University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Workshop on Access to Information on the Environment

School of Law, University College Cork

12 June 2015

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Convenor's Reflections on Key Points

BACKGROUND AND CONTEXT

UCC School of Law hosted a workshop on Access to Information on the Environment on Friday, 12 June 2015. The workshop brought together invited participants including: academic lawyers from Ireland, England and Scotland; the Office of the Commissioner for Environmental Information, (Dublin); the Information Commissioner's Office (ICO), UK; the Office of the Scottish Information Commissioner; the Department of Environment, Community and Local Government; the Environmental Protection Agency; and leading information rights advocates. A list of the participants is appended. The workshop provided a forum to discuss issues arising in implementation of the right of access to environmental information and how these issues might be addressed. It also aimed to facilitate an exchange of knowledge and experience on information law, policy and practice and to develop new networks with a view to identifying further opportunities for collaboration and future research projects.

The workshop was part of a larger research project *Delivering Access to Environmental Information: Old Challenges, New Approaches* funded by an Irish Research Council *New Foundations* Grant 2014/15. The overall aim of this research project is to increase the visibility of environmental information rights and to improve implementation of international and EU law in this increasingly specialised field. The material presented here draws on insights gained during the workshop discussions and takes account of significant developments in the jurisprudence at both national and European Union (EU) level since the workshop took place in June 2015. It aims to provide an overview of a selection of topical issues in environmental information law and practice with particular reference to Ireland.

The material was prepared by Áine Ryall, the workshop convenor, and it reflects her views.[1] It is intended as a discussion document, aimed at focusing attention on particular issues that are vital to effective implementation of the right of access to environmental information.

The relevant Irish law is found in the European Communities (Access to Information on the Environment) Regulations 2007 to 2014 (the AIE regulations).[2] These regulations aim to implement Directive 2003/4/EC[3] on public access to environmental information and the relevant provisions of the Aarhus Convention[4] dealing with information rights and access to justice to enforce those rights. The Office of the Commissioner for Environmental Information, established on 1 May 2007, deals with appeals concerning requests for access to environmental information.[5] The current Commissioner, Mr Peter Tyndall, was appointed in December 2013. The first Commissioner for Environmental Information, Ms Emily O'Reilly, served from May 2007 until her appointment as European Ombudsman in December 2013.

SELECTED ISSUES ARISING IN PRACTICE

"Environmental information"

The concept of "environmental information" is defined in broad terms in the Aarhus Convention (Article 2(3)) and Directive 2003/4/EC (Article 2(1)). The AIE regulations follow the definition set down in the directive (Article 3(1)). According to the Aarhus Convention Implementation Guide:

> Article 2(3) [of the Convention] does not define "environmental information" in an exhaustive manner but rather breaks down its scope into three categories and within each category provides an illustrative list. These lists are likewise non-exhaustive, and so they require a degree of interpretation on the part of the authorities in a given case. The clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation.[6]

Notwithstanding the broad definition, determining whether particular information falls within the scope of the definition of "environmental information" is challenging in practice. Broadly drawn

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[1] With thanks to Sean Whittaker, PhD candidate and IRC Government of Ireland Scholar, School of Law, UCC for research assistance.

[2] Unofficial consolidated text of the AIE regulations: http://environ.ie/en/Environment/AccesstoInformationontheEnvironment/Legislation/.

[3] Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26.

[4] United Nations Economic Commission for Europe (UN ECE) Convention on *Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* 1998 reprinted in 38 ILM 517 (1998) text available at: http://www.unece.org/env/pp/treatytext.html.

[5] The Commissioner's decisions are published online here: http://www.ocei.gov.ie/en/Decisions/Decisions-List/.

[6] *The Aarhus Convention: An Implementation Guide* (2nd ed, 2014) p51.

definitions lead inevitably to grey areas at the margins. The available rulings from the Court of Justice provide fairly limited guidance on the scope of the concept of "environmental information" (Case C-321/96 *Mecklenburg* EU:C:1998:300, Case C-316/05 *Glawischnig* EU:C:2003:343 and Case C-524/09 *Ville de Lyon* EU:C:2010:822). Given the uncertainty surrounding the definition of "environmental information", it is surprising that there have not been more references for preliminary rulings seeking specific guidance from the Court of Justice.

