no equivalent statistical data available for AIE, but anecdotal evidence indicates that public authorities struggle to deal with AIE requests efficiently and effectively due to a combination of lack of resources and, more significantly, lack of expertise on AIE matters.

5) Significant national law and jurisprudence on the definition of "environmental information" (Art. 1 para 1 Dir 2003/4/EC)

The definition of "environmental information" in the AIE regulations essentially mirrors the definition found in Directive 2003/4/EC. The definition has proved difficult to apply in practice. There is a series of decisions where the Commissioner found that public authorities were not justified in refusing requests on the basis of their assertion that the information sought was not "environmental information". These decisions

[19] The data is available here: http://environ.ie/en/Publications/StatisticsandRegularPublications/AccesstoInformationontheEnvironment/.

[20] Office of the Information Commissioner, *Annual Report 2014* p.17.

confirm that “environmental information” includes: information relating to judicial review proceedings concerning the regulation of a quarry;[21] speed restrictions on the Irish Rail network;[22] information on official travel by car;[23] and an asset purchase agreement providing for the transfer of a local authority’s waste collection service to a private waste recycling and recovery company.[24]

The definition of “environmental information” is not unlimited, however, and there are a number of recent cases where appellants failed to convince the Commissioner that the information they sought from public authorities fell within the definition.[25] The Commissioner takes the view that in order for information to qualify as "environmental information", it is necessary for the information to fall within one of the six categories set out in the definition in Article 3 of the AIE regulations (Article 2(1) of Directive 2003/4/EC). It is not sufficient, according to the Commissioner, that the information requested simply "relates to" one of the six categories, however distantly. Adopting this approach in *Stephen Minch and Department of Communications, Energy and Natural Resources,*[26] the Commissioner concluded that the Department's decision to refuse to release a report entitled *Analysis of options for potential State intervention in the roll out of next-generation broadband* on the ground that the report was not "environmental information" was correct. The appellant has appealed this decision to the High Court and a hearing date is set for 25 June 2015.

6) Significant national law and jurisprudence on determining the access right holder (“without having to state an interest”, Art. 3 para 1 Dir 2003/4/EC)

The AIE regulations define “applicant” as “any natural or legal person requesting environmental information” and provide expressly that an applicant is not required to state their interest in making the request. This particular issue has not proved problematic in practice to date. In *Hill of Allen Action Group and Kildare County Council*,[27] the Commissioner determined that the action group was an “applicant” within the meaning of the AIE regulations (the original request and the appeal had been made by a named individual described as the group’s Chairperson).

The AIE regulations prescribe a number of formalities that must be met in order for a request to be valid. A request must be made in writing or electronic form; must state

[21] Case CEI/08/0001 *Hill of Allen Action Group and Kildare County Council* (22 September 2008).
[22] Case CEI/10/0018 *Cian McGinty and Irish Rail* (24 June 2011).
[23] Case CEI/11/0001 *Gavin Sheridan and Central Bank of Ireland* (26 March 2012).
[24] Case CEI/12/0004 *Gavin Sheridan and Dublin City Council* (20 December 2013).
[25] Case CEI/12/0008 *Attracta Uí Bhroin and Department of Arts, Heritage and the Gaeltacht* (13 March 2013); Case CEI/12/0004 *Gavin Sheridan and Dublin City Council* (20 December 2013); Case CEI/11/0001 *Gavin Sheridan and Central Bank of Ireland* (26 March 2012) and Case CEI/13/0006 *Stephen Minch and Department of Communications, Energy and Natural Resources* (18 December 2014).
[26] Case CEI/13/0006 *Stephen Minch and Department of Communications, Energy and Natural Resources* (18 December 2014).
[27] Case CEI/08/0001 *Hill of Allen Action Group and Kildare County Council* (22 September 2008).

that it is made under the AIE regulations; and must state the name, address and any other relevant contact details of the applicant.

