



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-120059-J8M5X7

**Date of decision:** 7 June 2023

**Appellant:** Company A

**Public Authority:** Commission for Regulation of Utilities (CRU)

**Issue:** Whether the information sought was environmental information and, if so, whether the information sought was exempt from release under article 8(a)(ii) or 9(1)(c) of the AIE Regulations

**Summary of Commissioner's Decision:** The Commissioner found that the information sought was environmental information. He found that article 9(1)(c) did not apply to the information sought. He found that article 8(a)(ii) did apply to the information sought, but that the public interest in disclosure outweighed the interest served by refusal.

**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. This review concerns a third party appeal against a decision of the CRU to release information to a requestor. The request, made on 30 November 2021, sought copies of all representations/submissions received by the CRU as part of its consultation process regarding a proposed direction to system operators regarding the connection of data centres to the electricity grid. The proposed direction mandated a number of new measures to mitigate the risks that data centres posed to the electricity supply. The appellant company was, at the time, in the process of applying for planning permission for a data centre.
2. The CRU formed the view that a letter relevant to the request included information that may be considered to have been voluntarily provided by the appellant to the CRU, without legal obligation within the meaning of Article 8(a)(ii) of the AIE Regulations. On 14 December 2021, the CRU contacted the appellant using the email address held on its records to allow the appellant to make submissions on whether or not the information should be released to the requester.
3. There was a delay in the appellant company becoming aware of the letter from the CRU dated 14 December 2021, and on 28 January 2022 solicitors for the appellant belatedly responded outlining the appellant's objection to the release of the letter.
4. This letter crossed with a letter from the CRU to the appellant informing it that a decision had been made to release the letter to the requester. This letter also informed the appellant that the records would not be released for one month to allow the appellant an opportunity to appeal to this Office if it wished to do so. The appellant submitted its appeal to this Office on 25 February 2022.
5. I am directed by the Commissioner for Environmental Information to carry out a review under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and the correspondence provided to my Office by the CRU. I have also examined the contents of the records at issue. In addition, I have had regard to:
  - a. 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);
  - b. Directive 2003/4/EC (the AIE Directive), upon which the AIE Regulations are based;
  - c. 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); and
  - d. The Aarhus Convention—An Implementation Guide (Second edition, June 2014) ('the Aarhus Guide').



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

### **Scope of Review**

7. I am satisfied that the CRU acted appropriately in carrying out the decision-making process, and that it was through no fault of the parties involved that the appellant's submissions did not reach the CRU before a decision was made. A review by my Office is considered to be *de novo* and my jurisdiction allows me to review the matter in full. Having considered the issues raised by the appellant in its submissions, the scope of my review in this appeal concerns:
  - a. whether the information sought is environmental information; and, if so,
  - b. whether the information sought is exempt from release under article 9(1)(c) and/or article 8(a)(ii).

### **Preliminary Matters**

8. The appellant made a number of submissions regarding the burden of proof in this appeal. I consider that the scheme of the Regulations, and of Directive 2003/4/EC upon which the Regulations are based, make it clear that there is a presumption in favour of release of environmental information, and this was made clear to the appellant at the outset of the appeal. The implication of this is that in a third party appeal, the burden of proof rests on the third party appellant to justify why the relevant information should not be made available under the Regulations.
9. The appellant also noted that during the consultation process the CRU invited respondents to mark their submissions as confidential if they did not wish the submissions to be published on the CRU website. The consultation paper, however, did state that requests for confidentiality would be respected subject to any obligations to disclose information. Accordingly, it must be established that the information is exempt from release under the provisions of the AIE Regulations in order for the request to be refused- the fact that a letter is marked as private and confidential does not establish that the request must be refused.
10. A further point raised in the appellant's submissions was that the CRU's letter to the appellant informing it of the decision to release the letter stated that the decision maker considered that the public interest would be better served by granting rather than by refusing access to the information requested. The appellant questioned how this finding had been made. The CRU's decision did not identify any exemption in the provisions of the AIE Regulations that applied to the relevant letter, and in the circumstances, there was no requirement to consider the public interest test as set out in article 10(4) of the AIE Regulations and the comments made by the CRU in the letter to the appellant are not relevant to this appeal. Where the provisions of article 8 or article 9 are not found to apply to the requested information, the information must be released and there is no additional



requirement for the public authority to justify the release of the information by reference to the public interest or otherwise.

