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-93399-G8R1J0

Date of decision: 15 December 2021

Appellant: Lar McKenna

Public Authority: ESB

Issue: Whether certain information requested by the appellant is "environmental information" and whether any further "environmental information" is held by or for ESB within the scope of the appellant's request.

Summary of Commissioner's Decision: The Commissioner found that the information at issue is "environmental information". He found that adequate searches had been conducted by ESB to identify and locate information but that certain information redacted by ESB comes within the scope of the appellant's request. He remitted the matter to ESB for further consideration.

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 23 August 2019, the appellant wrote to ESB requesting the following information:

   (1) Decisions and/or awards of compensation of Property Arbitrators in relation to statutory compensation claims for the Bandon-Kinsale 38kV line.
   (2) Decisions and/or awards of compensation by Mr Michael Neary, Property Arbitrator, on statutory compensation claims submitted to ESB for electricity lines from 1 January 2009 to the date of the request.
   (3) Reports, studies or analysis carried out by or on behalf of ESB on the effects of electricity lines, poles and/or pylons on land and property values.
   (4) (i) A copy of the 1976 Building Rules adopted by the Electricity Supply Board; and (ii) the minutes of the meeting of the Electricity Supply Board wherein the 1976 Building Rules were adopted.

2. ESB issued its original decision on 20 September 2019 in which it refused the request on the basis that the information requested did not constitute "environmental information". ESB acknowledged that the placement of an electricity line was a measure or activity likely to have an effect on environmental elements or factors, such that information "on" such an activity could be considered "environmental information" within the meaning of paragraph (c) of the definition provided for in article 3(1) of the AIE Regulations. However, it considered that decisions and/or awards of compensation, such as those sought at Q1 and Q2, were not measures or activities affecting or likely to affect environmental elements or factors. It also disputed that the information requested in Q3 and Q4 was "environmental information". No reasoning was provided for this conclusion in the original decision but ESB did refer to correspondence with the appellant in relation to previous requests and relied on the reasoning set out in that correspondence.

3. The appellant sought an internal review of the decision on 20 September 2019. He argued that the information sought in Q1 and Q2 of his request was environmental information as it related directly to and had arisen directly from the erection of the electricity lines. He argued that the information requested at Q4 was environmental information as the 1976 Rules "reflect a decision of the Electricity Supply Board as to the rules and policies by which the Electricity Supply Board will determine how and whether landowners may erect buildings and structures in proximity to overhead electricity lines" such that the "application of the 1976 Rules and the information as to how and when those rules are applied or not applied has a direct bearing on the development of buildings and structures on land and therefore affects the built environment in which we all live". He also noted that the decision maker had not indicated that they had carried out a search for the information sought nor whether they had reviewed such information. He argued that it was not possible to make a decision as to whether information is or is not environmental information without reviewing the information and requested that the Internal Reviewer carry out a search for the requested information and review it as part of the internal review. The appellant also noted that I had made previous decisions indicating that the assessment of compensation arising from the placement of lines by ESB was "environmental information".

4. ESB issued an internal review outcome on 18 October 2019. The Internal Reviewer advised the appellant that a search had been carried out to identify and locate information within the scope of Q1 and Q2 of his request. Those searches identified one award by the Property Arbitrator and a

number of agreements made between ESB and landowners that were subsequently recorded by the Arbitrator. The Internal Reviewer noted that having reviewed a sample of the information, they were not satisfied that the information requested in Q1 and Q2 constituted "environmental information". They concluded firstly that decisions and/or awards of compensation do not in any way affect "the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites . . . and the interaction among these elements" nor do they affect "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". When considering paragraph (c) of the definition (i.e. whether the information requested was information on a measure or activity affecting, likely to affect or designed to protect the environment), the Internal Reviewer noted that they had distinguished between compensation paid after the placing of an electricity line and the placement of a line itself. They accepted that the placement of an electricity line; the nature of the line; the position and manner of the placement of the line, can or is likely to have the requisite environmental impact such that information on these activities could be considered environmental information within the meaning of article 3(1)(c). However, the Internal Reviewer concluded that decisions and/or awards of compensation were not a measure or activity affecting or likely to affect the environment in the manner required by the definition contained in article 3(1) of the AIE Regulations as the awards were concluded after the lines and infrastructure were put in place and did not influence the location of the line or any other environmental aspects of the structures.

