



Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

**Decision of the Commissioner for Environmental Information  
on an appeal made under article 12(5) of the European Communities  
(Access to Information on the Environment) Regulations 2007 to 2018  
(the AIE Regulations)**

**Case:** OCE-113779-M3S0Z5

**Date of decision:** 4 August 2023

**Appellant:** Dr. Fred Logue

**Public Authority:** Department of Housing, Local Government and Heritage [The Department]

**Issue:** Whether the Department was justified in refusing the appellants request on the basis that the records sought are not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that the information had issue as environmental information. He annulled the Department’s decision and remitted the matter for a fresh decision making process

**Right of Appeal:** A party to this appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision, as set out in article 13 of the AIE Regulations. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.



## **Background**

1. On 5 September 2021 the appellant wrote to the Department requesting a copy of advice provided to the Minister from officials of the Department relating to recently made amendments to Part V of the Planning and Development Act 2000.
2. The Department responded to this request on 13 September 2021, refusing access to records on the basis the information requested was not environmental information, as defined by Article 3(1) of the AIE Regulations.
3. The appellant replied on 13 September 2021, requesting an internal review of this decision.
4. The Department subsequently replied via an undated letter, affirming the original decision.
5. The appellant appealed to this Office on 1 October 2021.
6. I am directed by the Commissioner for Environmental Information to carry out a review of this appeal under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and the Department. I have also examined the contents of the records at issue. In addition, I have had regard to:
  - the Guidance document provided by the Minister for the Environment, Community and Local Government on the implementation of the AIE Regulations (the Minister’s Guidance);
  - Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
  - the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention);
  - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’);
  - the judgments in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Anor v Commissioner for Environmental Information & Anor* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar McKenna* [2020] IEHC 190 (*ESB*) and *Right to Know v Commissioner for Environmental Information & RTÉ* [2021] IEHC 353 (*RTÉ*);
  - the judgment of the Court of Appeal of England and Wales in *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*) which is referenced in the decisions in *Redmond*, *ESB* and *RTÉ*; and
  - the decisions of the Court of Justice of the European Union in C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)* and C-316/01 *Eva Glawischnig v Bundesminister für soziale Sicherheit und Generationen (Glawischnig)*.



7. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

### **Scope of Review**

8. This Office's review in this case is concerned with whether the withheld record comes within the definition of "environmental information" contained at article 3(1) of the Regulations.

### **Analysis and Findings**

#### **Positions of the parties**

9. The appellant submits that the document in question is environmental information, as it is advice on amendments to the Planning and Development Act and to the regulation of development, in particular the development of social and affordable housing. The appellant submits that it is information on measures and activities which affect or are likely to affect the environment under category (c) of the definition. In addition, the appellant understood from relevant newspaper reports that the guidance contains financial or other economic analyses in relation to the alleged financial effect of the proposed amendment in relation to sites purchased after 2015. On this basis, the appellant is of the view that the information also comes within category (e) of the definition of environmental information.
10. The Department has outlined in its submission to this office that the amendments to the Planning and Development Act, to which the advice relates, fall short of posing a real and substantial risk of impact on the environment, and nothing more than a theoretical or remote possibility exists. Therefore the advice cannot be considered to be environmental information as defined by Article 3(1) of the AIE Regulations.

#### **Legal Context**

11. Environmental information is defined in article 3(1) of the Regulations and article 2(1) of the Directive as "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 of the environment referred to in paragraphs (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).
12. The AIE Regulations transpose the AIE Directive at national level. The AIE Directive was adopted to give effect to the first pillar of the Aarhus Convention in order to increase public access to environmental information and enable an informed public to participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EC, the previous AIE Directive.
13. According to national and EU case law on this matter, while the concept of “environmental information” as defined in the AIE Directive is broad (Mecklenburg, at paragraph 19), there must be more than a minimal connection with the environment (Glawischnig, at paragraph 25). Information does not have to be intrinsically environmental to fall within the scope of the definition (Redmond, at paragraph 58; see also ESB at paragraph 43). However, a mere connection or link to the environment is not sufficient to bring information within the definition of environmental information. Otherwise, the scope of the definition would be unlimited in a manner that would be contrary to the judgments of the Court of Appeal and the Court of Justice of the European Union.
14. As set out above, the appellant submits, in the first instance, that the information at issue in this case comes within category (c) of the definition which concerns information on “measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements of the environment referred to in paragraphs (a) and (b) as well as measures or activities designed to protect those elements”. A measure or activity is “likely to affect” the elements and factors of the environment if there is a real and substantial possibility that it will affect the environment, whether directly or indirectly. While it is not necessary to establish the probability of a relevant environmental impact, something more than a remote or theoretical possibility is required (Redmond, at paragraph 63). Information may be “on” one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (Henney, at paragraph 42). In identifying the relevant measure or activity that the information



is “on” one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (ESB, at paragraph 43).