7) Significant national law and jurisprudence on the realm and obligations of private persons as defined by Art. 2 No. 2 b and c Dir 2003/4/EC. (see ECJ 279/11 (Fish Legal)

Article 3(1) of the AIE regulations defines "public authority" as per Article 2(1) of Directive 2003/4/EC, but it also provides that the definition "includes": Government Ministers; the Commissioners of Public Works; local authorities; harbour authorities; the Health Service Executive; a board or other body established by or under statute; and a company under the Companies Acts in which all the shares are held by, or on behalf of, a Government Minister. The definition of "public authority" set down in the AIE regulations is therefore far more detailed than that found in the directive.

The Commissioner has decided four appeals where the organisations from whom information was requested denied they were "public authorities".[28] In each of these cases, the Commissioner ruled against the organisation in question and determined that *Raidio Teilifís Éireann* (the national public service broadcaster),[29] Anglo Irish Bank,[30] the National Assets Management Agency (NAMA)[31] and *Bord na Móna*[32] are indeed public authorities and therefore subject to the AIE regulations. Both NAMA and Anglo Irish Bank appealed to the High Court against the Commissioner's decisions. The main thrust of their case was that the definition of "public authority" in the AIE regulations, as interpreted by the Commissioner, went beyond the definition provided for in Directive 2003/4/EC. As a matter of Irish constitutional law, it is not

[28] In another appeal decision, Case CEI/08/0005 *Peter Sweetman & Associates and the Courts Service* (5 August 2008), the Commissioner found that the Courts Service is a public authority when carrying out its administrative work. However, the Courts Service held the information at issue in this case (affidavits submitted in the course of judicial proceedings) on behalf of the courts, who, in turn, were acting in a judicial capacity. It followed, in the Commissioner's view, that in this situation the Courts Service was excluded from the definition of "public authority" by virtue of Article 3(2) of the AIE regulations. (According to this provision, which reflects Article 2(2) of Directive 2003/4/EC, the definition of "public authority" does not include any body when acting in a judicial or legislative capacity).

[29] Case CEI/09/0015 *Pat Swords and Raidio Teilifís Éireann* (10 May 2010).

[30] Case CEI/10/0007 *Gavin Sheridan and Anglo Irish Bank* (1 September 2011). Anglo Irish Bank was nationalised in January 2009 under the Anglo Irish Bank Corporation Act 2009, with the result that all of its shares were held by, or on behalf of, the Minister for Finance. It subsequently merged with the Irish Nationwide Building Society in July 2011 to form the Irish Bank Resolution Corporation.

[31] Case CEI/10/0005 *Gavin Sheridan and National Asset Management Agency* (13 September 2011). NAMA was established in December 2009 as one of a number of responses by the Irish Government to try to address the problems which arose in the Irish banking sector due to excessive lending for the purpose of purchasing property during the so-called "Celtic Tiger" years.

[32] Case CEI/12/0003 *Andrew Jackson and Bord na Móna* (23 September 2013). *Bord na Móna* is a semi-State company created under the Turf Development Act 1946 to develop Ireland's peat resources in the national interest. *Bord na Móna* brought an appeal to the High Court challenging the Commissioner's decision, but it subsequently withdrew this appeal following the Court of Justice ruling on the definition of "public authority" in Case C-279/12 *Fish Legal, Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* EU:C:2013:853.

permissible for secondary legislation (i.e. a statutory instrument such as the AIE regulations) to exceed the policies and principles set down in a directive, unless the material at issue is incidental, supplemental or consequential.[33] In February 2013, the High Court ruled that the Commissioner's approach was correct and that NAMA (a board established by statute) is a "public authority" for the purposes of the AIE regulations.[34] Mac Eochaidh J remarked that it was difficult to imagine a broader definition of "public authority" than that set down in Directive 2003/4/EC.[35] NAMA subsequently brought an appeal to the Supreme Court which was heard in July 2014 and judgment is pending at the time of writing (May 2015).[36] The Supreme Court ruling will, hopefully, bring much needed clarity on the correct interpretation of the (unique) definition of "public authority" deployed in the AIE regulations. It is difficult to argue against adopting a broad approach when determining whether a body is a "public authority" in light of the expansive definition set down in the directive. Moreover, the judgment of the Court of Justice in *Fish Legal*[37] confirms that the definition includes "all legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve". This interpretation plainly captures NAMA. It is therefore highly unlikely that the Supreme Court will determine that NAMA is not a "public authority".