5. With respect to Q3, the Internal Reviewer noted that they had had a search carried out for information within the scope of this question and no information had been located. As such, they refused Q3 of the appellant's request on the basis that no information within the scope of that question was held by or for ESB.

6. With regard to Q4, the Internal Reviewer noted that they had located two documents within the scope of that question. Those documents were provided to the appellant and can be described as follows:

   (i) A document entitled **Rules for Buildings near High Voltage Overhead Lines** dated 24 May 1976**.** The document does not consist of the Rules themselves but, rather, appears to consist of a Memo to the Director of Generation/Transmission which sets out the view of the author (the Head of the Transmission Department) that the Rules for Buildings should be revised and the reasons for same. The Memo notes that a copy of the Rules is attached but no such copy was provided to the appellant. However, the Memo does summarise the "changes in concepts and effects" for the Board.

   (ii) A document entitled **Electricity Supply Board General Meeting Held on Tuesday 8 June 1976 at 10am - Minutes** which appears to contain an agenda of the items for discussion at that meeting as well as the decisions taken on each item. One of the agenda items has been redacted. The other is the "Rules for Buildings near High Voltage Overhead Lines, excluding 10kV. Report, Head of Transmission Department dated 24 May 1976" (i.e. the Memo referenced at (i) above) and the document notes that the revised rules were approved by the Board.

7. The appellant appealed to my Office on 21 October 2019.

Scope of Review

8. The appellant has appealed the following aspects of the Internal Review decision:

   (i) the conclusion that the information within the scope of Q1 and Q2 of his request was not environmental information.

   (ii) the decision to refuse information within the scope of Q3 on the basis that no such information was held by or for ESB. The appellant contended that adequate searches had not been carried out by ESB to identify and locate such information.

   (iii) the decision with respect to Q4 of his request on the basis of his view that a copy of the 1976 Rules had been identified by ESB but not released to him.

9. ESB's position is as follows:

   (i) ESB refused to grant access to information requested by the appellant concerning Q1 and Q2 on the basis that it did not consider such information to be "environmental information" within the meaning of the AIE Regulations;

   (ii) ESB refused access to information requested in Q3 on the basis that no such information is held by or for ESB;

   (iii) ESB provided the appellant with the following documents relating to Q4 of his request. Documents (a) and (b) were provided at Internal Review stage while document (c) was provided during the course of this appeal:

      (a) **Electricity Supply Board General Meeting Held on Tuesday 8 June 1976 at 10am – Minutes** – a copy of an agenda of the Board Meeting of 8 June 1976 which records the approval of the 1976 Rules.

      (b) **Rules for Buildings near High Voltage Overhead Lines -** An Introductory Memo prepared for the Board setting out a summary of the revised 1976 Rules and the basis on which their adoption was considered necessary;

      (c) **Rules for Buildings near High Voltage Overhead Lines, excluding 10kV** – this document is referred to by ESB as the "Briefing Document" which ESB says is not the ultimate 1976 Rules document but "contained environmental information which might have satisfied this part of [the appellant's] original request".

   The document referred to at (c) above was subject to redactions with respect to information which ESB did not consider to come within the scope of the appellant's request and the appellant argues that ESB is not entitled to withhold the information which has been redacted and that the 1976 Rules documents should be "released in full".

10. My review in this case is therefore concerned with:

   (i) whether the information requested in Q1 and Q2 of the appellant's request is "environmental information" within the meaning of the AIE Regulations;

   (ii) whether adequate and reasonable searches have been conducted by ESB to identify information within the scope of Q3 and Q4 of the request;

(iii) whether ESB is entitled to redact information from the documents provided to the appellant in response to Q4 of his request in accordance with the AIE Regulations.

Preliminary Matters

Delay

11. Before I proceed with my analysis, I wish to express my regret that there has been a considerable delay in the resolution of this appeal which was due to a combination of factors including resourcing issues within my Office. I continue to be committed to improving the efficiency of my Office in order to achieve timely reviews in future.

Analysis and Findings

12. I have now completed my review under article 12(5) of the Regulations. In carrying out my review, I have had regard to the submissions made by the appellant and ESB. I have also examined the contents of the records at issue. In addition, I have had regard to:

    - 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 Mc Kenna* [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*;
    - 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)*;
    - the decisions of the High Court and Supreme Court in *ESB v Gormley* [1985] IR 129, *ESB v Burke* [2006] IEHC 214 and *ESB v Harrington* [2002] IESC 38;
    - 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').

