

# Access to Information on the Environment Regulations 2007

## Guidance Notes



AN ROINN COMHSHAOIL, ODHREACHTA AGUS RIALTAIS ÁITIÚIL

DEPARTMENT OF THE ENVIRONMENT, HERITAGE  
AND LOCAL GOVERNMENT





**European Communities  
(Access to Information on the  
Environment) Regulations 2007  
(S.I. No. 133 of 2007)**

**Guidance for Public Authorities  
and others  
in relation to implementation of  
the Regulations**



**AN ROINN COMHSHAOIL, ODHREACHTA AGUS RIALTAIS ÁITIÚIL**

**DEPARTMENT OF THE ENVIRONMENT, HERITAGE  
AND LOCAL GOVERNMENT**



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**Introduction**

These Guidelines have been issued by the Minister for the Environment, Heritage and Local Government under Article 14 of the European Communities (Access to Information on the Environment) Regulations 2007, (S.I. No. 133). Under this Article, public authorities are obliged to take account of these Guidelines in performing their functions under the Regulations. Nonetheless, the Guidelines do not purport to be a legal interpretation of the Regulations.

While the Guidelines have been drafted principally for the benefit of public authorities who hold environmental information, they should also be of benefit to the general public and others who wish to exercise their rights to access environmental information.



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## 1. Background to EU Directive and transposing Regulations

**1.1** Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information (the AIE Directive)<sup>1</sup> provides that, subject to certain exceptions, information relating to the environment held by, or for, a public authority must be made available on request to any person without that person having to state an interest.

**1.2** The AIE Directive was adopted by the EU to give effect to one part of the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus' Convention). Its provisions are designed to align relevant legislation in EU Member States with that Convention. Article 1 of the AIE Directive sets out its core objectives:

- “(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise, and
- (b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information.”

The Aarhus Convention - and, by implication, the AIE Directive – takes as its starting point the premise that people have a right to live in a clean environment and that a comprehensive regime of access to environmental information is one way in which each Member State can vindicate this basic right.

**1.3** Legislation providing for access to information on the environment has existed in the EU and in Ireland for over a decade.<sup>2</sup> The European Communities (Access to Information on the Environment) Regulations 2007 (S.I. No. 133 of 2007)(the AIE Regulations), forms part of a

<sup>1</sup> Directive 2003/4/EC of the European Council and of the Parliament of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

<sup>2</sup> Access to information on the Environment S.I. 125 of 1998; Access to information on the Environment S.I. 185 of 1996 and Access to Information on the Environment S.I. No. 133 of 1993. These Regulations all interact with the previous EU Directive (90/313/EEC).

legislative package that will secure compliance with Ireland's commitments under the 'Aarhus Convention' and transpose the AIE Directive into Irish law.

- 1.4** In Ireland, the principle of public access to information generally, including information on the environment, has been accepted for some time past. It has been carried into effect by regulations on access to information on the environment and by the Freedom of Information Acts. Many public bodies have environmental functions to perform. A well-informed public will promote the effective and timely discharge of these functions. The enhanced provisions of the new AIE Regulations are intended to give added impetus to this.
- 1.5** The AIE Regulations replace the European Communities Act, 1972 (Access to Information on the Environment) Regulations, 1998 (S.I. No. 125 of 1998). The AIE Regulations also transpose the 2003 AIE Directive; this Directive replaced Council Directive 90/313/EEC which was the previous EU instrument providing for access to environmental information.
- 1.6** The AIE Regulations in giving effect to the AIE Directive provide, *inter alia*, for a wider definition of environmental information than existed previously, and introduce a formal appeals procedure for access to information on the environment. These Regulations also oblige public authorities to be proactive in disseminating environmental information to the public.

### 2. Freedom of Information legislation

**2.1** The Freedom of Information (FoI) Act 1997 (as amended by the Freedom of Information (Amendment) Act 2003) was pre-dated by the relevant European and domestic AIE legislation that has been in place since 1990 and 1993 respectively. The FoI Act enacted in 1997 has operated in parallel with the AIE legislative code since that time, and both legislative codes have operated as fully distinct and separate systems.

**2.2** In effect, two legislative codes have been available since 1997 for accessing environmental information: the FoI Acts and the AIE Regulations. This basic structure will remain in place for the future. The AIE Directive (2003/4/EC) cannot adequately be transposed by means (or as a sub-set) of FoI legislation. While the two legislative codes are broadly similar (with respect to environmental information), the AIE Directive is in the form of framework legislation while the FoI code is much more detailed and specific in its provisions. Public authorities must take into account the differences between the AIE Regulations and the FoI Acts when implementing both systems. Among the significant differences between the two codes, are the following:

- A wider range of public authorities is covered by the AIE Regulations than by the FoI legislation,
- There are material differences in the grounds under which access to information can be refused under the two legislative codes.