8) National law and jurisprudence on the public authorities to be addressed ("information held by or for them") (Art. 3 para 1 Dir 2003/4/EC)

The AIE regulations provide that the definition of "public authority" does not include any body when acting in a judicial or legislative capacity.

In a significant number of appeals, the Commissioner found that the public authority in question did not hold the information requested. This is a valid basis for refusing a request for access. The Commissioner's role in such cases is "to decide whether the decision-maker has had regard to all the relevant evidence and to assess the adequacy of the searches conducted by the public authority in looking for the relevant records."[38] The Commissioner has also confirmed that s/he does not have power to require a public authority to create records where such records do not exist or where the information is not held by the public authority.[39]

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[33] Constitution of Ireland, Article 29.4.7; European Communities Act 1972, section 3; and *Meagher v Minister for Agriculture* [1994] 1 IR 329.

[34] *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 86. See also *National Asset Management Agency v Commissioner for Environmental Information* [2013] IEHC 166.

[35] [2013] IEHC 86 para 91.

[36] The Anglo Irish Bank appeal in the High Court has been stayed by agreement of the parties pending the outcome of the Supreme Court appeal in the NAMA case.

[37] Case C-279/12 *Fish Legal, Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* EU:C:2013:853 para 51.

[38] Case CEI/08/0012 *Cullen and Department of Environment, Heritage and Local Government* (27 October 2009).

[39] ibid.

9) Significant national law and jurisprudence on practices on access conditions (terms, "practical arrangements" (see Art.3 paras 3 – 5 Dir 2003/4/EC)

The AIE regulations provide that a public authority must make a decision on a request and, where appropriate, make the information available to an applicant "as soon as possible" and, at the latest, not later than one month from the date on which the request is received by the public authority concerned. The response time may be extended to a maximum period of two months where, because of the volume or complexity of the environmental information requested, the authority is unable to make a decision within the one month timeframe. The regulations also require the public authority to have regard to any time scale specified by the applicant.

The Commissioner has taken the view that it would not be reasonable under Directive 2003/4/EC or the AIE regulations to expect public authorities to provide individual copies of information that is publicly available in another format or manner of access (for example, information available in a public file).[40] Where a public authority provides information in a format other than the format requested, it is obliged to ensure that the format in which the information is provided is "accessible and reasonable". In *Percy Podger on behalf of Hands Across the Corrib Ltd v An Bord Pleanála*, the Commissioner found that the Board should have given reasons for providing the information in an alternative format and should have ensured that it was easily accessible in the alternative format.[41]

10) Law and practices/jurisprudence on charges for access (copying? administrative time?)

The provisions in the AIE regulations governing charges for access to information essentially mirror those set out in Directive 2003/4/EC. In *Pat Swords and Department of Environment, Community and Local Government,* the Department had proposed charging a search and retrieval fee of €146.65 for processing the applicant's request for information. The Commissioner took the view that a public authority was not entitled to charge search and retrieval fees for work involved in processing an AIE request. [42] A fee (which must not exceed a reasonable amount) may only be charged for the actual supply of information. In the words of the Commissioner:

> [I]t is neither permissible, nor is it reasonable having regard to the Directive, for a public authority to impose search and retrieval fees for the work involved in processing an AIE request. Such work is not part of the supply of information for which it is permissible to charge a fee; nor is charging for search and retrieval compatible with the prohibition on charges for the examination in situ of information requested. Allowing for such a charge would also run contrary to the purpose of the AIE Directive and the information or records management