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

13. I will consider each of the points referred to at paragraph 10 above in turn.

Is the information requested at Q1 and Q2 of the appellant's request "environmental information"?

14. The claimant, in Q1 and Q2 of his request, has sought decisions and/or awards of compensation by property arbitrators in relation to statutory compensation claims made as part of the process by which ESB constructs or places lines and electricity infrastructure on lands.

15. The first question to be addressed is whether those decisions and awards of compensation are "environmental information" within the meaning of the definition contained in article 3(1) of the AIE Regulations.

16. The appellant relied on my previous decision in CEI/18/0003 *McKenna and ESB* in support of his argument that the information is environmental information. I note however that since the date of the appellant's initial submissions, this decision was appealed to the High Court in the *ESB* case referred to in paragraph 12 above and my decision was set aside. While my Investigator invited the appellant to make updated submissions in light of the High Court decision no such submissions were received. The appellant also argued that awards of compensation were made by property arbitrators as a direct result of hearings on compensation arising directly from the development of electricity infrastructure on privately owned land and as such, decisions of the property arbitrators were information "on" a measure and activity within the meaning of article 3(1)(c) of the AIE Regulations.

17. ESB's position is that decisions and awards of compensation made by property arbitrators constitute mere follow-on matters which occur after a decision on line placement has already occurred and are thus not capable of having an environmental impact in the manner required by the AIE Regulations. It accepts that projects involving the placement of electricity lines are measures or activities likely to affect the environment "in the sense that such activities might pose a 'real and substantial possibility' of affecting" elements and factors of the environment referred to in paragraphs (a) and (b) of the definition contained in article 3(1) of the Regulations. However, ESB relies on the fact that the process through which decisions on line placement are undertaken and implemented involves distinct procedures carried out by separate actors (i.e. EirGrid which decides on line placement of transmission lines, ESB Networks DAC which makes decisions as to the placement of distribution lines and ESB which implements those decisions by arranging for the construction and maintenance of the lines). ESB's argument is that the decision on where a line is to be placed is set in stone before any compensation is paid. Its argument is that the environmental "die is cast" by the time a wayleave notice is served on the relevant owner/occupier and that all considerations and decisions, both generally, and insofar as they might impact on elements and factors of the environment, will have been made. Its position therefore is that all later, follow-on, or consequential matters, such as compensation for loss of development, or devaluation of property, will not affect the already-determined plan or the decisions that have been made (in the first instance by EirGrid or ESB Networks DAC, not ESB). It therefore argues that information on the determination, payment or award of compensation is not information "on" the line placement project nor can any of those matters themselves be a measure or activity within the meaning of paragraph (c) of the definition contained in article 3(1).

18. ESB originally provided my Office with three documents which it considered to come within the scope of Q1 and Q2. It provided one document in respect of Q1 which it categorised as a decision or award of a property arbitrator in relation to compensation amounts and two documents in relation to Q2 which it categorised as records of settled compensation cases. As early

correspondence with my Office had indicated that ESB may only have provided a sample of records, my Investigator wrote to ESB on 17 August 2021 to request copies of all information held by ESB within the scope of Q1 and Q2. ESB clarified in its submissions of 1 October 2021 that it had provided my Office with one decision of a property arbitrator on an award of compensation for a landowner affected by the placement of the Kinsale-Bandon line and with a sample of other records "which might [fall] within [Q2] if the request was interpreted broadly". ESB argued that while the second category of records were referred to as "awards" they were in fact more accurately described as Orders of the property arbitrator. ESB provided the additional awards/Orders held by it to my Office on 1 October 2021. However, it argued that the awards/Orders should be considered outside the scope of the appellant's request at Q2. Its position was that those awards/Orders were "not true awards of compensation" but rather, Orders reflecting that an agreement had been reached between the parties as to the acceptable level of compensation (thus obviating the need for a decision of the arbitrator) which would be required by the parties should they wish to have the issue of legal costs adjudicated on in the case of disagreement as to such costs. ESB noted in this regard that some of the awards/Orders in question did not even refer to the compensation amount.

