Draft Recommendations on

Access to Environmental Information

Comhar
February 2005
1. **Background**


1.2 At the plenary meeting held in June, Comhar approved funding for a proposal from Friends of the Irish Environment (FIE) to carry out a study in relation to the implementation into Irish law of the new EU Directive.

1.3 On 4th December 2004, FIE hosted a workshop in ENFO for stakeholders in the environmental NGO sector. Following this, a study, compiled by Michael Ewing on behalf of FIE, was submitted to Comhar on 14th January 2005.

1.4 The recommendations in this submission to the Department of the Environment, Heritage and Local Government have been informed by the FIE consultation and study.

2. **Review of experience on access to information on the environment**

2.1 The consultation workshop undertaken by FIE on 4th December identified a number of difficulties experienced by users in relation to access to information on the environment under current arrangements. Many of these difficulties reflect similar experiences elsewhere in Europe and have also been identified in national reports under article 8 of Directive 90/313/EEC.

2.2 It is apparent that many of the bodies covered by the legislation have a lack of knowledge of the Directive and the implementing Regulations; this lack of awareness and failure to comply with the existing legislative requirements is as significant a problem as any inherent deficiencies in the legislative code itself. The problems will therefore need to be addressed not only by improvements to the legislation, in transposing the new Directive, but also in the provision of comprehensive guidance for users on the implementation of the code.
2.3 The main difficulties identified at the FIE consultation workshop can be summarised as follows:

1. A lack of clarity regarding the definition of what constitutes “environmental information”.
2. A lack of clarity in the definition of “public authorities” has resulted in some public administration bodies, which were not environmental authorities in the strict sense of the term, claiming that their responsibilities did not relate to the environment and refusing to give access to environmental information that they held.
3. Many authorities have applied a narrow interpretation of Article 6 (2) (a) of the 1998 Regulations, regarding the format in which the request must be made, e.g., they have interpreted the requirement that the request to be “made in writing” as excluding the use of e-mail.
4. The failure of authorities to put in place proper procedures for the processing of requests under the Directive and the implementing Regulations, e.g:
   - Slow response times to requests for information are widespread; problems arise where information is required in order to make submissions regarding planning applications, licensing, permits, etc.
   - Examples of authorities evading a response to requests where the information that is requested is said not to exist and yet appears at a later date, or was known to exist previously.
   - The Data Protection Act, 1988 has been used to refuse access to information, even when that information is publicly available elsewhere.
   - Where requests were made to the wrong section of government, no attempt was made to redirect the request to the correct department or body.
   - The misuse of the discretionary grounds for refusal of access to information.
5. Uncertainty concerning the inter-action of responsibilities under the Freedom Of Information Act, 1997 (FOI) and Access to Information on the Environment Regulations (AIE):

- Requests for information made under the FOI, but for information to which AIE applies, incurred charges under FOI, in breach of the Directive, with no attempt being made to enlighten the person making the request.
- Requests for information made under the FOI to which the AIE applies have been evaluated under the FOI Act without reference to the Directive and have been refused for reasons contrary to the Directive.
- The lack of co-ordination between AIE and access to information using the Section 15 and Section 16 manuals available under the FOI Act.

6. The lack of a proper assessment to date of the success or failure of the implementation of the Directive/Regulations, coupled with an absence of any public register of complaints regarding the operation of same.

7. The absence of any concerted effort to publicise the existence of the Directive/Regulations or to train the staff of the relevant bodies in the operation of the legislation.

8. The imposition of excessive charges for copying information or restrictions on the number of pages that may be copied from a particular document.

9. The existence of enormous financial barriers to achieving access to justice where rights of access to information are denied, since legal challenges can only be made in the High Court. This is coupled with considerable time delays.

10. The lack of timeliness in issuing emergency information to enable persons to act to protect themselves and/or the environment.

11. The absence of any mechanism for tracking the progress of a request for information.
12. The inability of the Ombudsman to deal with complaints within a meaningful timescale to enable the use of information requested in time-limited situations.

