

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

Fourth meeting of the Task Force on Access to Information  
under the Aarhus Convention

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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
- The Scope of the definition of Environmental Information
- Types of Public Authorities
- Access to Information on Emissions

# The OCEI

- Independent statutory appeals body
- OCEI was established in 2007
- The current Commissioner is Peter Tyndall (appointed December 2013)
- The Commissioner for Environmental Information is also the Information Commissioner the Ombudsman
- Legally separate office

# 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@o cei.ie](mailto:info@o cei.ie)

# The role of the Commissioner

- To independently review decisions of public authorities on requests for environmental information (1<sup>st</sup> Pillar Aarhus as transposed)
- Can affirm, vary or annul such decisions, and can direct that access be provided to information.
- The Commissioner's decisions are binding, can be appealed on a point of law to the High Court
- Carries out reviews in threshold jurisdiction cases

# 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

# Definition of “Environmental Information” – Article 2(3)

- 3. “Environmental information” means any information in written, visual, aural, electronic or any other material form on:
- (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
- (c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

# Directive 2003/4/EC

1. "Environmental information" shall mean any information in written, visual, aural, electronic or any other material form on:
  - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
  - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
  - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
  - (d) reports on the implementation of environmental legislation;
  - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
  - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).

# Scope of the Definition

- Broad scope
- “any information...on”
- “activities and measures”
- “affecting or likely to affect”

Eva Glawischnig v Bundesminister für soziale Sicherheit und  
Generationen - C-316/01

25. "Directive 90/313 is not intended, however, to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision. "

# Advocate General Kokott's Opinion - Ville de Lyon v Caisse des dépôts et consignations - Case C-524/09

- “France and the Caisse des dépôts et consignations, however, counter that view by arguing, correctly, that transaction data can only show whether the emission allowance market is functioning. That market is indeed part of a system which as a whole serves climate protection, but to what extent the market contributes to achieving that **aim cannot be seen** from the transaction data. Article 2(1)(c) of the Environmental Information Directive does not therefore apply.”
- “At 34 “....information on the right to create such a factor, namely greenhouse gas emissions, is indirectly also information about that factor.”

# Aarhus Convention Implementation Guide

- Page 37
- “... where information is concerned, efficiency is served not by imposing a threshold, but by including everything that is relevant. Thus, ‘significance’ is inappropriate in the definition of ‘environmental information’.”

# ***Cieslik v Information Commissioner, Porsche Cars and others***, the UK Information Tribunal (First Tier) Decision of 4 August 2015

“...it is clear to anyone that in order to test the issue complained of (i.e. the vehicle throttle response under specific conditions) the vehicle must be driven, or at the very least the engine must be running.

Consequently, by conducting the safety test:

- the DVSA caused emissions by driving the vehicle (r.2(1)(b));
- at the very least those emissions affected the air (r.2(1)(a));
- they did so through a measure (a safety test) which was likely to affect the elements (air) (r.2(1)(c));

62. From this analysis it is clear that even if the Tribunal were to reject the argument that the safety test was undertaken due to an environmental concern, **the method by which it was undertaken was itself an interaction with the environment and thus caught by the definition of environmental information.**

# OCEI Decisions

- CEI/11/0001 Gavin Sheridan and the Central Bank
  - In keeping with the ECJ ruling in the *Glawischnig* case, to constitute environmental information, information must fall within at least one of the 6 categories set out in the definition
- CEI/12/0004 Gavin Sheridan and Dublin City Council
  - It is not sufficient for the information requested to simply be *related to* one of the 6 categories to constitute “environmental information”

# OCEI Decisions

CEI/14/0011 Jim Redmond and Coillte

- information on the sale of afforested land was not environmental information because, in the circumstances, it could not be said that the sale was a “measure or activity” *likely to affect* elements of the environment

# OCEI Decisions

CEI/13/0006 Stephen Minch and the  
Department of Energy, Community and  
Natural Resources

- The request was for report entitled "Analysis of options for potential State intervention in the roll out of next-generation broadband".
- Found: the information did not fall into any of the 6 categories. Therefore it was not environmental information.

# Definition of “Public Authority” – Article 2, Paragraph 2 - Aarhus Convention

“Public authority” means:

- (a) **Government** at national, regional and other level;
- (b) Natural or legal persons performing **public administrative functions** under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, **under the control** of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

# Exemption of legislative bodies

## **Flachglas Torgau GmbH v Bundesrepublik**

**Deutschland Case C-204/09** - the option given to Member States of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised when the legislative process in question has ended.

# **Case C-279/12 Fish Legal and Emily Shirley v Information Commissioner and Others**

- Three primary types of public authority (a-c)
- Three corresponding tests from CJEU

- (a) Government at national, regional and other level;
- All legal persons governed by public law which have been set up by the State and which it alone can decide to dissolve.

# Special powers test

- “(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;”
- Entities vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

# Control test

(c) Any other natural or legal **persons** having public responsibilities or functions, or providing public services, in relation to the environment, **under the control** of a body or person falling within subparagraphs (a) or (b)

(c) does not apply where a body does not determine in a genuinely autonomous manner the way in which it carries out environmental functions since a public authority covered by (a) or (b) is in a position to exert decisive influence on their action in the environmental field.

# Applications of “Fish Legal”

- National Asset Management Agency v Commissioner for Environmental Information -  
– 2015 IESC 51 – State established financial body
- Fish Legal v ICO [2015] UKUT 52 (AAC) –  
applies and interprets CJEU tests
- Dr Edward Fahy v Irish Fish Producers Organisation CEI/15/0011 – Consideration of powers under EU Regulation 1379/2013

# Article 4, Paragraph 4 Aarhus Convention

- Relationship between grounds for refusal and information on emissions into the environment.
- **Case T-545/11 (General Court, has been appealed) - Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission**
- Emissions information can create an “irrebuttable presumption in favour of disclosure” in some circumstances
- Where applicable it suffices that the information requested relate in a **sufficiently direct manner** to emissions into the environment.

# OCEI Decisions

CEI/13/0001 Friends of the Irish Environment and the Department of Agriculture, Food and the Marine

- The request related to information on emissions of chemical therapeutants into marine aquaculture cages
- The Commissioner found that commercial or industrial confidentiality could not justify refusal where emissions into the environment occurred.

# OCEI Decisions

## CEI/14/0013 Marine Terminals Limited and Dublin City Council

- The request related to noise emissions
- However, the information held did not say anything about noise emissions: therefore it did not relate in a sufficiently direct manner to emissions (following the *Stichting Greenpeace Nederland case*)
- Therefore the “emissions into the environment” provision did not apply