



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-117650-X6L4K7

**Date of decision:** 25 May 2023

**Appellant:** Mr. X

**Public Authority:** Department of Foreign Affairs (the Department)

**Issue:** Whether the Department was justified, under the AIE Regulations, in refusing access to the records that arose in the preparation of the Review of the Management of the Election Observation Roster (the Management Review), including inputs from the external consultant, on the basis that such records do not contain or consist of “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner affirmed the Department’s decision to refuse access to the information sought on the basis that it is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.

**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 14 October 2021, the appellant made an AIE request to the Department, as follows:

“As you are aware the Department published a review on the management of the international election observation roster.

International election observation has costs and benefits. Environmental costs include flying observers all round the world, the unthinking desire to do it on the 'cheap' may make it select less efficient 'dirty' airlines with lengthy transfer times in connecting airports giving rise to greater environmental costs.

It also is worth considering whether it is more environmental friendly to support domestic election observing NGO's than blindly transporting observers from Ireland and England.

Now with new technologies election observation may be possible without the international observer having to travel at all. For example, I observed elections in the Russian Federation using remote streaming crossed reference with observers on the ground.

The policy of discriminating against Cork and Shannon airports by own purchasing flights from only Dublin Airport give rise to environmental concerns.

I wish to apply for access to the records that arise in putting together this report including inputs from the external consultant. This is a request under AIE.

In my view, this request is covered by the AIE as it impacts/may impact the environment. Case law including recent High Court judgments indicates a broad approach must be taken to records covered by AIE. This approach demonstrates the narrow interpretation used by the Department and other public bodies is in error.”

2. The appellant and the Department then engaged in a significant amount of correspondence regarding the nature of the information the appellant was seeking and whether or not it was environmental information, within the meaning of the AIE Regulations.
3. In its original decision of 19 November 2021 the Department noted its engagements with the appellant to clarify what environmental information was being sought, along with the appellant's responses. In the absence of what it deemed to be sufficient clarification, the Department stated that it was refusing the appellant's request on the basis that the information sought did not fall within the definition of environmental information as set out in article 3(1) of the AIE Regulations.
4. The Department went on to again state that location of the Election Observation Desk did not form part of the Review of the Management of the Election Observation Roster (the Management Review). It stated that the purpose of the Management Review was to assist the Department's management of the



election observation roster and application processes. The Department argued that the Management Review was:

“[...] not an assessment of election observation as an initiative. The review assessed the extent to which the Department ensures the fairness, efficiency, and optimisation of its election observation function. It looked at issues such as where the election observation roster should be managed within the structure of the Department. It also dealt with limiting factors such as the number of transparency requests the Election Observation Desk were required to deal with.

The records that arise from compiling such a review do not pertain to the environment.”

5. The appellant sought an internal review of that decision on the basis of a deemed refusal, following which the Department affirmed its original decision on 22 December 2021.
6. The appellant appealed to my Office on 23 December 2021 on the basis of that the Department’s internal review decision was late and therefore also a deemed refusal.
7. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the correspondence between the Department and the appellant, as outlined above, and to correspondence between my Office and both the Department and the appellant on the matter. 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); and
  - The Aarhus Convention—An Implementation Guide (Second edition, June 2014) (‘the Aarhus Guide’).
8. I have taken account of the judgments of the Superior Courts in *Minch v Commissioner for Environmental Information* [2017] IECA 223 (*Minch*), *Redmond & Another v Commissioner for Environmental Information & Another* [2020] IECA 83 (*Redmond*), *Electricity Supply Board v Commissioner for Environmental Information & Lar Mc Kenna* [2020] IEHC 190 (*ESB*) and *Right to Know CLG v. Commissioner for Environmental Information and Raidio Teilifís Éireann* [2021] IEHC 353 (*RTÉ*) and the decisions of the European Court of Justice in case C-316/01 *Glawischnig v Bundesminister für Sicherheit und Generationen (Glawischnig)* and case C-321/96 *Wilhelm Mecklenburg v Kreis Pinneberg - Der Landrat (Mecklenburg)*. I have also had regard to the judgment of the Court of Appeal of England and Wales that is referred to in the latter three Irish judgments, *Department for Business, Energy and Industrial Strategy v Information Commissioner* [2017] EWCA Civ 844 (*Henney*).