15. As noted by Barrett J in *RTÉ*, where an assessment under article 3(1)(c) is to be carried out, the first step is to identify the relevant measure or activity. It is important to note that information may be “on” one measure or activity, more than one measure or activity or both a measure or activity which forms part of a broader measure (*Henney* at paragraph 42). In identifying the relevant measure or activity that the information is “on”, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned, and it may be relevant to consider the purpose of the information (*ESB* at paragraph 43).
16. The Aarhus Guide notes that the Aarhus Convention expressly includes “administrative measures, environmental agreements, policies, legislation, plans and programmes” when referring to measures and activities likely to affect the environment in its definition of “environmental information”. Similar wording is used in article 2(1)(c) of the AIE Directive and article 3(1)(c) of the AIE Regulations. The Aarhus Guide notes that the use of these terms suggests that some degree of human action is required. The Guide also describes the terms “activities or measures”, as referring to “decisions on specific activities, such as permits, licences, permissions that have or may have an effect on the environment”. The Court of Appeal in *Minch* was of the view that the reference to “plans” and “policies” in article 3(1)(c) is significant, and suggests that the measure or activity in question must have “graduated from simply being an academic thought experiment into something more definite such as a plan, policy or programme – however tentative, aspirational or conditional such a plan or policy might be – which, either intermediately or mediately, is likely to affect the environment” (paragraph 39). Hogan J went on to explain that the requirement for there to be a plan or something in the nature of a plan, curtails a potentially open-ended or indefinite right of access to documents (paragraph 41). If this were not the case, then virtually any information held by or for a public authority referring, either directly or indirectly, to environmental matters would be environmental information. This would run contrary to the CJEU’s judgment in *Glawischnig* (paragraph 21; see also *Glawischnig* at paragraph 25).
17. The CJEU in *Mecklenberg* stated at paragraph 20 of its judgment that “the use in Article 2(a) of the Directive of the term ‘including’ indicates that ‘administrative measures’ is merely an example of the ‘activities’ or ‘measures’ covered by the directive”. It noted that “as the Advocate General pointed out in paragraph 15 of his Opinion, the Community legislature purposely avoided giving any definition of ‘information relating to the environment’ which could lead to the exclusion of any of the activities engaged in by public authorities, the term ‘measures’ serving merely to make it clear that the acts governed by the Directive included all forms of administrative activity”.
18. Barrett J remarked in *RTÉ* that “the European Court of Justice [in *Mecklenberg*] could not have taken a more expansive view of what comprises an administrative measure for the purposes of



the 1990 directive” (paragraph 19). He also noted that Recital 2 of the current AIE Directive should be borne in mind when approaching case-law, such as Mecklenberg, which is concerned with Directive 90/313/EEC, the predecessor to the current AIE Directive (*RTÉ*, paragraph 7). Recital 2 of the AIE Directive provides as follows:

“Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment initiated a process of change in the manner in which public authorities approach the issue of openness and transparency, establishing measures for the exercise of the right of public access to environmental information which should be developed and continued. This Directive expands the existing access granted under Directive 90/313/EEC...”

19. Barrett J considered the reference to the current AIE Directive having “initiated a process of change” to be noteworthy and concluded that “what had been in play over the course of the lifetime of [the previous AIE] directive and its more recent successor is an evolutionary process”, the consequence being that “one must approach the current directive as being not just expansive but increasingly so” (*RTÉ*, paragraph 8). He also stated that it was “difficult to conceive of how the Community legislature could have taken a more expansive approach to the scope of the concept of “environmental information”, having regard to Recital 10 of the current AIE Directive (*RTÉ*, paragraph 9).

#### Analysis

20. In its internal review decision the Department contend that “while the provisions of Part V of the Planning and Development Act 2000 relate to residential developments granted planning permission and such residential developments environmentally impact on the element of land, the Part V percentage contribution itself has no impact on land and therefore no environmental impact.” The Department also outlines its opinion that changes to the percentage contribution specified in Part V and provisions regarding the effective date of their application have no environmental impact, and that the Part V percentage contribution has no environmental impact on the element of the land, as the impact on land of residential development is the same regardless of who ultimately purchases or occupies the completed structures or what amount of ‘planning gain’ is achieved by the developer
21. Having reviewed the information in full and taking into account some of the risks which have been identified and highlighted throughout the advice document in relation to potential impacts on the supply of new development land and the viability of new developments, I am satisfied that the relevant Amendments to Part V of the Planning and Development Act 2000 can be considered an administrative measure under paragraph (c) of the definition.
22. I am also satisfied that more than a theoretical or remote possibility exists of impact on the Environment because planning and development necessarily and by definition impact the environment in numerous ways, whether under Part V of the Act, or otherwise.



