



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-107135-P8N2Q0

**Date of decision:** 20 March 2023

**Appellant:** Mr. Lar McKenna

**Public Authority:** ESB Networks DAC [ESBNDAC]

**Issue:** Whether the requested information was held by ESBNDAC within the meaning of the AIE Regulations.

**Summary of Commissioner's Decision:** The Commissioner found that the requested information was held by ESBNDAC within the meaning of the AIE Regulations. He annulled the decision of ESBNDAC and directed that a fresh decision-making process be carried out.

**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 appeal relates to the relationship between a number of stakeholders in the Irish electricity market. ESB is the transmission asset owner (TAO) and distribution asset owner (DAO) in Ireland under licenses granted by the Commission for Regulation of Utilities under the Electricity Regulation Act 1999. This means that ESB is responsible for the physical electricity infrastructure. ESBNDAC is a separate legal entity and is the licensed distribution system operator (DSO), also operating under license pursuant to the 1999 Act. Through an operating agreement between ESB and ESBNDAC, ESB makes staff available to ESBNDAC to carry out its function as DSO. As well as this, ESBNDAC manages both the TAO and DAO functions for ESB through an Asset Management Agreement. In this capacity, ESBNDAC manages the staff of ESB to carry out the work involved in the TAO and DAO functions.
2. In *Electricity Supply Board & Anor v Killross Properties Limited* [2016] IECA 210, which was brought to my attention by ESBNDAC in this appeal, the Court of Appeal considered the arrangements between ESB and ESBNDAC, which was ESB Networks Limited at the time. The Court found that *“there is a clear legal distinction between ESB and ESB Networks Limited and that there is a clear distinction between the ESB Networks Business Unit (as a division within ESB) and ESB Networks Limited. It is also clear that ESB and ESB Networks Limited carry out different functions under the regulatory structure now in place in Ireland. It is clear that ESB and ESB Networks Limited have entered into various agreements required by the regulatory structure and it is also clear that ESB and ESB Networks Limited have entered into an Asset Management Agreement whereby ESB Networks Limited manage the ESB Networks Business Unit of ESB for and on behalf of ESB.”*
3. SIRO Limited is a joint venture between ESB and Vodafone with the aim of delivering fibre to building broadband across Ireland. Following the enactment of the ESB (Electronic Communications Networks) Act 2014, ESB entered into an agreement with SIRO Limited to allow SIRO access to ESB’s existing electricity network to place fibre optics on it to enable the roll out of wholesale broadband by SIRO.
4. On 28 January 2021, the appellant requested a range of information from ESBNDAC regarding the ongoing relationship between ESB, ESBNDAC and SIRO, specifically:
  - a. Information on the “capital contribution of network assets worth €0.9 million” received by SIRO from ESB, as referred to in page 25 and page 28 of the SIRO accounts to year end 31 December 2019;
  - b. A copy of (i) the “network access agreement (IRU)” and (ii) the “business and asset transfer agreement” referred to in the SIRO Limited annual accounts for year end 31 December 2019;
  - c. A copy of (i) the valuations and/or reports carried out by or on behalf of ESBNDAC in relation to the “network asset agreement (IRU)” and/ or “business and asset transfer agreement” transaction of €100 million which is identified in page 25 of the SIRO accounts and (ii) a copy of the minutes of the meetings where the €100 million deal/ contract was approved;



- d. Information on the “capital contribution of network assets worth €0.9 million” received by SIRO Limited which is referred to in page 25 and page 28 of the SIRO accounts to year end 31 December 2019, including a copy of the agreement to transfer these assets, the valuation/ report on this transaction and a copy of the minutes of the meeting where this transaction was approved;
  - e. Information on the type and nature of services provided to SIRO Limited by ESBNDAC and/or ESBNDAC relevant personnel in the past 12 months and the amounts paid by SIRO Limited for those services.
5. On 26 February 2021, ESBNDAC extended the time for response to the applicant’s request under article 7(2)(b) of the AIE Regulations. On 26 March 2021, ESBNDAC released one redacted document to the appellant. All but one paragraph of the document was redacted. ESBNDAC refused the balance of the request, stating that it was not appropriate for ESBNDAC to purport to make any decision under the AIE Regulations in respect of any information it might hold in its capacity as a service provider to ESB i.e. in circumstances where any information held by it is held for a different public authority. ESBNDAC proceeded to transfer the balance of the request to ESB under article 7(6) of the AIE Regulations. The appellant sought an internal review on the same date. The internal review, dated 23 April 2021, affirmed the original decision.
6. The appellant brought an appeal to this Office on 4 May 2021.
7. I am directed by the Commissioner for Environmental Information to carry out a review of this matter under article 12(5) of the Regulations. In so doing, I have had regard to the submissions made by the appellant and ESBNDAC and submission made by ESB as a third party to this appeal. 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’).
8. What follows does not comment or make findings on each and every argument advanced but all relevant points have been considered.