### 3. Relevant Public Authorities

- 3.1** The AIE Regulations apply to “public authorities” as defined in Article 3 of the Regulations. A “public authority” is broadly defined to encompass all bodies that have a role in public administration and that possess environmental information. It is important to note that this definition is wider in scope than the definition of “public body” in the FoI Acts. The AIE Regulations elaborate somewhat on the definition provided in the Directive but, unlike FoI legislation, there is not a list of the individual “public authorities” to which the Regulations apply.
- 3.2** While it is not practical to list individually all the public authorities to which the AIE Regulations apply, it is sufficient to flag here that such a list would include all authorities exercising “public administrative functions and responsibilities, and possessing environmental information”. In particular, and as was the case under the 1998 AIE Regulations, commercial semi-state bodies come within the remit of the AIE Regulations to the extent that they satisfy the above conditions. Ultimately, in the event that a person seeking environmental information does not receive the information requested on the basis that the body or organisation from whom the information is requested contends that it is not a “public authority” within the meaning of the AIE Regulations, that person will be able to exercise a right of appeal to the Commissioner for Environmental Information under Article 12 (and in conjunction with Article 11(5)(a)).

### 4. Status of AIE Guidelines

These Guidelines do not purport either to be exhaustive or to offer a legal interpretation. They are intended principally to provide assistance to public authorities on the implementation of the AIE Regulations. They should also be useful to applicants who wish to access environmental information from public authorities. The Guidelines are issued under Article 14 of the AIE Regulations; this article empowers the Minister to make such guidelines and requires public authorities to have regard to them in performing their functions under the Regulations.

### 5. Main provisions of the Regulations

#### 5.1 *Commencement*

The European Communities (Access to Information on the Environment) Regulations 2007 have been made by the Minister for the Environment, Heritage and Local Government on 28 March, 2007 but will not take effect until 1 May, 2007. This interim period should allow public authorities to familiarise themselves with the AIE Regulations. The transitional arrangements specified in Article 2 provide that requests received before the coming into effect of the 2007 Regulations will continue to be dealt with under the 1998 AIE Regulations (S.I. No. 125 of 1998).

#### 5.2 *Interpretation*

Article 3 defines various terms used in the AIE Regulations. The definitions of "environmental information" and "public authorities" are especially significant.

#### 5.3 *Definition of "environmental information"*

The definition of "environmental information" (as set out in Article 3(1)) is fundamental in that it determines what environmental information comes within the remit of the AIE Regulations. The definition is deliberately wide in scope and comprehends an extensive range of information. It makes it clear that information may be held in any material form (including written, visual, aural or electronic), and the definition includes not just the environmental information produced or received by a public authority, but also comprehends such information held on behalf of the authority.

It is important to understand the basic concepts underpinning this definition and article 3(1)(a), (b) and (c), in particular, is fundamental to this:

- paragraph (a) comprehends information on "the state of the elements of the environment" (e.g. "air and atmosphere, water, soil") – in other words, information pertaining to the state of the different environmental media;
- paragraph (b) comprehends information on "factors" which might affect the elements of the environment as set out in the previous paragraph - and this includes substances, energy,

noise, waste, emissions, discharges and other releases into the environment;

- paragraph (c) relates to information on items such as administrative measures, plans and programmes affecting or likely to affect (a) or (b) above and measures designed to protect the environment.

In summary, paragraphs (a), (b) and (c) include information on the state of the different environmental media, matters which are likely to affect them, and measures, plans or programmes which might affect the environmental media directly or indirectly.

Paragraphs (d) and (e) deal with reports on the implementation of environmental legislation, as well as information on cost benefit and economic analyses used in the context of administrative measures etc. as described in paragraph (c).

Paragraph (f) is important in that it extends the definition of "environmental information" to embrace human health, conditions of human life and certain aspects of the built environment in so far as they may be affected by the state of the different environmental media or, indirectly, through factors which affect those media. Thus, for example, where human health is affected by environmental pollution, information will be accessible under the AIE Regulations not only in relation to the pollutant/s and their environmental impact but also on its/their impact on human health (to the extent that these impacts are attributable to the pollutant/s). Similar considerations apply to social conditions and to certain built structures etc.

In summary, it will be seen from the above that the definition of environmental information is very comprehensive.