A public authority seeking to justify a refusal to release information may argue that the information in question is not "environmental information", thereby raising a preliminary issue as to whether the AIE regulations apply. In Ireland, the Commissioner for Environmental Information has considered the definition of "environmental information" in this context on a number of occasions.[7] In CEI/2013/0006 *Minch and Department of Communications, Energy and Natural Resources* (18 December 2014), the Commissioner determined that a report concerning technical and financial analysis of options for potential State intervention in the roll out of next-generation broadband was not "environmental information".[8] The requester appealed this decision to the High Court and judgment is pending at the time of writing. It is hoped that the High Court judgment will provide valuable guidance on the definition of "environmental information" that can be applied in future cases. *Minch* is the first occasion on which the High Court has been called on to consider the definition of "environmental information" under the AIE regulations.

"Public authority"

The concept of a "public authority" is defined in broad terms in the Aarhus Convention (Article 2(2)) and Directive 2003/4/EC (Article 2(2)). Notwithstanding the broadly drawn definition, identifying the scope of the concept of a "public authority" remains challenging in practice. This is especially the case where government subcontracts what were traditionally public functions to semi-State commercial bodies and / or private bodies. According to the Aarhus Convention Implementation Guide:

> The definition is broken down into three parts to provide as broad coverage as possible. Recent developments in privatised solutions to the provision of public services have added a layer of complexity to the definition. The Convention tries to make it clear that such

[7] See, e.g., CEI/11/0001 *Sheridan and Central Bank of Ireland* (26 March 2012) and CEI/12/0004 *Sheridan and Dublin City Council* (20 December 2013). In one of his most recent decisions, CEI/2013/0008 *Cassidy and Coillte* (1 October 2015), the Commissioner determined that maps showing the location of lands held by Coillte (the national forestry service), where Element Power Ltd is permitted to conduct test surveys with a view to an option to lease part of those lands as sites for wind farms, contained "environmental information" within the meaning of the AIE regulations.

[8] This report was commissioned by the Department in the context of the National Broadband Plan *Delivering a Connected Society* published in August 2012.

> innovations cannot take public services or activities out of the realm of public information, participation or justice.[9]

The ruling of the Court of Justice in *Fish Legal*[10] provides valuable guidance on the criteria for determining whether certain entities can be classified as legal persons which perform "public administrative functions" under national law as per Directive 2003/4/EC, Article 2(2)(b).[11] The Court confirmed that the key consideration here is whether the entity is "vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law."[12] The Court also provided a measure of clarification as regards the criteria for determining whether an entity is "under the control of" government (or other public administration) within the meaning of Article 2(2)(c) of the directive. The Court ruled that such control will exist if the entity in question does not determine "in a genuinely autonomous manner" the way in which it provides the public services in question.[13] Given the complex issues that can arise in this context due to the various powers that may be vested in entities that provide public services, and the sharp differences in the degree of control exercised over such entities by government, further references for preliminary rulings are likely to be required to bring a greater degree of certainty to this fundamental issue.

It is notable that the Commissioner has decided five appeals where the entities from whom information was requested denied they were "public authorities". In four of these cases, the Commissioner ruled against the public authorities and determined that *Raidio Teilifís Éireann* (the national public service broadcaster),[14] Anglo Irish Bank,[15] the National Assets Management Agency (NAMA)[16] and *Bord na Móna*[17] (a semi-state company) were public authorities. In the fifth case, the Commissioner ruled that the Courts Service of Ireland was excluded from the definition because it was acting in a judicial capacity.[18] NAMA brought an appeal against the Commissioner's