19. ESB is correct in its assertion that two of the six awards/Orders do not in fact make reference to an amount of compensation. That being said, Q2 of the appellant's request sought "decisions and/or awards of compensation by Mr Michael Neary, Property Arbitrator, on statutory compensation claims submitted to ESB for electricity lines from 1 January 2009 to the date of the request". Each of the documents provided by ESB is entitled "Award of Arbitrator" with the exception of one, which is entitled "Interim Award of Arbitrator". Even if it is the case that the compensation amounts were ultimately agreed, each of the Orders note that compensation amounts have been awarded by the arbitrator along with, in some cases, compensation for costs incurred as part of the arbitration and a decision on the arbitration fee to be paid by ESB. Each of the Orders is signed by the property arbitrator and includes the phrase "I award" or "I make interim award as follows". In my view, to hold these documents outside the scope of the appellant's request would be to take an unduly narrow approach and I am therefore satisfied that they should be considered to fall within the scope of Q2 of the request.

20. As such, my analysis in this section is concerned with whether either or both of the following constitute environmental information:

    (i) the decision of the property arbitrator providing for an award of compensation; and

    (ii) decisions of the property arbitrator which reflect a settlement between the parties as to the appropriate compensation.

21. ESB's argument in both instances is that since a decision as to the location of a line placement is made far in advance of any decision on compensation, information relating to compensation or arbitrators' awards is not information "on" that line placement and nor is the award of compensation or the arbitrator's decision a measure or activity within the meaning of article 3(1)(c). The appellant, as noted above, considers that the information sought is directly related to the development of electricity infrastructure on privately owned land and is therefore information on a measure or activity.

Legal framework for placement of electricity infrastructure

22. In order to assess ESB's argument, it is necessary to analyse the legal framework relating to the placement of electricity lines on land and the provision of compensation to affected landholders. While historically, many of the functions related to the generation and provision of electricity in the Irish market were carried out by ESB, the liberalisation of the Irish electricity market has diversified electricity generation, transmission and supply. Section 14 of the Electricity Regulation Act 1999 empowers the Commission for the Regulation of Utilities to grant licences "to any person" to generate and supply electricity as well as to discharge the functions of transmission system operator, transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner. The 1999 Act also provides that a licence to act as transmission system operator may only be granted to EirGrid while a licence to discharge the functions of transmission system owner, distribution system operator, public electricity supplier and Distribution System Owner may only be granted to ESB or, in the case of transmission system owner and distribution system operator, to one of its subsidiaries. As such, both ESB and EirGrid bear a degree of responsibility for the construction and operation of the electricity transmission system.

23. ESB submits that EirGrid, in its capacity as transmission system operator, is responsible for planning the development of the transmission system while ESB, as the transmission asset owner, is responsible for constructing and maintaining transmission lines on foot of instructions from EirGrid. The same applies to distribution lines except that in that case the decisions rest with ESB Networks DAC rather than EirGrid. ESB submits therefore that decisions with regard to line placement are undertaken by EirGrid or ESB Networks DAC and not by ESB. It is the responsibility of EirGrid and ESB Networks DAC to comply with the regulatory requirement to identify the "least cost technically acceptable" (LCTA) solution and to obtain any planning permissions required with respect to the line placement.

24. ESB submits that once the location of the line placement is decided by EirGrid or ESB Networks DAC, ESB makes preparations for the construction of the line and is also responsible for maintenance of the line, once constructed. As part of its preparations for construction, ESB must serve a Wayleave Notice on the owners and occupiers of any lands impacted by the line placement.

25. The service of a Wayleave Notice is governed by section 53 of the Electricity Supply Act 1927 as amended. Section 53 allows ESB to place electricity lines above or below ground across any land and to affix support infrastructure to any buildings on such land provided a notice is served on the owner and occupier "stating [ESB's] intention to place the line or attach the fixture (as the case may be) and giving a description of the nature of the line or fixture and of the position and manner in which it is intended to be placed or attached". Section 53(4) provides that ESB may proceed to place the line or attach the fixture if the owner or occupier provides consent within seven days of receipt of the Wayleave Notice and that such consent may be unconditional or subject to conditions which are acceptable to ESB. If the owner or occupier's consent is not forthcoming, section 53(5), as amended by section 1 of the Electricity (Supply) (Amendment) Act 1985, allows ESB to proceed with the placement of the line or fixture, subject to the entitlement of the owner or occupier to compensation which is to be assessed in default of agreement under the provisions of the Acquisition of Land (Assessment of Compensation) Act.