#### **5.4** *Definition of "public authority"*

As indicated at paragraph 3.2 above, "public authority" is broadly defined to comprehend all such bodies that have public administrative functions and that hold environmental information. The definition makes it clear that certain public bodies - such as Government Departments and local authorities - fall within the scope of the definition. The definition also makes it clear that bodies established by statute and certain companies established under the Companies Acts are comprehended by the definition. Broadly, it is intended to cover

bodies that are subsidiary public bodies and would include non-commercial and commercial semi-state bodies that perform public administrative functions and that hold environmental information.

- 5.5** When considering whether a public authority falls within the scope of the Regulations, it should be borne in mind that it is not necessary for the body or its agents to be directly or primarily involved in work of an environmental nature. If a public authority has public administrative functions and responsibilities (this is self-evident) and possesses environmental information, it satisfies the criteria specified in the AIE Regulations for falling within the definition of a "public authority".
- 5.6** It should also be noted that paragraph (c) of the definition refers to bodies under the control of a body specified in paragraphs (a) and (b). An example could be an organisation acting on an agency, contractual or other basis on behalf of a public authority - i.e. it performs functions or provides public services relating to the environment on behalf of its parent body.
- 5.7** In cases of dispute, where a body argues that it is not a public authority within the meaning of the AIE Regulations, a right of appeal exists to the Commissioner for Environmental Information (Article 12 in conjunction with Article 11(5)(a)) on the basis that the information sought was not provided.
- 5.8** Article 3(2) is very important and clarifies that the AIE Regulations will not apply to a public authority "when acting in a judicial or legislative capacity". It is suggested that "judicial.... capacity" refers, for example, to processes of determination (normally statutory in nature) which are open to the hearing of submissions from different parties, and where the authority concerned is required to act in a judicial manner. It is considered that "legislative capacity" will comprehend a public authority when involved in the preparation of legislative proposals for the Oireachtas, e.g. Government Departments and the Attorney General's Office, and the preparation and making of secondary legislation, e.g. regulations, orders and bye-laws whether made by central Government or other public authorities.



## Section 6

### 6. Discoverable information

- 6.1** Article 4(1) provides that the AIE Regulations do not apply to environmental information that is required to be made available under any other statutory provision, for inspection or otherwise, to the public.
- 6.2** Article 4(1) should not be construed as comprehending information that might be accessible under the Freedom of Information Acts. A distinction should be drawn between information which is available from public authorities as of right (see preceding paragraph) and information which might be made available under another legislative code (such as FoI), but which may, or may not, be granted by the public authority.
- 6.3** The effect of Article 4(2) of the AIE Regulations is to ensure that any restrictions in the statutory provisions referred to (especially in relation to time limits within which registers can be inspected) will not operate so as to limit the powers to access information under the AIE Regulations. The rights of access under the planning, air pollution and other codes referred to are not altered by the provisions of article 4(2).

### 7. General duties of Public Authorities

**7.1** An objective of the AIE Regulations is, as stated in Article 1 of EU Directive 2003/4/EC, "to guarantee the right of access to environmental information held by or for public authorities...". This places a general responsibility on public authorities to facilitate access to environmental information that people may wish to receive. Article 5 of the AIE Regulations establishes the basic requirements with which public authorities must comply, including:

- informing the public of their rights and providing information and guidance on exercising those rights; and
- making all reasonable efforts to maintain environmental information in a form that is readily reproducible and accessible.

**7.2** Articles 6 and 7 set out the general requirements for making and considering requests for environmental information. Public authorities are reminded that the objective of the Regulations is to facilitate access to environmental information to the greatest possible extent consistent with the provisions of the Regulations generally. Article 7 establishes the conditions under which a public authority must deal with an application for environmental information and provides for: the making of a decision on a request for environmental information; the time within which a response must be issued to requests; the transfer of applications to other public authorities, where appropriate; and the provision of assistance to applicants.

In addition, public authorities should, in line with Article 7(4) of the Directive, take all necessary steps to ensure that, in the event of an imminent threat to human health or the environment, all appropriate information likely to assist in mitigation measures will be disseminated without delay.

**7.3** In general, public authorities should:

- consistent with other provisions of these Regulations, maintain a presumption in favour of the disclosure of environmental information, and seek to respond positively and promptly to requests,

- offer assistance to members of the public to enable them to formulate requests in accordance with Article 6 of the Regulations, with particular regard to individuals who may have literacy or other relevant difficulties or disabilities,
- in the event that the environmental information sought is held by another public authority, transfer the application to that body. In this event, the applicant should be informed accordingly or be supplied with details of where the information is held and to whom the request should properly be made,
- identify the environmental information they hold and actively disseminate it to the public, particularly by electronic means,
- update their available information regularly to ensure that it is accurate and comparable and that it includes, at a minimum, the information specified in Article 7.2 of the Directive,
- retain environmental information in a manner that is easily accessible,
- designate Information Officers and establish systems and structures to register and process all requests within the relevant time limits,
- ensure that their staff are aware of the provisions of the AIE Regulations.