[9] *The Aarhus Convention: An Implementation Guide* (2nd ed, 2014) p46.
[10] Case C-279/12 *Fish Legal, Emily Shirley v The Information Commissioner, United Utilities, Yorkshire Water and Southern Water* EU:C:2013:853.
[11] ibid, paras 51 and 52.
[12] ibid, para 52.
[13] ibid, para 68.
[14] CEI/09/0015 *Pat Swords and Raidio Teilifís Éireann* (10 May 2010).
[15] CEI/10/0007 *Gavin Sheridan and Anglo Irish Bank* (1 September, 2011).
[16] CEI/10/0005 *Gavin Sheridan and National Asset Management Agency* (13 September 2011). NAMA was established in December 2009 as one of a number of responses by the Irish Government to try to address the problems which arose in the Irish banking sector due to excessive lending for the purpose of purchasing property during the so-called "Celtic Tiger" years.
[17] CEI/12/0003 *Andrew Jackson and Bord na Móna* (23 September 2013). *Bord na Móna* is a semi-State company created under the Turf Development Act 1946 to develop Ireland's peat resources in the national interest.
[18] CEI/08/0005 *Peter Sweetman and Courts Service* (5 December 2008).

determination that it was a "public authority". In *National Asset Management Agency (NAMA) v Commissioner for Environmental Information,*[19] a judgment delivered on 23 June 2015, the Supreme Court concluded that NAMA was indeed a public authority (although it found that Commissioner O'Reilly's line of reasoning in reaching her conclusion on the "public authority" point was flawed and could not be supported). Relying on the Court of Justice's "authoritative interpretation" of Directive 2003/4/EC in *Fish Legal*, O'Donnell J determined that it was "clear" that NAMA, a body established under statute, was a public authority exercising public administrative functions.[20] As per *Fish Legal*, the fact that NAMA was vested with special powers beyond those assigned to persons governed by private law was determinative.[21] Throughout his judgment O'Donnell J emphasised that the AIE regulations had to be examined in their international and EU context and fell to be interpreted in light of the scope and meaning of the relevant provisions of Directive 2003/4/EC and the Aarhus Convention.[22] The NAMA judgment confirms the importance of the *Fish Legal* ruling; O'Donnell J indicated that in the absence of this "authoritative" guidance from the Court of Justice, he would have considered it necessary to refer a question to Luxembourg as to whether a body such as NAMA was a public authority for the purpose of the directive because the definition provided in Directive 2003/4/EC "is unclear".[23]

Exceptions to the right of access to environmental information

It is notable that the Commissioner has delivered a series of recent decisions concerning the application of a number of the exceptions to the right of access to environmental information. In CEI/14/0007 *Tony Lowes, Friends of the Irish Environment and the Department of Agriculture, Food and the Marine* (13 July 2015), the Commissioner found that the Department was not entitled to rely on the exception protecting material in the course of completion or unfinished documents or data, or the exception for internal communications, to refuse to release the information requested. The information at issue involved preliminary reports and related documentation concerning storm damage to fish farms and the subsequent investigation into the loss of a very significant number of farmed salmon. As regards the public interest served by disclosure under AIE, the Commissioner observed:

> [I]t is important to have regard to the purpose of the AIE regime as reflected in Recital (1) of the Preamble to the Directive: "Increased public access to environmental information and the dissemination of such information contribute to greater public awareness of environmental matters, a free exchange of views, more effective participation by the public

[19] [2015] IESC 51.
[20] ibid, para 50.
[21] ibid.
[22] ibid, paras 1, 10-11, 43 and 46.
[23] ibid 50.

> in environmental decision-making and, eventually, to a better environment." Thus, the AIE regime recognises a very strong public interest in maximising openness in relation to environmental matters so that an informed public can participate more effectively in environmental decision-making. I also consider that there is a very strong public interest in openness and accountability in relation to how the Department and Marine Institute carry out their functions under the relevant legislation governing the aquaculture industry.

In CEI/14/0013 *Marine Terminals Ltd and Dublin City Council* (28 August 2015), the Commissioner found that the release of information concerning planning complaints, in the context of enforcement of planning law, would adversely affect the interests and the confidentiality of personal information of the person who had made the complaints to the planning authority.

