

**Appeals to the
Office of the Commissioner for
Environmental Information (OCEI)**

AIE Training - 19 October 2016
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Oifig an Choimisinéara um Fhaisnéis Comhshaoil
Office of the Commissioner for Environmental Information

Overview of Presentation

- The role and powers of the OCEI
- Some tips to help avoid unnecessary appeals
- The OCEI appeals process explained
- How the OCEI website can be a useful source of information

Introducing the OCEI

- OCEI was established by Article 12(1) in 2007
- The current Commissioner is Peter Tyndall (appointed December 2013)
- Article 12(2) provides that the Information Commissioner is also the Commissioner for Environmental Information
- He is also the Ombudsman
- These are all legally separate offices

Location of the OCEI

- OCEI is co-located with the Office of the Ombudsman and the Office of the Information Commissioner (OIC) at 18 Lower Leeson Street, Dublin 2, D02 HE97
- Our contact details are
Phone: +353-1-639 5689
Lo-call: 1890 253 238
Email: info@ocei.ie

The role of the Commissioner

- To review the internal review decisions of public authorities on appeal and to affirm, vary or annul such decisions
- To review AIE requests where a body contends that it is not a public authority under the AIE Regulations
- Where appropriate, to require public authorities to make environmental information available to an applicant

The Commissioner has no role in:

- Investigating whether (or how well) public authorities fulfil their Article 5 duties (e.g. the duty to maintain environmental information in a manner that is readily accessible and to ensure that the environmental information it holds is up-to-date and accurate, etc)
- Advising public authorities (or the public) on how to process AIE requests

Staff Resources

- The Commissioner is assisted by available staff of the OIC. Currently these are: 1 x senior investigator, 2 x investigators and the support staff of the OIC.
- The corporate services and IT staff of the Office of the Ombudsman also provide support.
- In June 2015, 2 x investigators were recruited specifically to work on OCEI appeals

Review Powers of the Commissioner

- To require a public authority to make environmental information available to him
- To require the public authority to attend before him for that purpose
- Where the public body is a body corporate, to require its chief officer to attend
- To examine, take and retain (for a reasonable period) copies of environmental information

Powers of the Commissioner article 12(6)

- To enter premises occupied by a public authority and take copies of any environmental information found or made available
- To refer any question of law arising in an appeal to the High Court for determination
- To deem an appeal to have been withdrawn if a public authority makes information available before the Commissioner has made a formal decision, and to waive fees in such cases

Avoiding unnecessary appeals

- Comply with Article 5 information management and dissemination obligations as far as possible
- If a member of the public requests information citing AIE, follow the Regulations – Review all aspects of article 7
- Give advice about rights and offer assistance –
- Seek to clarify requests which you consider “too general” - see article 7(8)
- Comply with deadlines
- Explain decisions

Avoiding unnecessary appeals

- In your decisions, show how you complied with Article 10, especially with regard to how you:
 - **Considered emissions**, where relevant
 - Considered each request individually
 - **Weighed the public interest**
 - Considered releasing information which can be separated from information to which articles 8 or 9 relate

The appeal process

A typical appeal follows 3 stages

1. Validation and Acceptance
2. Investigation
3. Conclusion, either by settlement, withdrawal or by formal decision

A very small minority of decisions result in appeals to the courts

Validation and acceptance

- OCEI requires appellants to establish the validity of an appeal – see article 6 and time limits generally
- OCEI will disregard any part of an appeal which involves a request for information which was not sought in the original AIE request

Validation and acceptance

- "Acceptance" does not mean that OCEI is satisfied that the body is a public authority or that the information requested is environmental information
- The Commissioner has discretion to admit late appeals

The acceptance process

OCEI will ask the public authority for copies of the decision-making records (i.e. the AIE request, the original decision, the request for internal review and the internal review decision), along with any other relevant correspondence, within 3 working days

“Deemed refusal”

- When there has been a “deemed refusal” of a request for internal review, OCEI will ask the Public Authority to notify both OCEI and the appellant of its position on the request
- If the appellant notifies OCEI (within 4 weeks of receipt of the PA’s position or the date on which it was due) that he/she is still dissatisfied, OCEI will resume processing the appeal

On acceptance

- OCEI will inform the parties that the case has been accepted
- OCEI will ask the public authority to provide it with a schedule of the subject records, together with copies of those records
- OCEI will invite the parties to make submissions within 3 weeks

The schedule of records

- OCEI suggests that a schedule should take the form of a table with six columns: record number; description of record (date, title, contents); number of pages; decision (grant, part-grant, refuse); AIE article justifying refusal; reason for decision
- In relation to the final two columns, note that all reasons for refusal must be grounded in the articles of the AIE regulations: FOI law does not provide a separate, free-standing basis for refusal

Submissions to OCEI

- Submissions can include such arguments of fact and law as the public authority sees fit
- Remember that there is a presumption in favour of disclosure
- Submissions provide an opportunity for PAs to
 - persuade the Commissioner that refusal was justified
 - ensure that sensitive information which could not be disclosed to the appellant is taken into account

Following acceptance by OCEI

- The case is allocated to an investigator
- Older cases are normally processed first
- Sometimes an appellant asks for their appeal to be treated as a priority: In other words, they ask if their case can “jump the queue”
- All such requests are considered. To be successful there must be a specific pressing reason
- Cases are only rarely given priority status

Investigation

On being assigned to a case, an investigator will:

- Inform the public authority of that fact
- Liaise with the public authority (preferably through its designated AIE Officer) as necessary

Throughout the investigation, he/she will be open to the possibility of settlement following full or partial disclosure

The investigator:

- Will consider 3rd parties and consult them if appropriate
- May request further information from the parties
- Will not normally exchange submissions, and will never do so without consent

The investigator:

- Will notify the parties of any material issues arising, and invite submissions
- May provide a view of the case on an informal basis: any such view should not to be taken to be the opinion of the Office / Commissioner
- Will provide an opportunity for comment if any view is expressed
- Is likely to ask for a written statement describing search efforts and results, when a public authority says that certain information is not held by or for it

Investigation

- If there is a settlement, the appeal is concluded without a binding decision
- The settlement may be referred to in OCEI's annual report
- If there is no settlement or withdrawal, the investigator submits a report to a senior investigator

Review

The Commissioner reviews the public authority's decision, taking account of all relevant material, including submissions, analysis and recommendations

Decision

- The Commissioner makes a decision
- The parties are provided with written copies of the decision
- Decisions are published at www.ocei.gov.ie, usually within a week from the date of decision

Requirement to make information available

- Where appropriate, the Commissioner will state in his decision that he *requires* a public authority to make certain environmental information available to the applicant
- Article 12(7) provides that a public authority must comply within 3 weeks of receipt

Appeal to the High Court

- Any party to an appeal or any other person affected by the decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given
- Note that the time-window for an appeal runs for five weeks longer than the time allowed for compliance with a decision

Enforcement of a requirement to make information available

- If a public authority fails to comply with a requirement to make information available within 3 weeks of receipt of a decision, the Commissioner may apply to the High Court for an order directing the public authority to comply
- OCEI itself never releases documents to appellants

What happens to records given to OCEI on the conclusion of an appeal?

OCEI asks the public authority whether it would prefer the documents to be returned or destroyed when the time-window for appeal has passed