**7.4** In accordance with Article 9 of the Directive, Ireland will be obliged to report to the European Commission in August 2009 on the experience gained in relation to its implementation. The Department of the Environment, Heritage and Local Government will coordinate this report and will require to be advised of the experience and statistical records of public authorities in implementing the Regulations. Accordingly, all public authorities are requested to designate Information Officers with responsibility for implementing these Regulations and to put in place systems to collate appropriate annual statistics, including the following:

- the number of requests for information received relating to access to information on the environment,
- the number of cases under which the information was either fully disclosed, partially disclosed or refused in full,
- in cases where access to information was refused, the reasons for refusal or the exceptions under which it was refused,
- the number of cases referred for internal review, and

- the number of cases in respect of which a charge was imposed for the release of environmental information, and the amounts involved.

The above information should be collated and forwarded (where appropriate, in the first instance to the Department under whose remit the public authority operates) to the Department of the Environment, Heritage and Local Government on an annual basis.

### 8. Requests for environmental information

**8.1** While Articles 7, 8 and 9 include provisions pertaining to the processing of requests for information, it is Article 6 that sets out the manner in which an applicant should submit his or her application for information to the public authority. The applicant is not required to state an interest in the request, but is required to:

- state that the application is being made under the AIE Regulations and submit it in writing or electronic form,
- provide their contact details,
- state, in terms that are as specific as possible, the environmental information required, and specify the form and manner of access desired.

**8.2** Applicants are required to invoke the AIE code in making a request under these Regulations so that, in circumstances where parallel systems to access information exist (AIE and FoI), public authorities can be clear about the code under which the information is sought. In this context, public authorities should especially note Article 7(7) of the Regulations. In the event that an applicant makes a request for information that could reasonably be regarded as environmental information but without invoking either the AIE code or the FoI code, the public authority must contact the applicant, inform him or her of their rights of access and how to exercise them, and offer assistance in the making of the application. In practice this will involve advising the applicant of the potential to make the request under either AIE or FoI and providing information on the different fees payable under each regime (if the body concerned is comprehended by the FoI Acts), explaining how these rights can be exercised and offering assistance to the applicant in this regard. It is, of course, always open to a public authority simply to provide the information sought to a person who requests it outside of the AIE or FoI codes if that is the preferred option of both parties.

### 9. Dealing with requests

Under Article 7(1) a public authority is required, subject to certain exceptions, to make available to the applicant environmental information that is held by or for them and to which the Regulations apply. As set out in Article 7, the following provisions relate to the processing of requests:

- a public authority must respond to (i.e. deal with and decide on) a request as soon as possible and at the latest within one month of having received a request;
- where, due to the complexity or volume of information required, a public authority is unable to reply to the applicant within one month, they should write to the applicant within that time frame setting out the reasons why they are unable to do so. The public authority should also inform the applicant of the date by which they will respond (i.e deal with and decide on the application), and this date should not be more than two months from the receipt of the original request;
- where an applicant requests information in a particular format or manner, public authorities should provide the information in that format or manner unless it is already publicly available in another form or manner, or access in an alternative manner would be more efficient (public authorities are requested to facilitate applicants in this to the greatest extent possible);
- where the information requested is not held by or for the public authority concerned, the authority should inform the applicant of this. If the public authority is aware that the information requested is held by another authority they should transfer the request to that authority and inform the requester. Alternatively, they should advise the applicant of the public authority to whom they believe the request should be directed;
- In cases where a request is formulated in too general a manner, public authorities must, within one month, inform the applicant accordingly and provide advice and assistance to the applicant in reformulating the request. The intention should be to assist the applicant as much as possible.

### 10. Grounds for refusing requests for information - general points

**10.1** The Regulations distinguish between the mandatory grounds by which a public authority shall refuse access to information (Article 8, **but subject to Article 10**) and the discretionary grounds under which the authority may refuse such information (Article 9). The approach adopted follows the distinction between mandatory and discretionary grounds for protecting information set out in the previous AIE Regulations of 1998. In addition, Article 10 sets down a number of important provisions that must inform consideration of any decision to refuse the disclosure of environmental information. In every case, public authorities must note that a decision to refuse to disclose information under Articles 8 and/or 9 must not be taken in isolation from the relevant provisions in Article 10; further information on these provisions is set out below. In particular, public authorities should be aware that the exemptions in Article 8, although mandatory in nature, are nonetheless subject to the provisions of Article 10.