In CEI/13/0008 *Oliver Cassidy and Coillte* (1 October 2015), the Commissioner considered the exemptions in the AIE regulations concerning: the confidentiality of proceedings of a public authority; commercial or industrial confidentiality; material in the course of completion; internal communications; and the interests of a person who has voluntarily supplied the information requested. The Commissioner determined that Coillte was not entitled to rely on any of these exceptions to justify its refusal to disclose certain maps identifying the location of particular lands relating to potential wind farm development. In the context of the exception concerning material in the course of completion, the Commissioner noted that:

> [T]he fact that environmental information might be misleading is not a justification for refusal to provide access. It would, in any case, be open to Coillte, when releasing information which it feared might be misleading, to provide explanatory information to help recipients of the information to understand its limitations and thereby avoid being misled.

The Commissioner also took the opportunity afforded by this appeal to make an important observation on the public interest test:

> While Articles 8 and 9 [of the AIE regulations] allow public authorities to refuse a request in certain circumstances, refusal is only permitted following a public interest test. Contrary to what appears to have happened in this case, a public authority is not mandated to refuse, and does not have a discretion to refuse, access to information under Articles 8 or 9 without first conducting a public interest test.

It is disappointing to find that, over eight years after the coming into force of the AIE Regulations, it is still necessary for the Commissioner to remind public authorities that the overarching public interest test must be applied in every case where an authority seeks to engage an exception to the right of access.

Charges for supplying environmental information

Article 5(2) of Directive 2003/4/EC provides that public authorities may charge for "supplying" any environmental information, but the charge must not exceed a "reasonable amount". Under Article 5(1), access to any public registers or lists established and maintained by the public authority, and examination *in situ* of the information requested, must be free of charge. A recent ruling from the Court of Justice in *East Sussex*,[24] delivered on 6 October 2015, provides important guidance on the scope of a public authority's discretion to charge for the supply of information. The specific questions at issue in this reference were: whether the costs of maintaining a database used for supplying environmental information, and the overheads attributable to staff time spent on keeping the database and on answering individual requests for information, could be taken into account when fixing a charge. The Court noted that under Article 5(2) the imposition of a charge is subject to two conditions: first, all of the factors on the basis of which the charge is calculated must relate to "supplying" the information requested and second, the total amount of the charge must not exceed a "reasonable amount".[25] The Court determined that the cost of maintaining a database used by the public authority for answering requests for environmental information may not be taken into consideration when calculating a charge for "supplying" environmental information.[26] The Court considered that the cost of "supplying" information which may be charged under Article 5(2) included, not only postal and photocopying costs, but also the costs attributable to the time spent by the public authority's staff on answering an individual request for information, which includes "time spent on searching for the information [search and retrieval] and putting it in the form required."[27] The Court was influenced in particular by recital 18 in the preamble to the directive which states that "as a general rule, charges may not exceed *the actual costs* of producing the material in question" (author's emphasis).[28] It followed from this statement, in the Court's view, that overheads, properly taken into account, may in principle be included in the calculation of the charge, but only to the extent that they are attributable to a cost factor falling within the "supplying" of environmental information.[29] On the other hand, staff time spent on the establishment and maintenance of a database used to answer requests for information could not be included when calculating the charge.[30]

[24] Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656.
[25] ibid, para 29.
[26] ibid, para 37.
[27] ibid, para 39.
[28] ibid para 40.
[29] ibid.
[30] ibid, para 41.

Recalling its earlier ruling in *Commission v Germany*,[31] the Court confirmed that any interpretation of the expression "reasonable amount" that may have a deterrent effect on persons wishing to obtain environmental information, or that might restrict their right of access to such information, must be rejected.[32] In order to assess whether a charge made under Article 5(2) has a deterrent effect, account must be taken of both the economic situation of the person seeking the information and of the public interest in protection of the environment.[33] In other words, the assessment involves both a subjective assessment of the person's economic situation *and* an objective analysis of the amount of the charge. In the words of the Court, "the charge must not exceed the financial capacity of the person concerned, nor in any event appear objectively unreasonable."[34] The net result of this line of analysis is that the charges levied in a particular case must not appear unreasonable to the public, having regard to the public interest in protection of the environment.[35] Subject to verification by the referring tribunal, the Court indicated that the charges at issue in the present case, (where the total charges involved amounted to approx €23 and had to be reduced to exclude the costs associated with the establishment and maintenance of the database), did not exceed what is reasonable.[36]

While the Court's ruling provides welcome clarity on public authorities' discretion to charge for supplying information, there is a danger that allowing authorities to include the cost of staff time spent on answering an individual request for information when calculating the charge will discourage requests for access to environmental information. Even a small charge has the potential to act as a deterrent, particularly in the case of environmental NGOs who may seek access to information on a regular basis. There is also a danger that poor records management by public authorities may lead to higher search and retrieval costs which could be passed on to the public, although the "reasonable" charge threshold must be respected in all cases.