[40] CEI/09/0004 *Pat Geoghegan and Environmental Protection Agency* (28 October 2009).
[41] CEI/09/0006 *Percy Podger on behalf of Hands Across the Corrib Ltd and An Bord Pleanála* (16 March 2010).
[42] CEI/11/0007 *Pat Swords and Department of Environment, Community and Local Government* (20 February 2013).

practices that are required of public authorities under the AIE regime. In other words, it would be inconsistent with the manner in which the AIE regime is meant to operate.[43]

The Commissioner accepted, however, that the costs connected with compiling or copying the information may be included in a charge for making environmental information available under the AIE Regulations.

In her Opinion in *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association*,[44] delivered on 15 April 2015, Advocate General Sharpston took the view that a charge of a "reasonable amount" is to be based on the costs actually incurred in connection with the cost of supplying the information in response to a specific request. According to the Advocate General, that would include staff time spent on searching for and producing the environmental information requested and the cost of producing it in the form requested.[45] However, it is not permission for such a charge to also seek to recover overheads, for example heating, lighting or internal services.[46] Such overheads are not incurred solely in connection with the supply of information in response to a specific request. It remains to be seen how the Court of Justice will determine this important practical point and whether it will agree with the Advocate General's interpretation of Article 5 of Directive 2003/4/EC.

11) Do any public authorities claim copyright in the material supplied, and impose conditions relating to use of information under copyright law (such as due acknowledgement and user fees in case of re-publication)?

The Commissioner's *Annual Report 2013* refers to a case where "complex issues relating to copyright law" were at issue.[47] The case involved a request made to Ordinance Survey of Ireland (OSI) by the NGO Friends of the Irish Environment (FIE) for access to the 1973 aerial survey of Ireland. This appeal was ultimately settled between the parties on the basis of the OSI providing FIE with access, on a phased basis, to "screen shot" photographs for FIE's internal use.

12) National law and jurisprudence on the role of affected third parties in access procedures esp. concerning trade secrets and personal data (designation of trade secrets, consultation prior to release of information, etc)

The AIE regulations provide that where a request is made for information that has been provided to the public authority on a voluntary basis by a third party, and in the public authority's opinion release of the information may "adversely affect" the third

[43] Ibid. See also on this point CEI/07/0006 *Open Focus and Sligo County Council* (26 May 2008).
[44] Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* ECLI:EU:C:2015:234.
[45] ibid., para 74.
[46] ibid.
[47] Office of the Commissioner for Environmental Information, *Annual Report 2013* p.70.

party, the authority must take all reasonable efforts to contact the third party in order to seek consent or otherwise to release the information.

A person other than the applicant who requested environmental information, including a third party, who would be incriminated by the disclosure of the environmental information concerned, may appeal to the Commissioner for Environmental Information against the decision of the public authority concerned.

The role of affected third parties in access procedures has not surfaced in a significant way in any of the Commissioner's decisions to date.

13) Significant national law and jurisprudence on exceptions (Art. 4 Dir 2003/4/EC). More specifically:

(a) Confidentiality of commercial or industrial information

In *Hill of Allen Action Group and Kildare County Council,* the Commissioner determined that the Council could invoke Article 9(1)(c) of the AIE regulations (confidentiality of commercial or industrial information) to withhold a small amount of information relating to a quarry's reserves.

(b) Confidentiality of the proceedings of public authorities / internal communications

Neither Directive 2003/4/EC nor the AIE Regulations contains any express exception for material that qualifies for legal professional privilege. Article 8(a)(iv) of the AIE Regulations, which is based on Article 4(2)(a) of the directive, protects the confidentiality of the proceedings of public authorities, where such confidentiality is otherwise protected by law, but subject to the public interest test. In *Hill of Allen Action Group and Kildare County Council*, the Commissioner determined that a number of internal communications and draft documents disclosing legal advice met the test for legal professional privilege and that the Council was entitled to invoke the exception in Article 8(a)(iv) to prevent disclosure. As regards the application of the public interest test, the Commissioner observed that "[g]iven the importance that the courts have placed on the confidentiality of the lawyer-client relationship, I think that there would have to be exceptional public interest factors at play before legal professional privilege could be set aside." The public interest in the appellant knowing the detail of exchanges between the Council and its legal advisors did not outweigh the public interest in upholding legal professional privilege in this particular instance.