**10.2** Before considering the detailed provisions of Articles 8, 9 and 10, public authorities are reminded of the provisions of Article 3(2) and 4(1) of the Regulations and the guidance provided in this respect at paragraphs 5.8, and 6.1 and 6.2. To recap, public authorities do not come within the remit of the Regulations when acting in a judicial or legislative capacity, and information that is otherwise available as of right to the public is not discoverable under the AIE Regulations.

### 11. Grounds that mandate a refusal

**11.1** Subject to the provisions of Article 10, public authorities are required to decline to make available information coming within the provisions of Article 8. The different circumstances where the requirement to refuse to provide information applies are set out below.

#### 11.2 *Personal information*

Where the confidentiality of personal information is protected by law, such personal information must not be made available without the consent of the person to whom the information relates. In applying this exception, public authorities should have regard to the FoI and Data Protection Acts, as well as to any other statutory provisions that may be relevant in the particular case. Where information is protected under these legislative codes, it must also be protected for the purpose of the provisions of the AIE code unless the person concerned consents to its release. In general, unless obvious sensitivities are involved (or where it would impose an undue burden on the public authority to contact the person concerned), an opportunity should be given to an individual to give consent to the release of personal information before a request for such information is refused.

#### 11.3 *Material supplied by a third party without that party being, or capable of being put, under a legal obligation to agree to its release*

This provision is intended to safeguard informal and voluntary communications between public authorities and third parties which are essential to good public administration generally. The prohibition on release of this kind of information only applies where the third party in question has supplied information on a voluntary basis and has not consented to its release. It does not apply where the provider of the information is, or is capable of being put under, a legal obligation to provide the information.

#### 11.4 *Material the disclosure of which would make it more likely that the environment to which such material related would be damaged*

This exclusion is designed to cover information such as that pertaining to the location of endangered species where, for example, disclosure of detailed information would pose a risk to the continued integrity of rare specimens.



### **11.5** *Confidentiality of the proceedings of public authorities*

In line with the Directive, where the confidentiality of the proceedings of public authorities is otherwise protected by law, information relating to such proceedings may not be made available under these Regulations. This includes information exempt from disclosure under the FoI Acts. In effect, this provision means that if information about the proceedings of public authorities would, were an FoI request to be made seeking discovery of it, be capable of being protected under the FoI Acts, a public authority must not release this information under these Regulations. In this context, the attention of public authorities is directed, in particular, to the very considerable level of protection available under the FoI Acts in respect of meetings of the Government and matters ancillary thereto. This level of protection should be applied, in full, to relevant requests under the AIE Regulations.

### **11.6** *Discussions at meetings of the Government*

Consistent with Article 8(a)(iv) of the Regulations, the Constitutional provision in relation to the confidentiality of discussions at a meeting of the Government is referred to in Article 8(b). Apart from the effect of Article 8(b) in its own right, this emphasises the importance of applying the previous paragraph - Article 8(a)(iv) - in relation to the confidentiality of the proceedings of public authorities in the context of information relating to meetings of the Government and ancillary matters related thereto.

### 12. Discretionary grounds for refusal

**12.1** Article 9 of the Regulations specifies a number of grounds under which a public authority may refuse to make environmental information available while retaining the power to make it available in cases where they consider it appropriate to do so. The various provisions that will allow refusal on discretionary grounds are set out below. As is the case in relation to Article 8, these provisions must be applied subject to the provisions of Article 10.

#### **12.2** *International relations, national defence or public security*

Requests for environmental information affecting international relations or national defence may be refused; this would include any restricted information or documents received from other States or international organisations. Information damaging to public security may also be withheld, e.g. information about explosives or firearms storage or manufacture.

#### **12.3** *The course of justice*

Environmental information relating to anything which is the subject matter of any legal proceedings, or of any formal inquiry (whether past or present), or any preliminary investigation, may be refused. Examples would include information in connection with intended prosecution of offences by the Director of Public Prosecutions or by local or other public authorities; information affecting enforcement proceedings; material arising from public or disciplinary inquiries; and information relating to preliminary or other proceedings instituted by the European Commission. The above provision is not to be confused with Article 3(2), which provides that a public authority, acting in a judicial capacity, is not a public authority for the purposes of the AIE Regulations.