The outcome in *East Sussex* serves to highlight the importance of public authorities' obligations under Article 7 of Directive 2003/4/EC to organise and disseminate environmental information actively and systematically, in particular by electronic means, where available. Where public authorities deliver on their active dissemination obligations, there should be less need for the public to make requests for access to environmental information and the issue of charges should not arise, at least in cases where information is made available online.

[31] Case C-217/97 *Commission v Germany* EU:C:1999:395.
[32] Case C-71/14 *East Sussex County Council v Information Commissioner, Property Search Group and Local Government Association* EU:C:2015:656 para 42.
[33] ibid, para 43.
[34] ibid.
[35] ibid, para 44
[36] ibid, para 45.

Dedicated resources for Office of the Commissioner for Environmental Information

It is well known that, traditionally, the Office of the Commissioner for Environmental Information was starved of resources. Predictably, this state of affairs led to unacceptably long delays in processing appeals and resulted in sharp criticism of the Commissioner's office from environmental NGOs and others for failure to carry out its functions in a timely manner. In CEI/12/0005 *Pat Swords and Department of the Environment, Community and Local Government* (20 September 2013), the previous Commissioner (Ms Emily O'Reilly) remarked that the delays in processing appeals are "arguably not in keeping with the state's obligations under the Aarhus Convention".

Remarkably, given Ireland's obligations under international and EU environmental law to provide an effective, timely remedy in environmental information disputes, the Commissioner's office has only recently been allocated specific funding from the State. Previously, the office was forced to rely entirely on the resources that could be made available to it from the Office of the Information Commissioner which was established in 1997 under Ireland's Freedom of Information (FOI) legislation.[37] It was this lack of dedicated funding for dealing with environmental information appeals that led directly to the unacceptable delays in processing appeals. It is therefore heartening to see that there have been significant and very welcome developments on the resources front in recent months. Following the allocation of dedicated resources to the Office of the Commissioner for Environmental Information, two new investigators were appointed in summer 2015 and progress is being made to deal with the current backlog of appeals. It is promising to see that in the period July to October 2015, the Commissioner delivered nine appeal decisions. This compares with only one appeal decision published in 2014. A number of the recent appeal decisions address important practical matters and confirm the vital importance of the Commissioner's role in developing the AIE jurisprudence and providing guidance for future cases.

Interaction between FOI and AIE

Unlike the situation in the United Kingdom, the FOI and AIE regimes in Ireland are legally separate systems that operate in parallel. The result is that in Ireland it is possible for a requester to seek access to environmental information under *both* FOI and AIE. The Commissioner recently observed that the fact that FOI and AIE "occupy the same space in law" has created "inevitable confusion" in

[37] The Freedom of Information Act 1997 (as amended) was repealed and replaced by the Freedom of Information Act 2014.

practice and has called for a more integrated approach.[38] The previous Commissioner also advocated for greater integration between the two access regimes.[39] While the Freedom of Information Act 2014, section 12(7) provides that an FOI body may advise a person who made an FOI request that records may be accessed under the AIE regulations or the Re-Use of Public Sector Information Regulations,[40] there is currently no automatic default mechanism for a request to be dealt with by way of another access regime. In such cases, it is necessary for the person seeking access to make a new request under the appropriate access regime.