In *Cullen v Department of Environment, Heritage and Local Government*, in the context of the Department's claim to legal professional privilege, the Commissioner recognised the "public interest in government being open and transparent in relation to environmental matters" and "in individual members of the public being able to understand the basis for decision making involving matters that affect the environment and involve breaches of environmental law." As against those interests, however, the Commissioner weighed "the strong and long established public interest in upholding legal professional privilege as interpreted by the Courts." While it was

open to the Department to waive the privilege claimed, it had chosen not to do so, as was its legal right. The Commissioner stressed that public authorities need to be reasonably certain that they can seek and obtain "full and
frank legal advice in confidence". She determined that the public interest factors in this case, "though considerable", did not justify setting aside legal professional privilege. Certain records were therefore exempt from disclosure.

These decisions confirm that material that qualifies for legal professional privilege is not automatically protected from disclosure; it is the outcome of the public interest balancing exercise that determines whether it must be released.

The High Court ruling in *An Taoiseach v Commissioner for Environmental Information*[48] is instructive on the scope and application of the exceptions for the confidentiality of proceedings of public authorities (Directive 2003/4/EC, Article 4(2)(a)) and "internal communications" (Directive 2003/4/EC, Article 4(1)(e)), as well as the impact of the fact that a request relates to information on emissions into the environment. Article 4(2) of Directive 2003/4/EC provides that where a request "relates to information on emissions into the environment", Member States may not rely on a number of the exceptions contained therein, including the confidentiality-based exceptions, to refuse access. This is reflected in Article 10(1) of the AIE Regulations which provides that the confidentiality-based exceptions may not be relied on to refuse access to information concerning emissions. The combined effect of Article 8(b) and Article 10(2) of the AIE Regulations, however, is to protect discussions at meetings of the Government from disclosure, including discussions on emissions. The origin of this protection is to be found in Article 28.3.4 of *Bunreacht na hÉireann* (the Constitution of Ireland) which governs Cabinet confidentiality. There is no exception in Directive 2003/4/EC which expressly protects Cabinet confidentiality, and the question arises therefore as to whether Cabinet confidentiality can be accommodated within any of the exceptions set down in the directive.

In *Fitzgerald and Department of An Taoiseach* (Prime Minister),[49] the Department refused access to a document (a handwritten note of discussions at a meeting of the Government in June 2003 concerning Ireland's greenhouse gas emissions) on the basis of the exception governing the confidentiality of the proceedings of public authorities and Article 8(b). The Commissioner found that there was no exception in favour of Cabinet confidentiality under the directive, and that Article 10(2) of the AIE Regulations was in direct conflict with Article 4(2) of the directive. Following a close examination of the relevant provisions of Directive 2003/4/EC and the AIE Regulations, the Commissioner concluded that it was not possible to interpret national law in a manner compatible with the provisions and objectives of the directive. The duty of consistent interpretation crafted by the Court of Justice does not require that national law must be interpreted *contra legem*. Although the Commissioner's ruling did not refer to the limits of the interpretative obligation, it is implicit in her decision that the sharp conflict between the directive and the AIE Regulations on the Cabinet confidentiality point precluded any prospect of deploying consistent interpretation to align Irish law with EU law in this particular instance. Applying the principle of supremacy of EU law and the doctrine of direct effect, the

[48] [2010] IEHC 241.
[49] CEI/07/0005 *Fitzgerald and Department of An Taoiseach* (Prime Minister) 10 October 2008.

Commissioner disapplied the conflicting provisions of national law and directed the release of the document.