#### **12.4** *Commercial or industrial confidentiality*

Requests for information may be refused in circumstances where the release of information could be detrimental to the commercial interests of an individual or company and the protection of this information has been provided for in national or Community law to protect a legitimate economic interest. The fact that a person or company asks for information to be treated as confidential does not of itself establish it as such for the purpose of the Regulations, and the public authority

must satisfy itself that real and substantial commercial interests are threatened. In addition, the fact that the release of information (for example, in relation to a pollution incident) might damage the reputation of a company is not of itself adequate reason for withholding it.

### **12.5** *Intellectual property rights*

A public authority may refuse to make available environmental information where its disclosure would adversely affect intellectual property rights. This would be likely to include copyright protected material, a patented design, the constituents of a product that has yet to be marketed or other confidential trade information. Information that is the subject of copyright does not necessarily prevent public authorities from releasing the information that they hold, but it would be prudent to satisfy itself fully that the information should properly be released and make it clear to the applicant that the copyright exists.

### **12.6** *Material in the course of completion*

Public authorities are not obliged to make available material that is incomplete or in preliminary or other draft form; this might apply, in particular, to reports or studies. Normally, a public authority should also be able to withhold information until the completion of a normal periodic statement/summary of the data concerned. However, public authorities should consider the possibility in particular cases of releasing interim reports or results. In general, ongoing monitoring of environmental emissions should not be treated as unfinished data - but release would seem appropriate when the periodic release of such information takes place.

### **12.7** *Internal communications of public authorities*

Article 9(2)(d) provides that information included in the internal communications of a public authority may be protected from release. This could include internal minutes or other communications, between officials or different public authorities, or between officials and Ministers. Public authorities should bear in mind that the use of this exception is discretionary. It should not be resorted to as a simple expedient to protect all internal communications in circumstances where it would be unreasonable to do so (see also sub-articles 10(3) and 10(4)). Normally, public authorities would not be expected to invoke this protection for information unless there are good and

substantial reasons – not otherwise available in Articles 8 and 9 – for doing so.

### **12.8** *Other discretionary grounds*

Article 9(2) of the Regulations clarifies that a public authority may refuse to make information available if the request is considered unreasonable due to the range of material sought, if the request is too general or if the material requested is not yet completed. Public authorities are requested to invoke these grounds for refusal sparingly, and to assist the applicant (to reformulate a request, for example) as appropriate.

### 13. Incidental provisions relating to refusal of information

- 13.1** Article 10 specifies a number of important provisions pertaining to decisions to refuse disclosure of environmental information. The points below should be noted carefully.
- 13.2** Subject to Article 10(2), Article 10(1) provides that requests for environmental information relating to emissions (including discharges and other releases) into the environment shall not be refused even in circumstances where the relevant environmental information might otherwise be protected in accordance with any provision of Article 8 (mandatory refusal) or Article 9(1)(c) in relation to commercial or industrial confidentiality. This is a very significant provision that limits the powers of public authorities to refuse to disclose environmental information. Emissions should be construed as including discharges of whatever kind to all environmental media. It is considered that "emissions into the environment" means actual emissions, and does not include information on, for example, plans on emissions, which have yet to occur.
- 13.3** In line with the Constitutional protection for the confidentiality of discussions at meetings of the Government, Article 10(2) provides that Article 10(1) does not have effect in respect of any discussions on the matter of emissions into the environment at a Government meeting.
- 13.4** Under Article 10(3), public authorities must consider each application on an individual basis, and weigh the public interest served by disclosure against the interest served by refusal. It is important to note that this "public interest" test applies to all applications for information irrespective of whether any provision of Article 8 or Article 9 may apply in relation to a particular application. In other words, even where the information would normally be comprehended by a provision for protecting information under Article 8, the information should be made available if, in the opinion of the public authority, the public interest is best served by doing so.
- 13.5** Cabinet confidentiality is an important principle of good governance. It is particularly important in supporting the exercise of collective responsibility. It provides Ministers with the opportunity to consider, discuss and offer opinions on issues, fully and frankly, before taking decisions, which must then be supported by the Government as a

whole. The Constitution requires Government to act as a collective authority and the recognition it affords to the principle of Cabinet confidentiality illustrates its importance in that regard. For these reasons, it is strongly suggested that public authorities should take the view that the “public interest” is consistent with upholding Cabinet confidentiality, and that Article 10(3) should be construed accordingly.

