

THE HIGH COURT  
JUDICIAL REVIEW

Record No.: 2014/726JR

Between/

FRIENDS OF THE IRISH ENVIRONMENT LIMITED

Applicant

-v-

THE COMMISSIONER FOR ENVIRONMENTAL INFORMATION

-and-

IRELAND AND THE ATTORNEY GENERAL

Respondents

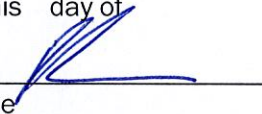
STATEMENT OF OPPOSITION ON BEHALF OF THE FIRST NAMED RESPONDENT

TAKE NOTICE that the First Named Respondent herein opposes the application for judicial review on the grounds following:-

1. It is denied that the Applicant is entitled to an order of mandamus since at no stage has the First Named Respondent refused to consider its appeal. There is therefore no factual basis on which this relief could be granted.
2. It is denied that the First Named Respondent is required to deal with the Applicant's appeal expeditiously. Article 6(2) of Directive 2003/4/EC on public access to environmental information and Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 under which the First Named Respondent operates, do not oblige him to determine an appeal expeditiously or within a prescribed time scale.
3. The Applicant's appeal was made on 2 July 2014 and the within judicial review proceedings were commenced on 1 December 2014. A time period of five months does not amount to a delay such as would justify the institution of judicial review proceedings or the granting of any relief by way of judicial review.

4. The within proceedings are speculative and premature in being instituted prior to the making of a determination of the appeal and at a time when the said appeal had only been lodged for a period of in or about 5 months.
5. The Applicant is not entitled to relief by way of judicial review remedies on what is in effect a *quia timet* basis.
6. The Applicant has not sought to quash the decision of the First Named Respondent not to exercise his discretion to deal with his appeal ahead of other appeals lodged prior to it. The said decision was made within jurisdiction and, not having been challenged, it stands. In the circumstances, there is no factual basis for the assertion of delay.
7. Any delay in determining the Applicant's appeal which has occurred to date is not so great as to give rise to any right to a legal remedy.
8. The purpose of judicial review proceedings is not to seek to micro-manage by the courts the internal administrative practices of decision-makers.
9. The Applicant only has standing to litigate this judicial review based on the facts and circumstances of its own particular case, namely the progress of its appeal that was made on 2 July 2014. It is not allowed to rely on a *jus tertii* such as what has happened or what may happen to any other appeals.
10. At all times the First Named Respondent has acted in a bona fide manner. The First Named Respondent has sought to deal with the Applicant's appeal in as timely a manner as the resources available to his Office permit and also having regard to the lawful exercise of the discretion of the Office of the Information Commissioner in the allocation of resources in circumstances where there is a statutory objective to determine applications for review under the Freedom of Information Acts within a four month period. There is no equivalent objective in respect of appeals under the European Communities (Access to Information on the Environment) Regulations 2007 to 2014.
11. In the premises, the Applicant is not entitled to the relief sought or to any relief as against the First Named Respondent.

Dated this day of 2015

Signed:   
Philip Lee  
Solicitors for the First Named Respondent  
7/8, Wilton Terrace  
Dublin 2

To:-

The Chief Registrar  
Central Office  
High Court  
Four Courts  
Dublin 7.

And to:-

O'Connell and Clarke  
Solicitors for the Applicant  
Suite 142  
The Capel Building  
Dublin 7

And to:-

Office of the Chief State Solicitor  
Osmond House  
Little Ship Street  
Dublin 8.

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AFFIDAVIT OF ELIZABETH DOLAN

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I, **ELIZABETH DOLAN**, Senior Investigator in the Office of the Information Commissioner, of 18 Lower Leeson Street, Dublin 2, aged eighteen years and upwards **MAKE OATH AND SAY** as follows:

1. I am a Senior Investigator in the Office of the Information Commissioner ("the OIC") within the meaning of Section 43 of the Freedom of Information Act 2014 ("the FOI Act"). I make this Affidavit from facts within my own knowledge save where otherwise appears and where so appearing I believe the same to be true.
2. I make this Affidavit on behalf of the First Named Respondent, the Commissioner for Environmental Information ("the Commissioner"), and with his authority and consent.
3. As provided for in Article 12 of the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 ("the AIE Regulations"), the Commissioner is assisted by the staff of the OIC and by such other resources as may be available to that office. Accordingly, I am currently assigned to assist the Commissioner in the carrying out of his functions under the AIE Regulations in addition to continuing in my position as Senior Investigator in the OIC.