23. The next question to be addressed is whether the advice provided to the Minister and requested by the appellant in this case can be considered information “on” the Amendments to Part V of the Planning and Development Act 2000. The right of access to environmental information that exists includes access to information “on” one or more of the six categories at (a) to (f) of the definition. In his decision in RTÉ, Barrett J expressly endorses the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the “information on” element of the definition of “environmental information” (RTÉ, at paragraph 52).
24. *Henney* suggests that, in determining whether information is “on” the relevant measure or activity, it may be relevant to consider the purpose of the information such as why it was produced, how important it is to that purpose, how it is to be used, and whether access to it advances the purposes of the Aarhus Convention and AIE Directive (paragraph 43; see also *ESB* at paragraph 42). Information that does not advance the purposes of the Aarhus Convention and AIE Directive may not be “on” the relevant measure or activity (*Redmond* at paragraph 99). As the Court noted in *Henney*, the recitals of both the Aarhus Convention and the AIE Directive refer to the requirement that citizens have access to information to provide for a greater awareness of environmental matters, to enable more effective participation in environmental decision-making and to facilitate the free-exchange of views with the aim that all of this should lead, ultimately, to a better environment. They give an indication of how the very broad language of the text of the provisions in the Convention and Directive may have to be assessed and provide a framework for determining the question of whether, in a particular case, information can properly be described as on a given measure (see *Henney* at paragraph 48 and *RTÉ* at paragraph 52). Finally, as the High Court noted in *ESB* information that is integral to the relevant measure or activity is information “on” it (see paragraphs 38, 40 and 41) while information that is too remote from the relevant measure or activity does not qualify as environmental information (*ESB* at paragraph 43). The guidance provided by the Courts suggests that there is a sliding scale, with information integral to a measure at one end (in the sense that it is quite definitively information “on” a measure) and information considered too remote from the relevant measure at the other (in the sense that it is not). The example referred to in *Henney* noted that a report on PR and advertising strategy might be considered information “on” the Smart Meter Programme “because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme”. However, information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project would likely be considered too remote (see paragraph 46).
25. The information in question is a comprehensive advice document which outlines a number of different options to the Minister in relation to the Amendments including associated risks and potential for legal challenge. I am satisfied that these records can be considered information “on” the Amendments to Part V of the Planning and Development Act 2000.
26. During the course of the investigation and following an initial examination of the case file this office’s investigator contacted the Department to outline that this information could be



considered environmental information. The Department, while maintaining its position that it was not environmental information, offered to make the records available to the appellant with some minor redactions. The redactions would occur where relevant advice from the Attorney General was included in the document. The Department indicated it would rely on Article 8(a)(iv) of the AIE Regulations while also citing section 31(1)(a) and 42(f) of the Freedom of Information Act 2014.

27. The investigator contacted the appellant to discuss this option in an effort to find an informal solution to this appeal. The appellant rejected this offer on the basis that he does not believe the Department can rely on these exemptions in this case.
28. The powers conferred on this Office apply only in respect of environmental information held by or for a public authority. In accordance with this Office's Procedures Manual, available at [www.ocei.ie](http://www.ocei.ie), the general practice in cases such as this, concerning a question of this Office's jurisdiction, is to limit the review to the preliminary matter of whether the information at issue is "environmental information", such that it falls within the remit of the AIE Regulations.
29. In addition, as I have previously noted, it is not appropriate for my Office to become the communicator of a first instance decision to the appellant. I also note that since those communications, the High Court has issued its decision in *Commissioner for Environmental Information v Coillte Teoranta & People Over Wind* [2023] IEHC 227 which provides further guidance on the application of article 8(a)(iv) of the Regulations and its interactions with the provisions of the Freedom of Information Act. While I understand that it will likely come as a disappointment to the appellant, I consider it more appropriate that the matter be remitted to the Department so that it can consider its position in light of that guidance.
30. Accordingly, I am satisfied that it is appropriate to limit the scope of this review to whether the Department was justified in refusing access to relevant records on the basis that they do not constitute "environmental information" within the definition provided at article 3(1) of the AIE Regulations.

## **Decision**

31. Having carried out a review under article 12(5) of the AIE Regulations, I hereby annul the Department's decision. Given the additional issues raised by the Department during the course of the investigation I do not believe it appropriate to direct release of the records in full at this time, and I now direct the Department to make a new first instance decision on the request taking my findings above into account.





Coimisinéir um Fhaisnéis Comhshaoil  
Commissioner for Environmental Information

### **Appeal to the High Court**

A party to the appeal or any other person affected by this 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 to the person bringing the appeal.

Dee Gallagher  
On behalf of Commissioner for Environmental Information  
4 August 2023