- 13.6** Article 10(4) adds to the above provision by providing that the grounds for refusing a request for information shall be interpreted restrictively. This means that, in addition to a public interest test, the grounds for refusal shall be interpreted in a narrow manner. At the very least, this should be construed as obliging public authorities to use grounds for refusal sparingly (and with due regard to the public interest that would be served by disclosure). Essentially, in considering a request/application, public authorities should start from a position of a presumption in favour of disclosure of information.
- 13.7** Article 10(5) requires public authorities not to refuse access to all the information requested where there are grounds (in Articles 8 and 9) for refusing only part of the information sought and where it is possible to separate information which cannot be disclosed from that which can. In circumstances where this separation may not be practicable, it may nonetheless still be possible for the public authority and the applicant to agree on a revised request or other mutually acceptable solution.
- 13.8** Under Article 10(6), where a request for information is refused because the requested information is in the course of completion or in draft form, the public authority should provide details to the applicant of the public authority who is responsible for preparing the material and the estimated time needed for completion.
- 13.9** Article 10(7) provides that where no decision is conveyed to an applicant who requests information, the request will be deemed to be refused when the time limits in Article 7 expire. This is a technical provision that will allow provisions in relation to internal review and, subsequently, appeal to the Commissioner for Environmental Information, to have effect.

## Section 14

### 14. Internal review

- 14.1** Article 11 of the Regulations establishes the right to internal review, and the procedure under which this right can be exercised. Public authorities must establish internal procedures to process such reviews by a person other than the original decision-maker. The following points outline the steps necessary for the applicant to request a review and for the public authority to consider it. The procedure is similar, in many ways, to the system of internal review which operates under the FoI Acts.
- 14.2** An applicant, who considers that their original request for environmental information was refused wholly or partially, or was otherwise not properly dealt with in accordance with the provisions of Articles 3, 4, or 5 of the Directive, may, not later than one month after they receive notification of that decision, request the public authority concerned to review the decision.
- 14.3** On receipt of a request for the review of a previous decision, the public authority should assign the role of reviewer in the case to an officer of at least the same grade as the original decision-maker, though not necessarily from within the same public authority. The reviewer is required to make a decision on the appeal and notify the applicant of that decision within one month of the date of receipt of the request.
- 14.4** The reviewer is required to affirm, vary or annul the original decision and the applicant must be informed in writing of the outcome of the review within one month. In the event that the reviewer annuls the original decision, the public authority will be required to release the information concerned. Where the original decision is affirmed or varied in a manner that results in some or all of the required information still not being released, the applicant must be informed of the reasons for the decision. Furthermore, they must also be advised of their right of appeal to the Commissioner for Environmental Information and the time limits associated with such an appeal.

### 15. Appeals

- 15.1** To give effect to the requirement in the Directive to provide for an appeals mechanism, Article 12 of the AIE Regulations establishes the office of the Commissioner for Environmental Information, and assigns that role to the person holding the office of Information Commissioner (already established under the Freedom of Information Acts 1997 and 2003) at any given time. The appeal process and the functions and responsibilities of the Commissioner for Environmental Information are set out in Article 12.
- 15.2** Article 12(3) provides for a right of appeal to the Commissioner where, under the internal review provisions of Article 11, the original decision of a public authority has been affirmed in whole or in part. Article 11(5) is important in this context as it clarifies what will constitute a refusal of environmental information for the purposes of allowing an appeal to the Commissioner. This provision makes it explicit that appeals can be made where the organisation concerned contends that it is not a public authority for the purposes of the Regulations, where the request has been inadequately answered (e.g. ignored), and where the applicant considers that the fee to be charged is excessive.
- 15.3** Article 12(3) also makes provision for third parties (i.e. persons other than the applicant) affected by the decision of the public authority to appeal to the Commissioner for Environmental Information against the decision of the relevant public authority. Appeals to the Commissioner must, under sub-article (4), be made not later than one month after the internal review decision has been, or was required to be, notified to the applicant. The Commissioner may extend these time limits for a particular case where he/she believes it is reasonable to do so.
- 15.4** It should be noted that neither the Aarhus Convention itself, nor the Directive, deal explicitly with the question of the involvement of third parties whose rights may be affected by the grant of a request for environmental information at the time of original consideration of the relevant request by the public authority concerned. The Directive (Article 6(2)) does however provide for the involvement of third parties at the independent review stage and the AIE Regulations have been drafted having regard to that provision.



In considering the potential impact on third parties by the release of environmental information, public authorities should be mindful that, under the AIE Regulations, there are grounds for refusal to disclose information relating to the release of personal and commercially sensitive information.