26. Compensation is therefore specifically referred to in section 53(5) of the 1927 Act, which provides that although the consent of a landowner or occupier is not required in order to place an electricity line on land, adequate compensation must be paid to the landowner or occupier in question. The level of compensation may be agreed between the parties or it may be the subject of arbitration proceedings. My understanding is that the statutory reference to an entitlement to compensation was introduced following the decision of the Supreme Court, in *ESB v Gormley* [1985] IR 129, that the previous iteration of section 53 was unconstitutional as it failed to provide for a right to compensation which could be assessed, in default of agreement, by an independent arbiter or tribunal.

27. The position is therefore that once ESB serves a valid Wayleave Notice (i.e. a notice which complies with the requirements of section 53 of the 1927 Act) on the owner or occupier of lands on which an electricity line is to placed, broadly speaking, one of the following can occur:

    (i) The owner/occupier can grant their consent subject to certain conditions (which presumably always include an appropriate compensation payment) and, if those conditions are agreeable to ESB, a Deed of Agreement or some form of contractual agreement is entered into relating to ESB's entry on the lands.

    (ii) The owner/occupier can refuse to grant consent. In this case, section 53(5) entitles ESB to proceed with the line placement or the erection of infrastructure in any case subject to the requirement to pay the owner/occupier of the land appropriate compensation. As such, in cases where an owner/occupier does not grant consent they may either:

        a. Accept the compensation offered by ESB; or

        b. Reject the compensation offered by ESB and seek to have an appropriate level of compensation determined by an independent arbitrator.

28. As noted above, ESB has submitted that in some cases, a landowner/occupier may initially reject the compensation offer put forward by ESB and proceed to arbitration but then reach a settlement with ESB before the arbitrator makes a decision on the appropriate award and in such cases the arbitrator may make an Order formalising the award so that parties can have their legal costs assessed in default of agreement.

29. As noted above, the crux of ESB's argument is that the determination, award and/or payment of an amount of compensation in any particular case is not any part of the design or implementation of any line-placement project or critical to its success, but, rather, a separate and consequential matter which cannot have a bearing on whether, when, where or how the project proceeds and is (and can only be) determined after the project proceeds. It therefore argues that information on the determination, payment or award of compensation is not information "on" the line placement project nor can any of those matters themselves be a measure or activity within the meaning of article 3(1)(c).

Definition of "Environmental Information"

30. Article 3(1) of the AIE Regulations defines "environmental information" as any information in any 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).

31. The AIE Regulations transpose the AIE Directive at national level and the definition of "environmental information" in the Regulations, mirrors that contained in the 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 and enable an informed public to participate more effectively in environmental decision-making. It replaced Council Directive 90/313/EEC, the previous AIE Directive.

32. 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 national and European courts.

33. 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. The element of the definition of relevance in this case is paragraph (c) which provides that 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 environmental information. An 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).

34. In his decision in *RTÉ*, Barrett J expressly endorsed the approach set out by the Court of Appeal of England and Wales in *Henney* to determine the "information on" element of the definition (*RTÉ* at paragraph 52). 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).

35. 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).

36. 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".

37. 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…."

38. 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).

Does this case involve measures or activities, which give rise to the environmental impact required under article 3(1)(c)?

39. ESB accepts that projects involving the placement of electricity lines are measures or activities likely to affect the environment "in the sense that such activities might pose a 'real and substantial possibility' of affecting" elements and factors of the environment. However, I do not consider this to be the only measure or activity of relevance in this case which falls within the definition set out in article 3(1)(c) of the Regulations.

40. In the first instance, I consider the construction of an electricity line (as opposed to a decision on its placement) to be a measure which has a "real and substantial possibility" of environmental impact. ESB note in its submissions that compensation is only paid to landowners following construction of a line, if there is "compensatable loss". Given that compensation has been paid in all cases in respect of which the appellant seeks information, it can be assumed that the construction has impacted on the lands in question which is an environmental impact. In broader terms, I also note that in the case of *ESB v Burke* [2006] IEHC 214 one of the arguments raised by the landowner in question, in response to an application by ESB for an interlocutory injunction to gain access to lands, was that the construction of the relevant line was not taking place in accordance with the planning permission granted. While this argument was ultimately unsuccessful, Clarke J in the High Court noted that while the planning permission granted was for an entirely over-ground line "it is common case that since the planning permission was granted, an arrangement has been entered into with certain landowners which will allow the initial connection from the wind farm to a point some 3.5 kilometres from the wind farm to go underground" (see paragraph 6). It does not therefore appear to me that environmental matters are in fact "set in stone" prior to the service of a Wayleave Notice in the manner contended for by ESB.