4. I make this Affidavit by way of reply to the Affidavit of Mr Tony Lowes sworn on 1 December 2014 and for the purpose of opposing the within application for judicial review and verifying the Statement of Opposition herein. I am familiar with the general background to these proceedings and with the overall administration of appeals under both the AIE Regulations and applications for review under the FOI Act (hereinafter referred to as "AIE appeals" and "FOI reviews" for ease of reference).

### Background

5. The role of the Commissioner is to review decisions of public authorities on appeal by applicants who are not satisfied with the outcome of their requests for environmental information.
6. Requests for environmental information are made pursuant to the AIE Regulations which give effect to Directive 2003/4/EC. The purpose of the Directive is to guarantee the right of access to environmental information held by or for public authorities subject to certain exceptions. The Office of the Commissioner for Environmental Information ("the OCEI") was established under Article 12 of the AIE Regulations for the purpose of providing an external administrative review procedure in accordance with Article 6(2) of the Directive.
7. A request is made in the first instance to the public authority concerned. Where the applicant's request is refused in whole or in part, the applicant can request the public authority to carry out an internal review of its decision. An applicant (and certain other persons) can appeal the public authority's decision to the Commissioner if they remain dissatisfied with the position following the internal review.
8. Following acceptance of an AIE appeal, the Commissioner carries out an independent review of the public authority's decision. He will invite submissions from the applicant and the public authority and may also examine the information in question.
9. The Commissioner can then affirm, vary or annul the decision of the public authority and, where appropriate, require the public authority to make available environmental information to the applicant. The decision is final and binding on the parties, subject only

to a right of appeal on a point of law to the High Court pursuant to Article 13 of the AIE Regulations.

### The chronology of events

10. A summary of the principal points of correspondence between the OCEI and the parties to the appeal are as follows. I have not referred to every contact in the chronology below but merely the correspondence of relevance to these proceedings. The Applicant has exhibited the majority of this correspondence in **Exhibit TD1** to the Affidavit of Tony Lowes.
11. By letter dated 2 July 2014, the Applicant wrote to the OCEI requesting an appeal of a decision made by the Department of Agriculture, Food and the Marine (“**the Department**”) on 5 June 2014 refusing the Applicant’s request for information about storm damage caused at an aquaculture site at Gearhais, Bantry Bay, County Cork in February 2014. The letter threatened that steps would be taken unless the date of a decision on the appeal was notified within 3 weeks of the date of the letter.
12. The Applicant’s request to the Department dated 10 March 2014 sought:

*“Copies of the preliminary scientific and technical reports provided by The Minister’s Department’s Engineering Division in conjunction with the Marine Institute referred to in the Minister’s Parliamentary reply Tuesday, 4<sup>th</sup> March, 2014 as a result of storm damage at Gerahies, Bantry Bay.*

*Any documentation concerning these Reports or concerning this incident, including scientific records or site visits observations and survey logs of inspection themselves, photographs, and any related records, including emails, records of meetings or phone calls.”*
13. The Department refused the request by reference to certain discretionary grounds of refusal set out in the AIE Regulations namely Article 9(2)(c) (material in the course of completion) and 9(2)(d) (internal communications of public authorities).
14. By letter of reply dated 4 July 2014, the OCEI informed the Applicant that the matter was being examined and it would be in touch in the near future.

15. By letter dated 9 July 2014, the OCEI informed the Department that it had accepted the appeal and requested that a copy of the records, the subject of the Applicant's request, be furnished to the OCEI by 24 July 2014. The Department was invited to make submissions and advised that any submission should be received by the OCEI no later than 31 July 2014.
16. By letter dated 9 July 2014, the OCEI informed the Applicant that it was accepting the appeal and requested that any further submissions be made by 31 July 2014.
17. By letter dated 15 July 2014, the Department made submissions on the appeal. The letter also indicated that it would have serious difficulty providing the relevant records by 24 July 2014, if they were still required, due to the volume of material and available staffing resources.
18. By email dated 16 July 2014, the OCEI informed the Department that the records sought would be required to conduct the review of the appeal and granted the Department an extension until 24 August 2014 to provide them. By letter dated 28 July 2014, the Department requested an extension to 26 September 2014 to prepare the records due to the number of officials involved and the absence on leave of several key officials over the summer period. This was agreed to by the OCEI.
19. By letter dated 29 July 2014, the Applicant advised that it believed that the matter was urgent and the appeal required immediate attention due to the *"ongoing danger to environment that arises through the failure of the Department to release the report"*. The letter threatened High Court proceedings.
20. By letter dated 29 August 2014, the Applicant's solicitors again requested that the appeal be prioritised and dealt with by a specific date and indicated that an application to the High Court would be made.
21. By email dated 2 September 2014, the OCEI stated that the matter was being examined and that the Office would be in touch shortly.