13. The confusion that arises from the fact that the Ombudsman oversees complaints in relation to the Regulations whilst the Information Commissioner oversees complaints in relation to the Freedom Of Information Act. Although these are the same person they are separate legal roles with separate bureaucracies.


3.1 The Department should give effect to the Directive by way of new Regulations replacing the earlier Regulations SI 125 of 1998. In addition, comprehensive guidance will be required for the public authorities that have statutory obligations under the legislation, as well as public information and awareness raising measures for users who wish to gain access to information under the revised code.

3.2 The underlying principle of this Directive is that wider and more effective access to information on the environment leads to better decision-making on matters relating to the environment, and ultimately to greater protection of same. Public authorities should implement their responsibilities in the light of these objectives, working towards a greater awareness and use of environmental information resources, as well as developing those resources to make both the information and the information increasingly accessible. Full transposition of the new Directive should take into account the aspirations of Principle 10, and the need to ratify the Aarhus Convention.

4. **Recommendations on matters to be addressed in the new regulations**

4.1 *The purpose of the Regulations should be stated as giving effect to Directive 2003/4/EC.*

4.2 *For the avoidance of doubt, the definitions of “environmental*
Information”, “applicant” and “public” in the new Regulations should be defined as in the new Directive.

It was noted that the 1998 Regulations contained no definition of environmental information even though Directive 90/313/EEC did, and that this had led to ambiguity in the interpretation of the 1998 Regulations. It is also noted that the definition in the new Directive was much broader, and included information regarding the effects of environmental change on cultural sites and built structures, reports on the implementation of environmental legislation, economic analyses used in decision-making on the environment as well as the state of human life and safety.

4.3 The definition of “public authority” needs to address clearly the position of state-sponsored bodies and their obligations under the new Regulations.

In general, state-sponsored bodies are bodies, with powers and duties set by statute or ministerial authority and to whose governing councils or boards the government appoints some or all of the members.

The definition of “public authority” in article 2(2) of the Directive refers to “any natural or legal person performing public administrative functions...or services in relation to the environment”

The FIE submission to Comhar advises that applications to some state-sponsored bodies for information, under the earlier Directive (90/313/EEC) were rejected by these bodies with statements that the Directive did not apply to them. FIE suggests that a non-exclusive list of public authorities should be included in the new regulations.

There are concerns from the business perspective about the extent of the application of the Directive to commercial state sponsored bodies, such as Aer Rianta, Bord na Mona, Coillte and ESB, making information on business decisions of such commercial bodies accessible. The new Directive, however, provides for a reasonable balance to be struck.
Article 8 of the earlier regulations (S.I No. 125 1998) had already provided for discretionary grounds for refusal of information on the grounds of commercial or industrial confidentially. Article 4(2) of the new Directive provides for a similar protection but this must not be interpreted in a restrictive way. The public interest served by disclosure must be weighed against the interest served by refusal and a request cannot be refused where the request relates to information on emissions into the environment.

Persons contracted to work for public authorities are now considered as public authorities themselves under the new Directive (article 2.2(c)) and so their position should also be addressed in the regulations.

4.4 The Regulations should address the uncertainties concerning the interaction of responsibilities under the FOI and AIE. Current practice is to apply the FOI Act with its charges and restrictions to environmental information when the applicant is unaware of the Directive (and sometimes even where the applicant is aware of the Directive); this is a breach of the Directive which applies to all environmental information. The regulations should specify that any fees charged or offered under the FOI Act must be refunded where they are not validly levied under the Directive (i.e. where the information is environmental information.). Similarly requests made for environmental information must be evaluated according to the Directive and not the FOI Act (the restrictions in the Directive are much narrower than those under the FOI Act).

4.5 The provisions of the new regulations should adequately address requirement in article 4 of Directive providing that the grounds for refusal of a request for environmental information must be interpreted in a restrictive way. The public interest served by disclosure must be weighed against the interest served by refusal and a request cannot be refused where the request relates to information on emissions into the environment.