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

### **Scope of Review**

10. In accordance with article 12(5) of the AIE Regulations, my role is to review the public authority's internal review decision and to affirm, annul or vary it. Where appropriate in the circumstances of an appeal, I will require the public authority to make available environmental information to the appellant.
11. My powers as Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. It is clear from the Department's original and internal review decisions, along with its correspondence with the appellant and this Office, that it is the Department's position that the information sought by the appellant is not "environmental information" such that it falls within the remit of the AIE Regulations.
12. In accordance with my Office's Procedures Manual, available at [www.ocei.ie](http://www.ocei.ie) my general practice in cases such as this, concerning a threshold jurisdictional issue, is to limit my review to the preliminary matter of whether the information sought is "environmental information" such that it falls within the remit of the AIE Regulations.
13. Accordingly, I am satisfied that the scope of this review concerns whether the Department was justified in refusing access to the records that arose in the preparation of the Management Review, including inputs from the external consultant, on the basis that such records do not contain "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations.

### **Preliminary Matters**

14. It is clear from the comments of the Court of Appeal in *Redmond*, at paragraph 51, that the nature of a review by my Office is inquisitorial rather than adversarial in nature. The extent of the inquiry is determined by me and not the parties to the appeal.
15. In light of the guidance of the High Court in *RTÉ*, it is my view that I should decide on a case by case basis whether it is essential for me to review the entire content of the requested information before determining whether it is environmental information. In many cases, the content of the requested information will be highly relevant to the determination. This is one of the reasons why, in most cases, I require the public authority to make the requested information available to my Office for the purposes of my review. In other cases, the information requested will not itself be intrinsically environmental and the question will be whether the information requested is information 'on' a different measure or activity which is likely to affect the environment. In such cases, examination of the entire content of the requested information may be unnecessary.



## **Definition of Environmental Information**

16. Article 3(1) of the AIE Regulations is the relevant provision to consider where the issue is whether information is “environmental information”. In line with article 2(1) of the AIE Directive, article 3(1) of the AIE Regulations provides that “environmental information” means:

“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,

(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,

(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 paragraph (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 paragraph (a) or, through those elements, by any of the matters referred to in paragraphs (b) and (c). ”

17. The right of access under the AIE Regulations is to information “on” one or more of the six categories at (a) to (f) of the definition. According to national and EU case law on the definition of “environmental information”, 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 CJEU.

## **Positions of the Parties**

### **Correspondence between the parties following the appellant’s AIE request**



18. As I have outlined above, following the appellant's AIE request of 14 October 2021, the appellant and the Department engaged in a significant amount of correspondence regarding the nature of the information the appellant was seeking and whether or not it was environmental information within the meaning of the AIE Regulations.
19. On 11 November 2021, the Department informed the appellant that the report in question concerned the management of the Election Observation Roster within the Department and that the processes involved in election observation itself were not part of the report's remit. It provided the appellant with four points describing the purpose of Management Review contained within the report itself.
20. In his response of the same date the appellant contended that an Anglo-centric approach to law is taken in Ireland, rather than a pan-European one. He argued that this approach has led to "proper" requests for environmental information being rejected. The appellant contended that, in terms of potential environmental information, a holistic approach should be taken. As an example, he contended that the location of the Election Observation Roster had shifted between Dublin and Limerick a number of times, and at one point was split between the two cities. The appellant argued that this gave rise to "lots of commuting and other environmental impacts."
21. In an email dated 12 November 2021 the Department responded that the report did not concern the geographical location of the Election Observation Desk and again asked the appellant to specify exactly the environmental information he was seeking. In response, the appellant queried in what capacity the Department official was acting in relation to the request, to which the Department official cited article 7(8) of the AIE Regulations, which allows a public authority to invite a requester make a more specific request if the original request is considered too general in manner, and requires a public authority to offer assistance to the requester when doing so.
22. In an email dated 18 November 2021, the appellant stated that he had gone as far as he could to show that his request relates to environmental information as understood in EU Law and, among other things, again reiterated his view of the importance of the geographical location of the unit.
23. On 19 November 2021 the appellant sought an internal review on the basis of a deemed refusal as the Department's original decision issued later than the time period set out in the AIE Regulations. He made no specific arguments on whether the information he was seeking was in fact environmental information.

#### The appellant's correspondence with this Office

24. In the appellant's appeal, received by this Office on 23 December 2021, the appellant sought a review by this Office on the basis of the Department's deemed refusal of his internal review request.
25. In an acceptance letter from this Office dated 12 January 2022, the appellant was invited to make submissions in support of his appeal by 2 February 2022. To date, no submissions by the appellant have been received by this Office.



### The appellant's position

26. From the information available to me it appears that the appellant's position may be summarised as follows. It is clear from his original request and his engagements with the Department that the appellant is of the view that the records used by the Department in the preparation of its Management Review report contain or comprise environmental information within the meaning of the AIE Regulations.
27. In support of this view, the appellant argued in his original request that the Department's desire to keep expenditure low for flights for election observers may lead it to select less efficient and more polluting airlines with longer airport transfers, which would in turn have environmental costs. The appellant also argued that the change in the geographical location of the Department's Election Observation Roster gave rise to "a lot of commuting and other environmental impacts."