22. By letter dated 18 September 2014, the Applicant's solicitors indicated that an application to the High Court would be made unless the OCEI confirmed by close of business the following day that the appeal would be given priority.
23. By email dated 19 September 2014, the OCEI informed the Applicant the case file had been briefly examined by an investigator and it had been determined that it was not the type of case that could be expedited. It was noted that "*we are currently working on other high priority cases dated from 2012 and 2013*" and thus it was not possible to indicate specifically when work would commence on the review that the Applicant had requested. The email assured the Applicant that the OCEI was endeavouring to progress reviews as speedily as possible.
24. By letter dated 24 September 2014, the Department sent the relevant records to the OCEI and confirmed its position that it would not be in the public interest to release elements of the overall report into the incident prematurely in circumstances where the overall report was not yet complete and had not been submitted to or considered by the Minister.
25. By letter dated Wednesday 26 November 2014, the Applicant's solicitors stated that unless a satisfactory response was received by Friday, 28 November 2014, then an order of mandamus would be sought.
26. On 1 December 2013 the Applicant sought and obtained leave to institute the within judicial review proceedings.

#### The grounds of challenge

27. I say and believe that the First Named Respondent has not failed to deal with the Applicant's appeal within a reasonable time or in a reasonable manner.
28. It may be of assistance to the Court if I set out the current position as regards the resources available to the First Named Respondent. In this regard it is relevant to note that the AIE Regulations provide for a separate access regime from that under Freedom of Information legislation.



### Absence of Specific Funding

29. Article 12 of the AIE Regulations provides that the holder of the Office of Commissioner for Environmental Information shall be the same person who, for the time being, holds the Office of Information Commissioner under the FOI Act. However, the Office of the Commissioner for Environmental Information is a legally independent office from that of the OIC and performs separate and distinct functions. Notwithstanding this, the OCEI has not received any specific funding allocation from the State since its establishment in 2007 and has had to rely on the resources that can be made available to it from the OIC (subject to very recent developments discussed below). The operation of the OIC accordingly impacts on the operation and performance of the OCEI. The OIC itself has faced significant challenges since it was established in 1997 in terms of securing sufficient resources having regard to the level of demand for its services.
30. The lack of specific funding for the OCEI, combined with the other demands placed on the OIC's own limited resources and the complex nature of the majority of AIE appeals, has resulted in a growing backlog of appeals before the OCEI.
31. In addition, a large backlog of work had also developed in respect of applications for FOI reviews made to the OIC under the Freedom of Information regime. This was a particular cause for concern in 2013 as new FOI legislation was imminent. The new legislation, since adopted in October 2014, provides for a reduced fee structure and the extension of the FOI regime to approximately 100 additional bodies. The OIC expects an increase of up to 20% in demand for its services as a result of these changes.
32. Furthermore, the FOI Act provides at section 22(3) that decisions on reviews shall be made as soon as may be and, insofar as is practicable, not later than 4 months after receipt of the application for review (the previous FOI Acts 1997 to 2003 contained the same provision in section 34(3)). It was of huge concern to the Information Commissioner that the statutory objective in FOI cases was not being met in the majority of cases and an organisational review resulted in new processes to address this.
33. In anticipation of the increased workload under the new FOI regime and having regard to the 4 month statutory objective for FOI reviews, the Information Commissioner also identified as a priority for 2014 an objective of having no FOI reviews over 12 months old on hand by the end of that year. At the time of the Applicant's appeal, there were 177

FOI reviews on hand. By the end of 2014, there were 118 on hand of which only 9 were older than 12 months.

34. In light of the above, the OIC was not in a position to assign additional staff resources to the OCEI function in 2014 and investigators who had AIE appeals assigned to them prioritised FOI reviews.