4.6 The new Regulations should provide for a review procedure, in accordance with article 6 of the Directive, that is expeditious and
either free of charge or inexpensive. The FIE submission recommends that the Government should establish a new, independent and impartial body, The Commission for Access to Information and Decision-Making on the Environment headed by a Commissioner for Access to Information and Decision-making on the Environment. It is suggested that there is a great deal of confusion around the dual but legally separate roles of the person who is both the Ombudsman and the Information Commissioner.

There are some concerns from a business perspective about establishing a new body when there are a number of other bodies who provide this function; it has been suggested that adding another one may lead duplication and confusion. However, the key point is that an independent review procedure must now be provided for whether or not this function is assigned to an existing or new body. This function could be assigned to the Office of the Information Commissioner with the functions and role of the office clearly provided for in the new Regulations. It could act as the administrative review body for complaints regarding rights denied regarding access to environmental information. It could also take on the responsibility for promoting and developing the rights of access to information and decision-making on the environment and for enabling the ratification of the Aarhus convention.

4.7 In addition to the review procedure, referred to above in paragraph 4.6, an applicant should have access to a review procedure before a court of law in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. The court of law could be any one of the following: the District Court, the Circuit Court, or the High Court. Third parties incriminated by the disclosure of information may also have access to legal recourse. Final decisions should be binding on the public authority holding the information. Reasons should be stated in writing where access to information is refused. Access to justice must be accessible to all and expeditious, with little or no financial burden, if it is to be of any real value. These requirements cannot be fulfilled if the only court of
recourse is the High Court. Indeed the financial implications of going to the High Court can be very serious.

4.8 The regulations should require public authorities, where there is an apparent high risk of, or in the event of, an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat shall be disseminated, immediately and without delay.

5. Recommendations on matters to be addressed in guidance and public information and awareness raising measures.

5.1 Public authorities should encourage and assist persons making requests for information on the environment. Where a person makes a request for information on the environment, but does not do so under the Directive or its implementing Regulations, the public authority involved should inform the applicant of the pertinent rights that apply to the applicant, the provisions regarding the application process.

5.2 Where a request is formulated in too general a manner the public authority should offer assistance to the applicant in the use of the public registers and in formulating a more precise request. Public authorities must however recognise that sometimes, particularly where registers don’t exist, it is necessary for applicants initially to ask broad questions before honing the search down to the more specific.

5.3 Where a public authority claims that information that has been requested does not exist, or cannot be found, the non-existence or unavailability of the information should be certified by a public servant at an appropriate level.

5.4 Public authorities should provide easily accessed and user-friendly registers of all environmental information, as defined in the Directive, available both electronically and in their offices. This is essential to enable applicants to search for information, and for officials to respond quickly and
efficiently and to enable them to redirect requests in the same fashion. The registers produced under sections 15 and 16 of the Freedom of Information Act, 1997 could be adapted, where these exist already.

5.5 In order to create the capacity within public bodies to fulfil their obligations under the Directive, the following measures should be adopted

(i) the designation of information officers in each public authority;
(ii) the training of all staff, but in particular information officers and officers designated under the Freedom of Information Act, 1997, in each public authority, in the proactive operation of these regulations;
(iii) the establishment and maintenance of facilities for the examination of the information required;
(iv) the creation of registers or lists of the environmental information held by public authorities;
(v) the placing of notices in the offices and on the web-sites of the relevant public authorities informing the public of the regulations and their operation, and the rights of persons under same;
(vi) information points, with clear indications of where such information can be found;
(vii) the inclusion of information drawing attention to these regulations in all the forms and publicity material distributed under the Freedom of Information Act, 1997.
(viii) making available in each public authority a register of complaints made under the regulations;
(ix) making available a national register of complaints made under the regulations;
(x) the establishment of procedures that enable the applicant to track the processing of the request for information.