11. The appellant made reference to the release of the letter potentially undermining the policy approach of Government in relation to data centres. This submission was not grounded in any provision of the AIE Regulations and I am satisfied that the information sought is not exempt from release on these grounds.

### **Analysis and Findings**

#### **Whether the letter contains environmental information**

12. The definition of environmental information is set out in article 3 of the AIE Regulations, and the relevant part of the definition states that “environmental information” means any information in written, visual, aural, electronic or any other material form on-...(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 paragraphs (a) and (b) as well as measures or activities designed to protect those elements.
13. In considering the letter that is the subject of this appeal, I will first outline the relevant “measure” that will affect or is likely to affect the environment, which brings the letter within the definition of environmental information. The requested information consists of a letter in response to the CRU request for submissions on the proposed direction to system operators related to data centre grid connections. I consider that this direction, which was subsequently published by the CRU on 23 November 2021, is a measure that affects the environment, as the demands placed by large energy users such as data centres on the national electricity grid may affect the security of electricity supply in Ireland and the State’s ability to reach its climate change targets. Given that the letter was in response to the CRU’s request for submissions in relation to that direction, I consider that the letter is information “on” the direction within the meaning of article 3.
14. For the avoidance of doubt, environmental information can include information that is also commercially sensitive, but such information may be exempt from release under article 8 or 9 of the AIE Regulations, which I will consider below.

#### **Whether the information is exempt from release under article 9(1)(c) of the AIE Regulations.**

15. The appellant says that the letter relevant to this appeal contains sensitive commercial business information which is subject to confidentiality agreements between the appellant and other parties, and that the release of this information would damage the appellant’s legitimate economic and business interests.



16. Article 9(1)(c) provides that a public authority may refuse to make available environmental information where the disclosure of the information requested would adversely affect commercial or industrial confidentiality, where such confidentiality is provided for in national or Community law to protect a legitimate economic interest. A number of elements are required in order to engage the exemption provided for in this article:
- a. The information must be commercial or industrial in nature.
  - b. The confidentiality of the information must be provided for by law.
  - c. The confidentiality is protecting a legitimate economic interest.
  - d. The confidentiality would be adversely affected by disclosure.
17. Confidentiality can arise in Irish law in a number of different ways, including through common law. The Supreme Court decision of *House of Spring Gardens v Point Blank Limited* [1984] IR 611 confirmed that a duty of confidence will arise if:
- a. The relationship of the parties is such that it would give rise to an obligation of confidence regarding the information imparted.
  - b. The information disclosed would properly be regarded as confidential information.
18. The Court approved the following set of criteria to establish whether the information in question is confidential for the purposes of the second prong of the test (nature of the information):
- a. The information must be information "the release of which the owner believes would be injurious to him or of advantage to his rivals or others".
  - b. The owner must believe the information to be confidential.
  - c. This belief must be reasonable.
  - d. The information must be judged in light of the use and practices of the particular industry or trade concerned.
19. As mentioned above, the consultation paper relating to this appeal specifically set out that the CRU is subject to disclosure requirements. Paragraph 4.2 of the consultation paper stated:
- “Unless marked confidential, all responses from companies or organisations may be fully published on the CRU’s website. Respondents may request that their response is kept confidential. The CRU shall respect this request, subject to any obligations to disclose information. Respondents who wish to have their responses remain confidential should clearly mark the document to that effect and include the reasons for confidentiality”*
20. Due to the above, I consider that a duty of confidence only arises at common law in this instance subject to any valid request under the AIE Regulations. It must be established that article 9(1)(c) of the AIE Regulations applies in order for the appellant’s request (that its response be kept confidential) to lead to the information being exempt from release under the AIE Regulations. This would also be subject to public interest considerations.