#### Efforts to Secure Additional Resources

35. The OCEI has been acutely aware of the difficulties arising due to the absence of specific funding and dedicated staff and has been making concerted efforts to obtain additional resources to enable it to carry out its functions under the AIE Regulations. In addition to drawing attention to the matter in the Annual Reports, the OCEI has been in correspondence with the relevant Government Departments since 2011 setting out its concerns and requesting dedicated funding and staff for the OCEI. By way of example, I beg to refer to extracts from recent Annual Reports for the OCEI which I have placed together and upon which marked with the letters and number "ED1" I have signed my name prior to the swearing hereof.
36. The submissions of the Ombudsman's Office to the Department of Public Expenditure and Reform on additional budgetary requirements for 2015 also set out the additional costs required to fund the OCEI. This included funding to cover the provision of two dedicated investigator posts which it had been determined would be required to allow for marked improvements in the level of service delivery to date.
37. By letter dated 23 December 2014, the Department of Public Expenditure and Reform formally sanctioned the filling of these two positions and an open recruitment process is now being organised. I beg to refer to a copy of the Department's letter dated 23 December 2014 upon which marked with the letters and number "ED2" I have signed my name prior to the swearing hereof. The job specification for the public competition is currently being finalised and the positions will be advertised in the coming weeks.
38. Aspects of the selection/recruitment process are outside the control of the OCEI as it is being handled by the Public Appointments Service. However, we are hopeful that the new staff will be in a position to commence work in or around May 2015 by the time the recruitment process has concluded and they have received the necessary training. This

development will mean that, for the first time, work on AIE appeals will be dealt with by dedicated staff rather than by a very small number of OIC staff having involvement in a few AIE appeals at any one time.

*The current status of the Applicant's appeal*

39. Dedicated staff will greatly assist the OCEI in the performance of its functions. However, it remains difficult to estimate when the backlog of AIE appeals will be cleared and the Applicant's appeal determined. There are 14 AIE appeals to be determined prior to the appeal lodged by the Applicant. This may not appear to be a significant number. However, the majority of AIE appeals are of a time-consuming nature due to factors such as the volume of records involved, complex legal and factual issues and delays in receiving information from public authorities. For example, the information the subject of the Applicant's request amounts to two banker's boxes of information involving approximately 950 records which will have to be assessed for the purposes of determining whether they are in fact within the scope of the request and, if so, whether they should be released under the AIE Regulations.

40. The OCEI regrets that it cannot give a guaranteed determination date for the Applicant's appeal. It assessed the Applicant's request for priority and did not consider that it was the type of case which could be expedited or given priority over those which had been lodged before it. However, the Commissioner is very mindful of the need to avoid delay and, as set out above, has made the case to the State for resources for the OCEI. Those resources have now been granted and, with these resources, the OCEI will be in a much better position to process the Applicant's appeal and other outstanding AIE appeals in an effective and timely manner.

41. I beg to refer to paragraphs 11 to 13 of the Affidavit of Tony Lowes in this respect which expresses a concern that it is unlikely that the Applicant's appeal will be determined before 2016 at the earliest. This appears to be based on a misunderstanding of the email of the OCEI dated 19 November 2014 as referred to in paragraph 11. The reference in the email to high priority cases from 2012 and 2013 includes the FOI reviews which were being given priority at that time as referred to in paragraph 33 above. Now that progress has been made on clearing the backlog of FOI reviews and additional

resources have been allocated to progress AIE appeals, the OCEI hopes to be in a position to determine the Applicant's appeal by the end of 2015.

Prayer

42. I say that at all times the First Named Respondent has acted in a bona fide manner and has sought to deal with the Applicant's appeal in as timely a manner as the resources available to the OCEI permit and also having regard to the lawful exercise of the discretion of the OIC in the allocation of resources including, as referred to above, the objective of determining all outstanding FOI review applications, made prior to 31 December 2013, by the end of 2014.

43. In the premises, on behalf of the First Named Respondent, I Pray this Honourable Court for an Order refusing the reliefs sought by the Applicant against the First Named Respondent.

Sworn by the said ELIZABETH DOLAN

(a) ~~who is personally known to me;~~ or, *ad.*

(b) who has been personally identified to me by *RACHEL MINCH*


who is personally known to me and who has certified to me ~~his~~/her personal knowledge of the Deponent; or

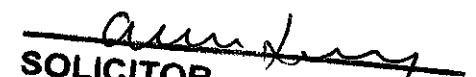
*ad.* (c) ~~the identity of the Deponent has been established by me by reference to a~~

~~containing a photograph of the Deponent;~~

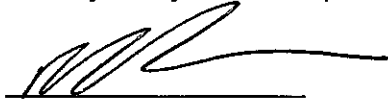
this *18<sup>th</sup>* day of February 2015 at

  
Deponent

  
Practising Solicitor

  
**SOLICITOR  
KILROYS SOLICITORS  
69 LOWER LEESON STREET<sup>9</sup>  
DUBLIN 2**

I hereby certify that the Deponent is personally known to me.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Filed on the                      day of    , 2015 on behalf of the First Named Respondent  
by Philip Lee, 7/8 Wilton Terrace, Dublin 2.

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