



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-118395-Y6B8D7

Date of decision: 30 March 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 research/groundwork underpinning the decision to recommence the deployment of Irish election observers

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 15 October 2021, the appellant submitted a request to the Department seeking access to the research/groundwork underpinning the decision to recommence the deployment of Irish election observers, which had been suspended since March 2020. He contended that this decision would impact the environment due to the need for observers to travel from Ireland by air. On 11 November 2021, the Department informed the appellant that, due to the complexity of the information requested, it required an extension of one month in accordance with article 7(2)(b) of the AIE Regulations, in order to make its decision.
2. On 17 December 2021, the Department issued its original decision. It explained that information on the Election Observation Roster, including on the decision to resume the nomination of observers, is publicly available on the Irish Aid [website](#) and in replies to relevant Parliamentary Questions. It noted that the information on the website includes relevant environmental information, such as flight costs and average CO2 emissions for 2021 in accordance with article 5(1)(b) of the AIE Regulations. The decision maker went on to note:

“However, the research and groundwork, which underpinned the decision to resume nominations, was entirely on public health grounds. Consequently, I am of the view that your request is irrelevant to Access to Information on the Environment Regulations. In my opinion, it is also vexatious and forms part of a pattern of manifestly unreasonable requests submitted by you over a sustained and prolonged period that amounts to an abuse of process of the right to access records.”
3. The decision maker then referred to correspondence from the Office of the Information Commissioner (the OIC) relating to an appeal to that Office in respect of a separate request submitted by the appellant to the Department under the Freedom of Information Act 2014 (the FOI Act) and to the judgment of the High Court in another FOI case involving the appellant, the OIC, and the Department.
4. Also on 17 December 2021, the appellant sought an internal review of the Department’s decision. On 19 January 2022, the appellant wrote to my Office, stating that the Department had not responded. On 20 January 2022, the Department issued its internal review decision, wherein it affirmed its original decision. On 2 February 2022, the appellant confirmed to my Office that he wished to proceed with his appeal of the Department’s decision, noting he was dissatisfied with its refusal of his request.
5. 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).



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

Scope of the Review

8. 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.
9. My powers as Commissioner for Environmental Information apply only in respect of environmental information held by or for a public authority. The Department in its original decision, among other things, stated that the research and groundwork, which underpinned the decision to resume election observation nominations, was entirely on public health grounds and consequently, was "irrelevant" to the AIE Regulations. In its internal review decision, the Department stated that it was affirming its original decision "as a whole". I am satisfied that it is the Department's view that the information sought by the appellant is not "environmental information" such that it falls within the remit of the AIE Regulations.
10. In accordance with my Office's Procedures Manual, available at 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.
11. Accordingly, I am satisfied that the scope of this review concerns whether the Department was justified in refusing access to the research/groundwork underpinning the decision to recommence the deployment of Irish election observers, on the basis that it is not "environmental information" within the meaning of the definition in article 3(1) of the AIE Regulations.

Preliminary Matters

12. 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.



13. In light of the guidance of the High Court in *RTE*, 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

14. 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). "
15. The AIE Regulations transpose the AIE Directive. 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 so that an informed public can participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive. 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.

Position of the Parties

16. The appellant is of the view that the research/groundwork underpinning the **decision to recommence the deployment** of Irish election observers is “environmental information”. In his original request, he contended that the decision will impact the environment as observers from Ireland need to travel by plane.
17. It is the Department’s position that the research/groundwork underpinning the **decision to resume the nomination** of Irish election observers is “irrelevant” to the AIE Regulations. As indicated, I am satisfied that it is the Department’s view that the information sought is not “environmental information”.
18. Notwithstanding the different descriptions of the information sought, I have no reason to doubt that both parties are referring to the same research/groundwork.

Analysis and Findings

19. 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

20. 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).
21. The Department’s Irish Aid website includes the following detail related to election observation:



“International election observation plays an important role in the promotion of democratisation, human rights and the rule of law. The Department maintains a roster of observers who are available to participate in election observation missions. We nominate observers to missions organised, in the main, by the EU and the OSCE.”