41. I am also of the view that the service of a Wayleave Notice is in itself a measure or activity within the meaning of article 3(1)(c) as there is a "real and substantial possibility" that the service of that

Notice will have an environmental impact on the lands to which it relates. Indeed, as the Supreme Court noted in *ESB v Gormley* (at para 29):

> The results of the exercise of th[e] power [to compulsorily impose a burdensome right over land under section 53], are, firstly, that the use of the land for agriculture is permanently interfered with to a greater or lesser extent, depending on whether at any time the area in which the masts are situated is used for grazing or tillage; secondly, that in the case of any particular land-owner who wished to erect a building or other structure on the portion of land occupied by one of these masts he would be prevented from doing so; and, thirdly, that in the case of this Defendant's land, at least, there is major permanent damage to the amenity of the lands surrounding the house.

42. As such, there are a number of measures at issue in this case which affect or are likely to affect elements or factors of the environment in the manner required by article 3(1)(c): (i) the line placement project generally; (ii) the construction of the line; and (iii) the service of the Wayleave Notice. The next question to be considered is whether the information within the scope of Q1 and Q2 is information "on" any or all of those measures.

Is the relevant information, information "on" those measures or activities?

43. Having identified the relevant measures or activities, it is necessary to consider the information in question with a view to determining whether it is information "on" that measure or activity. Again, *RTÉ* (see paragraph 52) endorses the approach set out by the Court of Appeal of in England and Wales in *Henney* which is as follows (see paragraphs 47 and 48):

> "…the way the line will be drawn [i.e. in determining whether one is dealing with 'information on…'] is by reference to the general principle that the Regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line the information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information on the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments.
>
> My starting point is the recitals to the Aarhus Convention and the Directive, in particular those set out at para 15 above. They refer to the requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment. They give an indication of how the very broad language of the text of the provisions may have to be assessed to provide a framework for determining the question of whether in a particular case information can properly be described as on a given measure".

44. As noted above, there are two categories of information here:

    (i) the decision of the property arbitrator providing for an award of compensation; and

    (ii) the decisions of the property arbitrator which reflect a settlement between the parties as to the appropriate compensation.

I am mindful that my decision in this case relates to a threshold jurisdictional issue and that a finding that the information in question is "environmental information" will not result in automatic disclosure of the information; rather, the matter will need to be remitted to ESB for further consideration. This means that the detail that I can give about the content of the records and the extent to which I can describe certain matters in my analysis is limited. I should make it clear that I have examined all records provided by ESB for the purpose of this analysis. In order to determine whether those records constitute environmental information, it is necessary to look in more detail at the guidance contained in the case law relating to the meaning of the term "information on".

45. *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).

46. I should note at this juncture that ESB's submissions made repeated reference to the fact that information was not information "on" a "measure" if it could not be considered integral to the measure. As is clear from my summary of the relevant case-law above, this is not in fact the case. What is clear from the guidance provided by the Courts is 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).

47. Thus, while ESB was correct to note in its submissions that the Court of Appeal in *Henney* upheld the trial judge's conclusion that the information at issue in that case was information "on" the Smart Meter Programme, ESB's follow on statement that the basis of the Court's conclusion was that the information "was 'integral' and 'critical' to and a 'key element' in the success of the National Smart Meter Programme" omits key aspects of the *Henney* decision. In my view, *Henney*

makes it clear that the definition should be applied purposively having regard to matters such as "the purpose for which the information was produced, how important it was to that purpose, how it is to be used and whether access to it would make the public better informed above, or to participate in, decision-making in a better way" (see paragraph 43). Thus, I do not agree with ESB's submission that "it is possible that the UK Court of Appeal would not even have considered the compensation information to be information "concerned with [the line placement] project", whatever about considering it to be information concerning the project that was also "on" it."