In *An Taoiseach v Commissioner for Environmental Information*,[50] an appeal to the High Court from the Commissioner's decision, O'Neill J determined that meetings of the Government should be categorised as "internal communications" of a public authority under Article 4(1) of the directive. In contrast to the confidentiality-based exceptions in Article 4(2), this exception may be invoked by a public authority even in cases where the information requested concerns emissions. It is notable however that this aspect of the judgment ends abruptly. The "internal communications" exception in Article 4(1) of the directive requires that the public interest served by disclosure must be taken into account. It appears from the judgment that the High Court assumed, incorrectly, that simply invoking the "internal communications" exception was sufficient to protect the document from disclosure. The judgment should have gone on to consider whether the blanket prohibition on disclosure of Cabinet discussions on emissions under the AIE Regulations was consistent with the balancing of interests required under Article 4 of the directive.

(c) Approach to the disclosure of:

- **"Raw data"**

  There are no significant decisions of the Commissioner on this point.

- **"Material in the course of completion" vs "unfinished documents"**

  There are no significant decisions of the Commissioner on this point.

(d) "Information on emissions into the environment" (Art. 4 para 2 subpara 2 Dir 2003/4/EC)

See the discussion of the High Court decision in *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241 in section (b) above.

(e) International relations, public security, national defence (see T-301/10 Sophie t' Veldt)

There are no significant decisions of the Commissioner on this point.

(f) Weighing of interests in every particular case (Art. 4 para 2 subpara 2 Dir 2003/4/EC)

It is clear from the Commissioner's decisions that the public interest in ensuring openness and transparency in relation to environmental matters operates as a

[50] [2010] IEHC 241.

powerful force in favour of disclosure. In *Cullen and Department of Environment, Heritage and Local Government*[51], the Commissioner highlighted the "strong public interest in the public being aware of how allegations about waste management, the administration and regulation of permits and the overall issues of pollution resulting from authorised dumping of waste are handled."

14) Judicial control of access-decisions

(a) Have specialised administrative appeal bodies (information officer etc) been set up? How do they work? Are their opinions respected?

Specialised independent administrative appeal bodies in have been established under FOI and AIE.

The **Office of the Information Commissioner** was first established under the Freedom of Information Act 1997 to review (on appeal) decisions of public authorities in relation to FOI requests.

The **Office of the Commissioner for Environmental Information** was established on 1 May 2007 under the AIE regulations 2007. The Commissioner's role is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their request for access to environmental information.

The office of Commissioner for Environmental Information is held by the person who is also the Information Commissioner under the FOI Acts, but both roles are legally separate.

Prior to engaging the appeals mechanism, an applicant who is dissatisfied with a public authority's response to their request must first engage the public authority's "internal review" procedure. Essentially, this involves a review of the original decision on the request for access to information by a person designated by the public authority whose rank is the same as, or higher than, the person who made the original decision. There is a fee of €30[52] to apply for internal review under FOI, while a request for internal review under AIE is free of charge.

How the AIE appeals mechanism works

There is a (controversial) fee of €50 to make an appeal to the Commissioner for Environmental Information (note that this fee was reduced from an even higher fee of €150 in December 2014).[53] Following receipt of an appeal, the Commissioner reviews the public authority's decision and may affirm, vary or annul it and, where appropriate, may require the public authority to make the information available in accordance with the AIE regulations. The Commissioner has considerable powers under the AIE regulations, including the power to require a public authority to make environmental information available to the Commissioner and to examine and take

[51] Case CEI/08/0012 *Cullen and Department of Environment, Heritage and Local Government* (27 October 2009).

[52] A reduced fee of €10 applies to medical card holders and their dependents.

[53] A reduced fee of €15 applies in certain cases. The Commissioner may waive or refund all or part of the appeal fee in certain circumstances.

copies of any environmental information held by a public authority and retain it for a reasonable period of time. The Commissioner also has jurisdiction to refer any question of law arising in an appeal to the High Court for determination, although this power has not been invoked in any appeal to date.