5.6 Public authorities should accept requests for information and reply to those requests using the format chosen by the applicant. They should make every effort to send a receipt for the request within 5 working days, attached to which should be information regarding the rights of the
applicant and complaints procedures together with an official complaints form.

5.7 Public authorities should respond to requests for information as soon as possible, taking the time-scale needs of the applicant as the guideline and the statutory limit on foot of article 3(2) of the Directive. As suggested by FIE, every effort should be made to provide the requested information 15 working days, or a reason given as soon as possible, or at the latest within 15 working days. Where the reason for not meeting the 15-day time limit is that it is not possible to assemble the information required in the given time, then a further period of 15 working days may be added to the search time. However, in this case, the applicant should be informed of the changed timescale as early as possible and the reasons given for the change. Any information already gathered at this point should be passed on to the applicant with the notification. These time limits are based on those used to great effect in the European Commission regarding public access to information and allow for the intervention of public holidays.

5.8 Where a public authority does not possess the requested information it should refer the request to the public authority that does. This referral should not alter the administrative time limit. The applicant should be informed of the referral in the receipt for the request and within 5 working days. This is currently the system operating in Hungary, and is one which protects the rights of the applicant without placing undue pressure on the relevant authorities, especially if they are able to conduct the processing electronically.

5.9 Guidance for public authorities should elaborate on the statutory provisions giving effect to “Exceptions” under article 4 of the Directive where a request for access to environmental information may be refused. The Directive provides the grounds for refusal must be interpreted in a restrictive way. The public interest served by disclosure must be weighed against the interest served by refusal and a request cannot be refused where the request relates to information on emissions into the environment.
5.10 Public authorities should be advised of their obligations under article 5 of the Directive not to impose unreasonable charges for access to information. We would support the FIE suggestion that in responding to requests for information on the environment, public authorities should photocopy up to 20 pages of A4 text free of charge and may then make a charge at cost for supplying any further copies. Such charges would be in line with Regulation (EC) 1049/2001 (regarding access to the documents of the European Parliament) and not exceed a reasonable amount. Experience in Europe shows that in order to ensure that financial barriers are not an impediment to access to information, and to ensure that every person can afford information; public authorities often waive fee requirements for individuals and NGOs. The policy of free photocopies and printouts of information, applied in the library of ENFO, should be broadened to apply to all public authority sources of environmental information, where the information is for non-commercial use. Access to ENFO should be promoted particularly the website and on-line databases.

5.11 The training of the judiciary in relation to the Aarhus convention and where relevant the consequent European directives, is already on going in many of the ECE member states, and should begin in Ireland as soon as possible.

5.12 The Information Commissioner, if assigned the review function (see paragraph 4.6) should produce an annual report showing the success or otherwise of the implementation of the Directive.

5.13 Resources should be made available to facilitate the dissemination of environmental information through the use of computer and electronic technology. Provision should be made for affordable access for community and environmental NGOs to Ordnance Survey maps, necessary software and hardware and training to fully utilise GIS databases. The relevant information should be updated as appropriate and should include the following:

(a) texts of international treaties, conventions or agreements and of Community, national, regional or local legislation, on the environment or relating to it;
(b) policies, plans and programmes relating to the environment;

(c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities;

(d) the reports on the state of the environment;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found;

(g) environmental impact studies and risk assessments concerning the environmental elements or a reference to the place where the information can be requested or found.

(h) Digital maps relating to local authority development and area plans; housing strategies; Valuation Office functions; maps used by development agencies such as Temple Bar Development Ltd., Ballymun Regeneration, and Strategic Development Zones etc. Also, where appropriate, maps used by other public and semi-state agencies such as the Regional Authorities, the NRA, Eirgrid, Coillte and Bord Na Mona and Teagasc etc.

(i) The following information should always be available:

   (i) Files generated under the Planning Acts
5.14 Planning notices should be put on planning authority web-sites in sufficient time to enable the public have a meaningful opportunity to comment and make observations on planning applications.