### The Department's position

28. It is the Department's position that the records that arose in the preparation of the Management Review report, including inputs from the external consultant, do not contain environmental information within the meaning of article 3 of the AIE Regulations.
29. In its original decision the Department emphasised that the Management Review concerned the "management of the Election Observation Roster" within the Department and not with election observation itself. It reiterated that the location of the Election Observation Desk did not form part of the Management Review.
30. The Department stated that the purpose of the Management Review was to assess the Department's management of the election observation roster and application processes, and was not an assessment of election observation as an initiative. It said that the Management Review assessed the extent to which the Department ensures the fairness, efficiency and optimisation of its election observation function and also dealt with limiting factors such as the number of transparency requests the Election Observation Desk were required to deal with.
31. The Department stated that the records that arise from compiling such a review do not pertain to the environment. It also stated that the appellant's request "[...] it does it comply with section (1)(d) of the AIE Regulations, which state that "[a] request for environmental information shall— . . . d) state, in terms that are as specific as possible, the environmental information that is the subject of the request" .” Given the engagements of the parties in advance of the Department's original decision, it seems reasonable to me to conclude that the Department intended to state that the appellant's request did not comply with article 1(d) of the AIE Regulations.
32. The Department cited a previous very similarly worded AIE request that the appellant had made in 2021, which the Department had refused, and contended that the making of this request amounted to "an abuse of process of the right to access records". The Department also argued that the appellant's request came "in the wake of a number of freedom of information requests concerning the election observation roster that have been refused on the grounds that they are vexatious". It contended that the appellant's AIE request in this case also formed part of a pattern of manifestly unreasonable



requests submitted by the appellant over a sustained and prolonged period.

33. As mentioned above, the Department's internal review decision affirmed its original decision.
34. In an initial submission to this Office dated 2 February 2022 in support of its decision, the Department set out the purpose of the Management Review, as stated in the review's terms of reference at Appendix 1 of the report, as follows:
- 1 To provide an independent assessment of the effectiveness of the processes and controls involved in establishing and maintaining the Election Observation Roster.
  - 2 To identify lessons learned from the processes involved which will inform decisions with regard to arrangements for future rosters.
  - 3 To assess the suitability of the location of responsibility for management of the election observation roster.
  - 4 To provide accountability, including to the Oireachtas Joint Committee of Foreign Affairs and Defence.
  - 5 To assess the compliance of observers with requirements set out in the recruitment booklet e.g. DFAT code of conduct.
  - 6 To examine whether five years is a suitable roster duration.
35. The Department stated that the Management Review focused on the management of the election observation roster. It stated that the reference to the location of the management of the election observation desk refers to where that function would reside within the management framework of the Department, and does not refer to the geographic location of the desk.
36. The Department went on to state that the appellant had a long history of abusing transparency instruments in pursuing a grievance with the Department, specifically with the election observation desk.
37. This Office sought a focused submission from the Department on 11 November 2022 in which the investigator sought details concerning the records held by the Department relevant to the appellant's request and further information on the Department's position that the information sought by the appellant is not environmental information within the meaning of article 3 of the AIE Regulations.
38. In an email dated 17 November 2022 the Department made a further submission to this Office. The Department stated that on receipt of the request, its FOI Unit asked the Evaluation and Audit Unit to carry out a search for records that fell within scope. The Department stated it was unable to identify any such records in the context of article 3(1) of the AIE Regulations. The Department re-stated that the Management Review focused exclusively on the management of the Election Observation Roster within the Department. It said that that the Management Review did not concern itself with election observations as a process or any of the issues raised by the appellant, such as the environmental costs of flying election observers abroad or the geographical location of the Election Observation Desk in





Dublin or Limerick. The Department went on to outline its engagements with the appellant following receipt of his request, which I have already set out above.

39. The Department concluded its submission by stated that as the “reference terms and remit” of the Management Review did not relate to any of the issues identified by the appellant, the Department refused the appellant’s request.

### **Analysis and Findings**

40. In my view, paragraph (c) of the definition, which provides that “environmental information” means any information on 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, is the most relevant to this review.