Preliminary issues of jurisdiction and delay

The AIE regime is only engaged when the request for access concerns "environmental information" and the body from whom the information is sought is a "public authority". The Commissioner has been called on to deal with a considerable number of AIE appeals concerning preliminary or threshold matters of jurisdiction where an organisation denies that it is a "public authority" and / or refuses to accept that the information requested is "environmental information". If the Commissioner determines that the request does indeed fall within the scope of the AIE regulations, the matter is then remitted to the public authority in question to process the request under the terms of the regulations. A further appeal to the Commissioner may prove necessary should the requester be dissatisfied with how the public authority subsequently deals with the request following remittal, thus leading to further delay in bringing a particular case to a conclusion. Recent developments in the case law concerning the definition of "public authority" and "environmental information" should go some way towards reducing the scope for disputes on these preliminary issues, but there will still be gray areas and an element of delay as a result of remittal is inevitable. It is to be hoped that the dedicated resources made available to the Commissioner's office in recent months will lead to reduced timeframes for processing appeals, including in cases involving preliminary issues of jurisdiction.

AIE guidance notes in need of review and revision

The AIE regulations provide that the Minister for the Environment, Community and Local Government may publish guidelines in relation to implementation. Public authorities are required to have regard to any such guidelines in the performance of their functions under the AIE regulations.

[38] "Access to Information on the Environment: Recent Developments and Future Trends" speech by Commissioner for Environmental Information Peter Tyndall at Meeting of Irish Environmental Law Association, 13 October 2015.

[39] Lecture by Commissioner for Environmental Information Emily O'Reilly at Meeting of Irish Environmental Law Association, 15 January 2008.

[40] SI No 279 of 2005 as amended.

The current AIE guidance notes published by the Department of the Environment, Community and Local Government date from May 2013 and are now significantly out of date.[41] The guidance notes need to be revised to reflect the amendments made to the AIE regulations in 2014, as well as new developments in the jurisprudence at national and EU level. It is notable that the Information Commissioner's Office (ICO), UK and the Office of the Scottish Information Commissioner publish guidance on specific aspects of the environmental information regimes in those jurisdictions.[42] A similar approach, whereby sets of guidance notes are produced that focus in detail on specific practical issues, could be considered for Ireland. As things stand under the AIE regulations, the task of developing and publishing guidance is assigned to the Minister for the Environment, Community and Local Government and not the Commissioner's office.

Scope of the Commissioner's jurisdiction

Under the AIE regulations, the Commissioner's jurisdiction is limited to dealing with admissible appeals. The office is not given any oversight or enforcement role as regards the operation of the AIE regime generally. For example, the Commissioner has no role in enforcing the various obligations created in Article 5 of the AIE regulations concerning the actions that public authorities must take to support the public in exercising AIE rights.[43] Nor does the Commissioner have jurisdiction to investigate poor AIE practice by public authorities outside of the formal appeals process. Integrating AIE and FOI would ensure that AIE has the benefit of the general oversight and enforcement role that the Information Commissioner currently fulfils in the context of FOI.

Lack of up to date, reliable data on AIE activity

The most recent published data on AIE activity in public authorities is from 2013 and is incomplete.[44] The only other official source of AIE data is the information on appeals published by the Commissioner's office in its Annual Reports and on its website. The office received 18 appeal applications in 2014. The FOI and Environmental Information Regulations (EIR) database and statistics portal operated by the Office of the Scottish Information Commissioner since April 2013

[41] *European Communities (Access to Information on the Environment) Regulations 2007 to 2011: Guidance for Public Authorities and others on implementation of the Regulations* (May 2013) http://environ.ie/en/Legislation/Environment/Miscellaneous/FileDownLoad,30001,en.pdf.

[42] See, for example: ICO, UK, *Charging for environmental information (regulation 8)* Version 1.4, 2015: https://ico.org.uk/media/for-organisations/documents/1627/charging-for-environmental-information-reg8.pdf and Office of the Scottish Information Commissioner *"What is environmental information?"* (24 February 2015): http://www.itspublicknowledge.info/Law/EIRs/WhatIsEnvironmentalInformation.aspx.

[43] On this point see, for example, CEI/14/0001 *Marcus Dancey and An Bord Pleanála* (24 July 2015).