21. In order to show that the confidentiality is protecting a legitimate economic interest as required by article 9(1)(c), there must be some adverse effect on the legitimate economic interest that the confidentiality is designed to protect. Accordingly, when relying on article 9(1)(c) the appellant must set out the reasons why it considers that disclosure of the information at issue could specifically and actually undermine the economic interest identified. The risk of the economic interest being undermined must be reasonably foreseeable and not purely hypothetical (see by analogy, C-57/16 P *ClientEarth v Commission*, paragraph 51). If there would be no adverse effect on the economic interest identified, then article 9(1)(c) cannot be relied upon, as it would not be shown that the confidentiality is protecting that economic interest.
22. The appellant said that if this information was released it would breach its confidentiality obligations to third parties which are enforceable through non-disclosure agreements and would result in significant financial loss to the appellant. The appellant also stated that it was concerned that any departure from strategy outlined in the letter when compared to the planning application would be used against it in a future judicial review of planning decisions related to the data centre or otherwise adversely affect planning decisions in relation to the data centre. The appellant stated that if this information was made available to its competitors, it would be adversely affected but did not provide any further detail on how this might be the case.
23. My investigator requested copies of these confidentiality or non-disclosure agreements in order to establish the extent of these confidentiality obligations. No agreements or further details were provided to our Office. Due to this, I cannot be satisfied that the information contained in the letter is subject to any or any relevant confidentiality obligations between the appellant and third parties. These agreements were said to be with a potential end user of the data centre. I cannot see any reference to an end user in the document in question.
24. I have also considered the appellant's submission that the information in the letter could be used against it in a future judicial review or could adversely affect planning decisions in relation to the data centre. My investigator sought submissions on what information in the letter led to this concern and did not receive a response. I have considered all of the relevant documentation and circumstances of the case, in particular the date upon which the letter was sent (3 July 2021). I am not satisfied that this risk is more than purely hypothetical. I also note that a significant proportion of the information contained in the letter is available to the public via the initial planning application for the data centre which is available online. Other information contained in the letter is clearly not confidential, as it is factual background information about other data centres.
25. I am not satisfied that the appellant has shown that any potential adverse effect that it states may result from the release of the requested information reaches the threshold required in order to show that article 9(1)(c) applies. As I have not found that the release of the information would harm the legitimate economic interests of the appellant, I am not satisfied that the confidentiality that the appellant seeks to establish is protecting a legitimate economic interest. As each of the conditions set out above must be satisfied before article 9(1)(c) can be said to apply, it is not



necessary for me to consider the application of the other elements of article 9(1)(c) to this appeal. I find that article 9(1)(c) does not apply to the information contained in the letter.

**Whether the information is exempt from release under article 8(a)(ii) of the AIE Regulations**

- 26.** Article 8(a)(ii) provides that a public authority shall not make available environmental information where the disclosure of the information would adversely affect the interests of any person who, voluntarily and without being under a legal obligation to do so, supplied the information requested, unless that person has consented to the release of that information.
- 27.** As set out above, I am not satisfied that the release of the information contained in the letter would adversely affect the appellant company's economic or business interests. The appellant in its submissions said that the release of the letter may lead to protests and intimidation for the director of the company and the company's employees and agents. The appellant states that this has already occurred and is concerned that the release of the letter would cause such protests to be restarted.
- 28.** As information released under the AIE Regulations is effectively made available to the world at large, I accept that there is a risk that the release of the letter could bring attention back to the data centre and could cause protests to restart. I consider this risk to be on the lower end of the scale, as much of the information contained in the letter is already in the public domain and the letter was written and sent in mid-2021. However, in the circumstances, I accept that article 8(a)(ii) applies to the letter.
- 29.** As I have found article 8(a)(ii) to apply to the letter, I must consider whether the public interest served by disclosure outweighs the interest served by refusal.
- 30.** In favour of release, I consider the following factors to be relevant:
- a.** The general public interest in disclosure of environmental information
  - b.** that there is a particular public interest in the information contained in the letter, in circumstances where the Irish electricity system is facing particular difficulties due to international conditions, and there has been specific debate regarding the role of large scale users;
- 31.** In favour of refusal I consider the following factors to be relevant:
- a.** The risk that the release of the letter could lead to protests at the homes or place of work for the director of the appellant company and its employees or agents.
- 32.** In weighing up the above factors, I note that the appellant states that such protests have already occurred. I consider that the risk of such protests restarting solely on the basis of the release of this



letter is on the lower end of the scale. Overall, I consider that the public interest in releasing the letter outweighs the interest served by refusal.

### **Decision**

33. Having carried out a review under article 12(5) of the AIE Regulations on behalf of the Commissioner for Environmental Information, I find that article 9(1)(c) does not apply to the information requested. I find that article 8(a)(ii) applies to the information requested, but that the public interest in releasing the information outweighs the interest served by refusal. Accordingly, I affirm the decision of the CRU and direct the release of the information sought to the requester.

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

34. 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.

**Deirdre Gallagher**

**On behalf of the Commissioner for Environmental Information**

7 June 2023