### **Identification of a measure or activity**

41. Paragraph (c) requires the identification of a relevant measure or activity, which the information sought is “on”. Information may be “on” more than one measure or activity (*Henney* at paragraph 42). In identifying the relevant measure or activity, one may consider the wider context and is not strictly limited to the precise issue with which the information is concerned (*ESB* at paragraph 43). The list of examples of measures and activities given at paragraph (c) is not exhaustive, but it contains illustrative examples (*Redmond* at paragraph 55). The CJEU stated in *Mecklenburg* that the term ‘measure’ serves “merely to make it clear that the acts governed by the directive included all forms of administrative activity” (*Mecklenburg* at paragraph 20, emphasis added), and a similarly expansive approach should be taken to the term ‘activity’ (*RTÉ*, at paragraph 19).
42. The Executive Summary of the [Management Review report](#) provides the following details as to the background and purpose of the Management Review:
- “The members of the Election Observation roster play an important role in the promotion of democracy, human rights and the rule of law. They form part of an international community that encapsulates Ireland’s values and commitment as a member of the EU and OSCE. This report provides forward-looking recommendations that aim to ensure Ireland continues to facilitate high quality, responsive volunteer observers, and an election observation function that is fit for purpose and effective in the years to come.”
43. It goes on to restate the first four of the six points of the terms of reference of the review set out at Appendix 1 of the report and already outlined above at paragraph 34.
44. It is clear from the extracts of the report referenced above, along with the Department’s submissions to this Office, that in conducting the Management Review and preparing the resulting report, the Department was engaged in an administrative activity within the meaning of *Mecklenburg*. I am therefore satisfied that the preparation of the Management Review report is a measure or activity within the meaning of paragraph (c).



Whether the measure or activity is affecting, likely to affect or designed to protect the environment

45. To meet the definition at article 3(1) paragraph (c), the measure or activity must affect or be likely to affect the elements and factors referred to in paragraphs (a) and (b) (i.e. the environment) or designed to protect the environment (*Redmond* at paragraph 57). 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). It is also important to note that the actual outcome of a measure or activity is irrelevant. In this respect, I note the analysis of Hogan J in *Minch* at paragraph 40 of his judgment.
46. I have outlined the positions of the parties in considerable detail above. I have had regard to the decisions and submissions of the Department, the purpose and terms of reference of the Management Review, as set out in that review’s report, and the appellant’s correspondence with the Department and this Office.
47. Specifically, I note that the appellant made reference to several potential environmental impacts he contended could arise from various issues, including: the geographic location of the Department’s Election Observer function; whether election observation takes place remotely in Ireland or in-person abroad; and what airports and airlines are used to transport election observers.
48. The methodology for carrying out the Management Review, as set out in the report, linked above, comprised a combination of a literature review and the carrying out of qualitative interviews. I see no evidence that the carrying out of such a review, particularly in the manner described in the report, could be deemed to have an effect, or to be likely to affect, the environment. It is clear that the undertaking of the Management Review did not concern the geographic location of the Department’s Election Observer function, whether election observation takes place remotely in Ireland or in-person abroad, what airports and airlines may be used to transport election observers, or any of the other issues the appellant argued could give rise to environmental impacts.
49. It seems to me that, in large part, the appellant’s submissions concern the act of election observation itself, rather than the undertaking of a review of the functioning of the administrative unit of the Department responsible for the election observation function.
50. It is clear to me that the issues raised by the appellant are not connected with the measure at issue, the undertaking of the Management Review. In all the circumstances, I am therefore satisfied that the undertaking of the Management Review by the Department is too remote from any impact on the environment put forward by the appellant or evident from the information before this Office.
51. I find, therefore, that the undertaking of the Management Review is a measure and/or an activity within the meaning of paragraph (c) but it is not likely to affect the environment.

Whether the information is on the measure or activity



52. Where the relevant measure or activity has the requisite environmental effect, one must consider whether the requested information is “on” that measure or activity within the meaning of article 3(1) of the AIE Regulations. In this case, having found that the relevant measure and/or activity – the undertaking of the Management Review – does not have the requisite environmental effect, it is not necessary for me to consider whether the requested information is “on” that measure or activity within the meaning of article 3(1) of the AIE Regulations.

### Conclusion

53. In conclusion, I find that the information sought is not environmental information within the meaning of paragraph (c) of the definition in article 3(1) of the AIE Regulations. I am also satisfied that the information sought is not environmental information within the meaning of any of the remaining paragraphs of the definition.

54. I make no other findings on the matter.

55. Accordingly, I find that the Department was justified in refusing access to the information sought.

### Decision

56. Having carried out a review under article 12(5) of the AIE Regulations, I hereby affirm the Department’s decision to refuse access to the information sought on the basis that it is not “environmental information” within the meaning of the definition in article 3(1) of the AIE Regulations.

### Appeal to the High Court

57. 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.

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**Ger Deering**  
**Commissioner for Environmental Information**  
25 May 2023