In practice, there are significant delays in processing appeals due to a long-standing problem with lack of resources in the Commissioner's office.

In June 2010, a High Court ruling severely limited the scope of the Commissioner's jurisdiction to enforce EU environmental law. In *An Taoiseach (the Prime Minister) v Commissioner for Environmental Information*[54], the High Court was required to consider whether the Commissioner had jurisdiction to determine whether the AIE regulations were inconsistent with Directive 2003/4/EC and, if so, to disapply any conflicting provisions of national law. O' Neill J ruled that only the High Court could disapply provisions of national law and that the Commissioner had acted *ultra vires* in purporting to do so when determining an appeal. [55] An appeal to the Supreme Court from this decision was subsequently withdrawn by the Commissioner.

Status of decisions of the Commissioner for Environmental Information

Where the Commissioner makes a formal decision in an appeal, the decision is published on the Commissioner's website. Decisions of the Commissioner for Environmental Information are legally binding on the parties and are respected by public authorities. Where a public authority disagrees with the Commissioner's decision, it may challenge that decision in the High Court. The Commissioner's decisions provide valuable guidance on interpretation and application of the AIE regulations in practice.

Under the AIE regulations, a public authority is obliged to comply with the Commissioner's decision within three weeks of receiving the decision. In cases where a public authority fails to comply, the Commissioner may apply to the High Court for an order directing compliance.

(b) Court review: "in-camera"-control? Standing of parties affected by decisions denying or granting access?

Under the AIE regulations, a party to an appeal to the Commissioner, or any other person affected by the Commissioner's decision, may appeal from that decision to the High Court on a point of law. The High Court's decision on any such appeal may be appealed to the Court of Appeal. Apart from the right to appeal on a point of law, the full original jurisdiction of the High Court may be invoked in judicial review proceedings to ensure that the hearing and determination of the appeal by the Commissioner is in accordance with the law.

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[54] [2010] IEHC 241.

[55] For a critical commentary on this ruling see Ryall, Á, "Environmental Information Rights in Ireland: An Assessment of Compliance with the Aarhus Convention and EU Law" (2014) 22 *Environmental Liability* 182 pp.191-192.

Court proceedings are generally heard in public, subject to very limited exceptions. If necessary, in order to enable the judge to determine the points at issue between the parties, the contested information may be disclosed to the judge hearing the case.

(c) How do States fulfil the duty to make information actively available?

In practice, public authorities rely on their websites to disseminate a wide range of environmental information. The AIE regulations oblige a public authority to make "all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means." There is a wealth of information posted on the Environmental Protection Agency's website, for example: www.epa.ie although the search facility could be improved. A good example of environmental information being made available proactively to the public is the *Splash!* national bathing water information website with the latest water quality for bathing waters around Ireland: http://splash.epa.ie/.

More recently, a number of public authorities have engaged social media, and Twitter in particular, to alert the public to various materials on their websites including, for example, the launch of public consultations on draft policies and plans etc. Overall, the picture remains very mixed across the various public authorities. Some authorities are far better than others at making information available in a readily accessible and understandable format.

Selected References:

Department of the Environment, Community and Local Government, *Access to Information on the Environment Regulations 2007 to 2011: Guidelines for Public Authorities and Others on Implementation of the Regulations* (May 2013) http://environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,30001,en.pdf

Ryall, Á, "Environmental Information Rights in Ireland: An Assessment of Compliance with the Aarhus Convention and EU Law" (2014) 22 *Environmental Liability* 182

Ryall, Á, "Access to Environmental Information in Ireland: Implementation Challenges" (2011) 24 *Journal of Environmental Law* 45

Ryall, Á, "Access to Environmental Information: Enforcement and Remedies" (2010) 17 *Irish Planning and Environmental Law Journal* 92

Information Commissioner website: www.oic.gov.ie/en/

Commissioner for Environmental Information website: www.ocei.gov.ie/en/

Courts Service of Ireland website (access to court judgments): www.courts.ie