[44] http://environ.ie/en/Publications/StatisticsandRegularPublications/AccesstoInformationontheEnvironment.

provides an interesting model of data collection and publication.[45] The user-friendly, online data entry system, through which public authorities self-report their statistics to the Commissioner's office on a quarterly basis, is especially noteworthy as a potential model for Ireland.

Promoting implementation of AIE obligations among public authorities

There is no AIE equivalent of the sophisticated support structure that is in place for FOI. The leadership role played by the FOI Central Policy Unit (CPU) - which is based in the Department of Public Expenditure and Reform - is vital to the effective implementation of FOI. The CPU's mandate is "to develop FOI policy and to guide, inform and advise public bodies on key FOI policy issues across the public service".[46] There is no equivalent body to promote AIE, to encourage good practice among public authorities and to monitor and report on AIE activity. Integrating FOI and AIE would enable AIE to benefit from the established FOI infrastructure.

Certain public authorities are fearful of the potential burden and costs associated with FOI / AIE. With a view to addressing this issue, FOI / AIE training should highlight the benefits of transparency for public authorities including, for example, improved public trust. Consideration might also be given to developing a system whereby public authorities who persistently fail to engage in good faith with their FOI / AIE obligations, for example by deliberately destroying or concealing information, are "named and shamed".

Lack of public awareness of AIE rights

The Commissioner (and his predecessor) has highlighted the general lack of awareness of the right of access to environmental information, especially when compared with the significant public profile enjoyed by the FOI regime. The (limited) data published by the Department of Environment, Community and Local Government indicates that the number of AIE requests made to public authorities is very low. With a view to publicising the right of access under the AIE regulations, public authorities should include an explicit reference to AIE on their websites. Currently, many public authorities' websites highlight FOI as the means of accessing information, with no reference whatsoever to the separate right of access under AIE (e.g. NAMA).[47] Clear guidance must be available to enable the public to engage with AIE and to navigate the system without the need to

[45] http://www.itspublicknowledge.info/ScottishPublicAuthorities/StatisticsCollection.aspx.
[46] FOI Central Policy Unit, Department of Public Expenditure and Reform *Code of Practice for Freedom of Information for Public Bodies* (December 2014) p6.
[47] https://www.nama.ie/freedom-of-information/.

engage a lawyer or seek specialist advice. A Model Publication Scheme for AIE, similar to the FOI Model Publication Scheme under section 8(2) of the FOI Act, should be developed.[48]

CONCLUDING REMARKS

The workshop discussion highlighted a range of practical challenges in AIE implementation that are difficult to resolve. In the absence of an overarching support structure, similar to that which is in place for FOI, AIE will not gain the attention it deserves. Training in AIE for public authorities, which includes opportunities to share experiences and develop best practice, is vital. Development of AIE policy is hampered by the lack of reliable data on AIE activity. Beyond the data deficit, there are considerable research gaps, in particular a study of who uses AIE and for what purpose(s)? An empirical analysis of the impact of AIE on law and policy development to date is long overdue.

As the Commissioner remarked recently, AIE remains "an underappreciated facility".[49] A key challenge is to improve public awareness of the value of the right of access under AIE and to promote proactive dissemination of environmental information by public authorities. A better resourced Office of the Commissioner for Environmental Information should facilitate the necessary developments in the jurisprudence in a more timely fashion than heretofore to enable AIE to bed-down in public authorities. But greater publicity for the Commissioner's decisions is needed if any real momentum is to develop around AIE. Finally, a wider AIE oversight and enforcement role for the Commissioner needs to be developed if the right of access to environmental information is to be guaranteed in a meaningful way.

Áine Ryall
13 November 2015

[48] http://foi.gov.ie/model-publication-scheme/.
[49] "Access to Information on the Environment: Recent Developments and Future Trends" speech by Commissioner for Environmental Information Peter Tyndall at Meeting of Irish Environmental Law Association, 13 October 2015.

Appendix

Workshop Participants

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Margaret Keyse, Head of Enforcement, Office of the Scottish Information Commissioner

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Paul Mutch, Freedom of Information Officer (Policy & Information), Office of the Scottish Information Commissioner

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Marguerite Ryan, National Focal Point – Aarhus, Department of Environment, Community & Local Government

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