### **Scope of Review**

9. The question that arises in this review is whether ESBNDAC holds the information sought within the meaning of article 7(1) of the AIE Regulations.



### **Analysis and Findings**

10. Article 3(1) of the AIE Regulations provides that the regulations apply to environmental information that is held by, or for, the relevant public authority. This article elaborates on this definition by providing the following definitions:
  - a. “environmental information held by a public authority” means environmental information in the possession of a public authority that has been produced or received by that authority; and,
  - b. “environmental information held for a public authority” means environmental information that is physically held by a natural or legal person on behalf of that authority.
11. These definitions mirror those in Directive 2003/4/EC.
12. From this it appears that there are two elements required for information to be “held by” a public authority for the purposes of the AIE Regulations: the information must be a) in the possession of the public authority and b) must have been produced or received by that authority.
13. The most relevant authority in relation to these definition is the English Upper Tribunal case *Holland v Information Commissioner and University of Cambridge* [2016] UKUT 260 AAC. In this case, the Tribunal considered the above definitions in the context of allegedly personal emails held in a staff member’s personal email account. The Tribunal held that it needed to consider a) how the information came into the possession of the authority and b) whether the information is connected to the authority such that it can be said that the production or receipt of the information was attributable to the authority. In *Holland* the Tribunal found that the emails related to voluntary work being carried out by the staff member in a personal capacity, and were not received by him as an officer of the university. Accordingly, the emails were not “held” by the university.
14. ESBNDAC’s submissions also made reference to the decision of the High Court in *Minister for Health v Information Commissioner* [2014] IEHC 231, a case which related to the provisions of the Freedom of Information Act 2014. In this case the Court held that there could be circumstances (under the FOI Act) where records could be physically held by a public body but not be “held” for the purposes of the FOI Act. While this case reached a similar conclusion to *Holland* above, I consider it to be of limited value in this appeal as it relates to the provisions of the FOI Act which differ from the AIE Regulations.
15. In the process of carrying out my review in this appeal, I have examined the asset management agreement between ESBNDAC and ESB. It creates a broad remit for ESBNDAC to “*discharge all of the Board’s DAO functions and TAO functions, including, without limitation, the performance of the construction and maintenance works constituting the works requiring to be performed by the Board in its capacity as DAO and as TAO and to that end shall manage and direct the activities of the Relevant Personnel*”. The agreement also affords ESBNDAC unrestricted access to the distribution and transmission systems.



### Whether the information is in the possession of ESBNDAC

16. ESBNDAC says that while information relevant to the request may be in its physical possession or accessible to it, this information is not “held” by it within the meaning of the AIE Regulations as it only holds the information on behalf of ESB in its capacity as Asset Manager and has no discretionary authority relating to the information.
17. ESBNDAC made a number of submissions with reference to guidance published by the Information Commissioner’s Office for England, Wales and Northern Ireland (ICO), on determining whether information is in fact “held” by a public authority and the circumstances in which information that may be physically in the possession of the public authority may not be in its possession within the meaning of the legislation.
18. As set out above, this Office’s investigator wrote to ESB seeking third party submissions. ESB responded and made similar points to those raised by ESBNDAC, all of which have been considered.
19. ESBNDAC made a number of specific arguments in which it seeks to draw a distinction between its role as DSO and Asset Manager, namely:
  - a. The information is not prepared, received or used (or in any sense 'held' other than in the physical sense) for its own purposes as licensed Distribution System Operator ("DSO") but is prepared used and held by it solely in its capacity as the Asset Manager.
  - b. The information is held solely on behalf of another person (ESB).
  - c. ESBNDAC has no access to, use for, or interest in the information other than in its capacity as the Asset Manager, that is as a service provider to ESB.
  - d. ESBNDAC does not, at its own discretion and for its own purposes, create, record, file or remove the information.
20. Having regard to the provisions of the asset management agreement, I do not agree that such a distinction can be drawn between ESBNDAC’s role as DSO and its role as Asset Manager. ESBNDAC manages ESB staff in carrying out the DAO function on a daily basis. It would be artificial to distinguish between these two functions when seeking to determine whether information is “held” by ESBNDAC within the meaning of the AIE Regulations. There is nothing in the scheme or provisions of the AIE Regulations to suggest that information held by a public authority in its role as service provider to another public authority is not within the possession of the public authority providing the service.
21. ESBNDAC is contractually obligated to carry out its role as Asset Manager, and is paid a fee for doing so. On this basis, I do not agree that it is the case that information received or produced in its capacity as Asset Manager is so unconnected to ESBNDAC that it cannot be said to be in its possession or that ESBNDAC has “no interest” in the information.