**15.5** The Commissioner, on receipt of an appeal, is required to review the case and either uphold, vary or annul the decision of the public authority. The Commissioner must explain the reasons for the decision reached and, in a case where the decision is being varied or annulled, will instruct the public authority to release the relevant information to the applicant. Public authorities are obliged to comply with decisions of the Commissioner within three weeks (Article 12(7)). In the event that a public authority fails to comply with a decision of the Commissioner, under Article 12(8), the Commissioner has the power to apply to the High Court for an order to compel the public authority to comply with the decision.

**15.6** Under the appeal process, the Commissioner may utilise the following powers (similar powers apply in the FoI context) to assist in the determination of an appeal:

- require the public authority to make available environmental information on the basis that it is relevant to a review or investigation,
- require a public authority or the chief officer of a public authority to attend before the Commissioner,
- examine, remove and retain copies of environmental information, and
- enter any premises occupied by a public authority for the purposes of the above.

**15.7** Where, in the opinion of the Commissioner, a question of law arises, he/she is empowered to delay the making of a decision under an appeal and to refer the issue to the High Court (or, on appeal from that Court, to the Supreme Court) for a determination of the point of law concerned. In addition, any party to an appeal to the Commissioner, or any other person affected by the Commissioner's decision, can appeal to the High Court on a point of law arising from that decision. Such an appeal must be made not later than two months after the Commissioner's decision was notified to that person. With regard to

the referral of questions of law to the High Court or Supreme Court by either the Commissioner, a party to an appeal to the Commissioner or any other person affected by the Commissioner's decision, the relevant court may order that some or all of the costs of the applicant or a third party be met by the public authority.

**15.8** Contact details for the Commissioner for Environmental Information are as follows:

Office of the Commissioner for Environmental Information,  
18 Lower Leeson Street,  
Dublin 2.

Telephone: 01- 6395689

Further contact details and information on the Commissioner's Office are contained on the Office of the Information Commissioner (OIC) website at [www.oic.ie](http://www.oic.ie)

### 16. Fees

- 16.1** Article 15 of the Regulations provides that public authorities may make a charge for supplying information but also provides that such a charge may not exceed an amount which is considered reasonable having regard to the actual cost of supplying the information requested. It should be noted that public authorities may not charge for the actual making of a request for environmental information, for access to registers or lists of environmental information or for the examination *in situ* of such information.
- 16.2** In general, it is to be expected that public authorities should adopt a policy in favour of providing information without charge as long as the costs involved to the authority are not significant. It would be reasonable to take account of the extent of the information being requested and the overall resources necessary to supply the environmental information in determining any charge that is made.
- 16.3** Public authorities must make publicly available a list of fees, if any, charged for provision of environmental information and the method by which those fees were calculated. Applicants should be informed of any charges (and details thereof) for the provision of the information they have requested.
- 16.4** A "reasonable" charge will vary depending on the volume of information to be released but could, for example, include the cost of staff or other costs connected with searching, retrieving, compiling or copying of the information. The charge may only relate to the supply of information, and charges should not be made for:
- provision of general advice on the information that is available,
  - time expended on discussing a request, or
  - determination of what information is discoverable.
- 16.5** No fee may be charged for the internal review process.

**16.6** The AIE Regulations provide that a fee of €150 must be charged for an appeal to the Commissioner for Environmental Information. However, provision is also made for a reduced appeal fee of €50 for medical card holders and their dependents and also for people, not party to the original request for access to information, who are appealing a decision to release information which they believe will affect them.

### 17. Information policy statement/notices to employees

- 17.1** To facilitate the public in identifying available information, public authorities possessing a substantial amount of environmental information are advised to produce an information policy statement. An information policy statement should be a brief and user-friendly guide to the type of environmental information held by the public authority and to the arrangements for dealing with requests for this information. The statement need not be limited to information to which these AIE Regulations apply, but could also refer to other statutorily available information including that available under the Freedom of Information Acts.
- 17.2** Such policy statements should be published and could be included in annual reports or other periodic publications of a public authority. Copies of all information policy statements should be forwarded (preferably electronically to [info@enfo.ie](mailto:info@enfo.ie)) to ENFO, 17 St. Andrew Street, Dublin 2 (ENFO – The Environmental Information Service of the Department of the Environment, Heritage and Local Government) where a central registry of statements will be kept for ease of reference by the public.
- 17.3** In addition to informing the public, appropriate steps should be taken to ensure that the employees of the public authority are aware of the Regulations and the manner in which they are to be implemented.
- 17.4** Public authorities should continue to make available more general information to the public on a voluntary basis and should make it clear that such information can be accessed without a formal request under these Regulations. In particular, ENFO will continue to develop its environmental information services, which are fully accessible to the public and, in general, free of charge (including at [www.enfo.ie](http://www.enfo.ie)).

