Access to Information on the Environment (AIE) in Ireland

Update on the Administrative Review of AIE Decisions by the Office of the Commissioner for Environmental Information (OCEI)

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The AIE Regulations

- European Communities (Access to Information on the Environment) Regulations 2007 to 2018 (the AIE Regulations)

- Secondary rather than primary legislation; therefore, strictly bound by the Directive


The OCEI

- Established by Article 12 of the AIE Regulations in May 2007
  - A fee of €50 generally applies
- Initially intended to fulfil the Article 6(2) review function under the AIE Directive, but question of the required “expeditious procedure” remains undecided
  - Difficult to manage expectations: best of both worlds desired (despite internal review procedure)
- The role of Commissioner is assigned to the holder of the Office of the Information Commissioner (OIC)
  - The Commissioner is also the Ombudsman
  - Previously Emily O’Reilly, the current European Ombudsman
  - Current office holder: Peter Tyndall
- The OCEI is a legally separate & independent office, but “assisted by” the staff and resources of the OIC
Functions of the Commissioner

- To review decisions of public authorities
  - *De novo* approach taken
- To affirm, vary or annul such decisions, specifying the reasons
- Where appropriate, to require the public authority to make the requested environmental information available to the applicant
- The Commissioner’s decisions (available on our website) are final & binding, but subject to appeal to the High Court on a point of law
  - Alternatives: settlements, withdrawals & deemed withdrawals
- If the public authority fails to comply, the Commissioner may apply to the High Court for an order directing compliance
- The OCEI has no other role (e.g., no role in providing guidance, or in promoting public awareness, or in reviewing the provision of environmental information generally by public authorities)
Judgments of the Irish Courts

- An Taoiseach v Commissioner for Environmental Information [2010] IEHC 241
- Minch v Commissioner for Environmental Information & Anor [2016] IEHC 91
- Minch v Commissioner for Environmental Information & Anor [2017] IECA 223
- National Asset Management Agency v Commissioner for Environmental Information [2013] IEHC 86
- National Asset Management Agency v Commissioner for Environmental Information [2015] IESC 51
- Redmond v Commissioner for Environmental Information & Anor [2017] IEHC 827
- Many others in the pipeline (very costly)
Total number of AIE requests

- Increase in the number of AIE requests being made to public authorities year on year from 2013 to 2016 with decline in 2017 (Government Departments/Bodies & Local Authorities only)

"Total number of AIE requests to public authorities 2013 – 2017 (population ca. 4,800,000)"
AIE appeals to the OCEI

- Increase in appeals year on year from 2014 to 2016 (drop in fee from €150 to €50 in 2014)
- The OCEI received 52 new appeals from 16 appellants in 2017; 48 new appeals from 24 appellants in 2018 (rate of appeal to the OIC: <2%)
Challenges include . . .

- Difficulties with interpretation, including the basics:
  - Scope of “environmental information”, especially “measures . . . and activities”
  - What is a “public authority” (or what is not)?

- 12.5% of the Commissioner’s decisions in 2018 were appealed to the High Court
  - 10% (four of the five) appeals of the Commissioner’s decisions concern matters of interpretation

- Potential conflict with Irish constitutional principles
  - Cabinet confidentiality
  - Presidential immunity (hence S.I. No. 309 of 2018)

- Lack of awareness by public authorities of obligations & confusion with FOI

- Failure to meet statutory deadlines & poor decision-making generally

- Conflicting expectations among applicants

- Questions over third party rights & the complexity of such cases
Drop in the number of cases on hand

- The number of appeals on hand at the end of the year dropped for the first time since 2012 in 2018
- The OCEI had 36 valid appeals on hand as of 31 December 2018
Increase in the number of cases closed

- The OCEI closed 54 cases in 2018 - more cases than were closed in any other year since its establishment in 2007
- The Commissioner made 40 formal decisions in 2018; this too is more than in any other year since 2007
The only alternative

- Average length of judicial review proceedings before the High Court: 376 days (according to the Courts Service Annual Report 2017)

- Court of Appeal waiting times
  - Generally: 20 months
  - Fast tracked short appeals: 10 months

- Just an indication of the costs:
  - €218,000+ in solicitor fees alone in 2018 on 18 OIC cases (most without judgments)
  - *NAMA v. Information Commissioner*: €203,000 in legal fees (solicitors & barristers) for the OCEI alone
    - OCEI decision in Sept. 2011; High Court judgment in Feb. 2013; Supreme Court judgment in June 2015
  - *Minister for Communications, Energy & Natural Resources v Information Commissioner* [2017] IEHC 222: €94,500+ in solicitor fees over two years (2016 & 2017); now on appeal to the Court of Appeal
    - OIC decision in Nov. 2015; High Court judgment in April 2017; Court of Appeal hearing in Feb. 2019
For further information

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