### Arguments relating to control over information

22. ESBNDAC also argues that it has no discretionary authority in relation to the requested information, specifically stating that:
- a. ESBNDAC has no discretionary authority in relation to information which comes into its possession in the performance of its obligations under the Asset Management Agreement, on the contrary, it is required to treat such information in compliance with confidentiality provisions as set out in Section 10 of that Agreement.
  - b. ESBNDAC does not make its own decisions about what information is retained, altered or deleted.
  - c. ESBNDAC has access to and some physical possession of the information, but this is pursuant to, and conditioned by, the legal, contractual and regulatory arrangements in place as between ESB and ESBNDAC as described above.
23. I do not agree that this lack of discretionary authority is of such a level that it can be said that ESBNDAC does not have control of the information sought. It is not the case that ESBNDAC is merely physically storing the information sought on its premises or computer systems. It is evident that ESBNDAC is required to engage to some extent with the requested information, as ESBNDAC manages ESB staff in the performance of all of their functions, including in the performance of ESB's functions as DAO and TAO. The asset management agreement between ESB and ESBNDAC in fact provides for ESBNDAC to discharge all of ESB's DAO and TAO functions without limitation.
24. While the agreement provides for confidentiality, these obligations are not such that ESBNDAC cannot be said to have control of the information sought. These provisions of the agreement make specific reference to the disclosure of information pursuant to statutory or other legal obligations, of which potential disclosure under the AIE Regulations would be such an obligation.

### Whether information was produced or received by ESBNDAC

25. I have reviewed the information identified by ESBNDAC as relevant to the request. While I must be mindful not to disclose the contents of these documents, I am satisfied that this information, which is in the possession of ESBNDAC was produced or received by ESBNDAC and is therefore held by it within the meaning of the AIE Regulations. ESBNDAC also provided information on the information storage arrangements between ESB and ESBNDAC. The submissions stated that there is a strict division of information between the organisations. Due to this, I am satisfied that any information accessible to ESBNDAC that is relevant to the request has been made available to ESBNDAC and is not simply accessible to it by virtue of a sharing of storage systems or otherwise.

### Other arguments

26. ESBNDAC also referred to the fact that under the FOI Act, ESBNDAC is only a public body insofar as it relates to records concerning its functions under its distribution under s.14(j)(g) of the Electricity



Regulation Act 1999. For the purposes of clarity, I note that this has no effect on its status under the AIE Regulations. Indeed, no party has put forward the suggestion that ESBNDAC is not a public authority for the purposes of the AIE Regulations.

### **Conclusion**

27. As a result of the foregoing, on behalf of the Commissioner for Environmental Information, I find that any information in the possession of ESBNDAC, that has been produced or received by it, whether in its capacity as asset manager or otherwise, is held by ESBNDAC within the meaning of the AIE Regulations. This includes both the record that was part-released to the appellant and the records that were identified as relevant to the request, but in respect of which ESBNDAC sought to transfer the decision-making process/authority to ESB. I note that should ESBNDAC be of the opinion that the release of information would adversely affect the interests of ESB or of any other third party, it is required under article 7(11) of the AIE Regulations to contact the third party to seek their consent or otherwise to the release of the information.

### **Decision**

28. Having carried out a review under article 12(5) of the AIE Regulations, on behalf of the Commissioner for Environmental Information, I annul the decision of ESBNDAC on the basis that the information at issue is held by it for the purposes of the AIE Regulations. Accordingly, I direct that a fresh decision-making process be carried out in respect of the appellant's request.

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

29. 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 McGoldrick**

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

**20 March 2023**