22. The Department’s [Overseas Election Observation Roster Information Note for the Joint Committee on Foreign Affairs and Trade, and Defence](#) further explains:

“A roster of volunteers willing and suitable to partake in overseas election observation missions is maintained by the Department of Foreign Affairs and Trade. Volunteers are nominated as occasions arise to observation missions organised by either the European Union or the OSCE’s Office for Democratic Institutions and Human Rights (OSCE-ODIHR). The current roster was mustered in January 2019.” (paragraph 1)

“...Today, the practice is to nominate volunteers from the roster to EU and OSCE-ODHIR missions only...” (paragraph 4)

“OSCE-ODHIR carries out election observation missions in OSCE member states. EU election observation missions are agreed on a case-by-case basis. In advance of a prospective election observation mission, interested States are invited to submit the names of prospective participants for consideration by the OSCE-ODHIR or EU central authorities. Typically, each mission has two categories of observer, long-term and 2 short-term, with the latter category accounting for the majority of observers. The selection of observers is made on a mission by mission basis by the EU or OSCE-ODHIR on the basis of those nominations from national rosters.” (paragraph 6)

“Volunteers on the Irish roster are made aware of each prospective mission and of any specific requirements, such as language, identified by the EU or OSCE-ODHIR in their Call for Observers. Volunteers are invited to indicate their willingness to be nominated for a given mission. Nomination is made by the Department of Foreign Affairs and Trade having regard to specific mission requirements, as well as general principles of considering gender balance and providing a fair opportunity for all roster members.” (paragraph 9)

23. Further detail regarding election observation is also set out in the Department’s [Review of the Management of the Election Observation Roster](#) and in its [Composite Response to queries and observations received following the mustering of the Election Observation Roster, 2019-2023](#). I am satisfied that the nomination of observers forms part of the overall election observation deployment process whereby, the Department nominates observers for consideration and selection by the EU/OSCE and, if the nominees are selected, the Department deploys them to the relevant election observation mission at the request of the EU/OSCE. I understand that the final decision on observer selection is made by the EU/OSCE. I also understand that, while many Irish nominees have been selected, it is not a guarantee that the EU/OSCE will accept each nominee.
24. The Department did not nominate observers between March 2020 and October 2021 (i.e. during the Covid-19 crisis). In its original decision, the Department stated that the research/groundwork, which underpinned its decision to resume nominations, was entirely on public health grounds. In its internal review decision, the Department further stated that the decision to suspend nominations had been on



public health grounds and, accordingly, the decision to resume nominations examined public health considerations. I note that the Irish Aid website also states: “In October 2021, given the progress of Ireland's vaccination programme and the re-opening of non-essential international travel, Ireland resumed nomination of observers to Election Observation Missions organised by the OSCE and the EU.”

25. I am satisfied that the Department’s decision to resume the nomination of Irish election observers as part of the election observation deployment process 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

26. To meet the definition, 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.
27. In my view, there is no real and substantial possibility that the Department’s decision to resume the nomination of Irish election observers, as part of the election observation deployment process, will affect the environment. This decision merely resumes, following suspension due to Covid-19, the part of the process by which the Department nominates observers for consideration by the EU/ OSCE. The deployment of observers requires a final selection decision by the EU/OSCE.
28. Furthermore, while I acknowledge that the actual deployment of selected observers requires (air) travel, this is the case for election observation missions organised by the EU/OSCE generally, regardless of whether or not any Irish nominees have been put forward by the Department or whether or not those nominees have been selected.
29. In all the circumstances, I am satisfied that the decision to resume the nomination of observers by the Department for consideration by the EU/OSCE is too remote from any impact on the environment.
30. I find, therefore, that the decision to resume the nomination of Irish election observers as part of the election observation deployment process is a measure and/or activity but is not likely to affect the environment.

Whether the information is on the measure or activity

31. 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.
32. In this case, having found that the relevant measure and/or activity – the decision to resume the nomination of Irish election observers as part of the election observation deployment process – 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

33. 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.
34. Accordingly, I find that the Department was justified in refusing access to the information sought.

Decision

35. 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

36. 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.

Ger Deering
Commissioner for Environmental Information
30 March 2023