48. In addition, I consider ESB's focus on the line placement project to be too narrow. As I have identified above, there are other "measures" and "activities" at issue in this case which I consider to come within paragraph (c) of the definition of "environmental information". However, even if the line placement project was the only measure at issue, I do not agree with ESB's contention that information on compensation paid to land owners in connection with line placements cannot be information "on" such projects on the basis that the decision as to the location of the line placement has already been taken. Firstly, I consider that information on payments made to landowners in connection with line placements is "integral" and "critical" to the line placement project and a "key element" of that project. ESB referred to the case of *ESB v Harrington* [2002] IESC 38 in its submissions in support of its contention that the question of compensation and all aspects of that question have no bearing on the decision to place a line. However, I consider the finding of Denham J to emphasise another important point, which is that under section 53 of the 1927 Act, ESB's entitlement to proceed with a line placement is dependent firstly on the service of a valid Wayleave Notice and secondly, is, as Denham J noted "subject to the [owner/occupier]'s right to compensation". If the entitlement to proceed with line placement is subject to the entitlement to compensation, it appears to me that compensation is an integral part or a key element of the line placement project. This reasoning applies whether the amount of compensation is decided by the property arbitrator or on the basis of an agreement between the parties. Indeed, the import of the Supreme Court's decision in *Gormley* is that the entitlement to compensation and the ability to avail of the arbitration process to exercise that entitlement is an integral part of the line placement powers conferred on ESB under section 53 of the 1927 Act since, in the absence of such entitlements, those powers would be unconstitutional.

49. Secondly, the basis of ESB's argument is that making compensation or payment information publicly available won't influence the line placement project to which that compensation relates because the decision as to the location of the line has already been taken and thus the environmental impact is "set in stone". I would note firstly in that regard that I do not consider this to be the case, as I have outlined above. Even if the environmental impact of the line placement project was "set in stone" before any issue of compensation, that does not necessarily mean that providing the public with access to information detailing the compensation amounts paid, the process by which such payments are awarded and decided and setting out how compensation fits into the overall framework of the line placement project, does not contribute to greater public participation in environmental decision-making. Ideally, public participation would take place at a time when the public's views might shape the relevant decision-making. However, at the very least, knowing how, when and how much compensation is paid to landowners for one line-placement project, might contribute to the public's ability to participate in debate concerning further projects. In addition, while Recital 1 of the Directive emphasises that one of the key purposes of the

Regulations is to enable greater public participation in environmental decision-making, it is not the only purpose referred to. Recital 1 also notes that access to environmental information contributes to a "greater awareness of environmental matters" and a "free exchange of views". Information does not therefore need to enable participation in a manner that influences the decision-making process to which that information directly relates in order for it to fall within the definition of "environmental information". Indeed, this is recognised by the Court of Appeal in *Henney* when it notes that regard should be had to "whether access to [the information] would enable the public to be informed about, or to participate in, decision-making in a better way" (paragraph 43, emphasis added). Having information about the compensation process enables the public to better understand the line placement system. Again, this reasoning applies whether the amount of compensation is decided by the property arbitrator or on the basis of an agreement between the parties.

50. I am therefore satisfied that the decision of the property arbitrator providing for an award of compensation and decisions of the property arbitrator reflecting a settlement between the parties as to the appropriate compensation, are both "environmental information" within the meaning of paragraph (c) of the definition contained in article 3(1) of the Regulations.

Have adequate and reasonable searches been conducted by ESB to identify information within the scope of Q3 and Q4 of the request?

51. My approach to dealing with cases where a public authority has effectively refused a request under article 7(5) is that I must be satisfied that adequate steps have been taken to identify and locate relevant environmental information, having regard to the particular circumstances. In determining whether the steps taken are adequate, I consider that a standard of reasonableness must necessarily apply. It is not normally my function to search for environmental information.

52. ESB's position is that no information within the scope of Q3 of the appellant's request is held by or for it. The appellant asserts that ESB has not carried out sufficient searches to locate such information.

53. In his submissions, the appellant queried whether ESB's Internal Reviewer had had regard to the fact that the Distribution Asset Owner and Transmission Asset Owner functions of ESB were now managed and executed by ESB Networks division, in turn managed by ESB Networks DAC, both of which, he submitted, were "ring-fenced" from ESB. The appellant referred to an Asset Management Agreement between ESB and ESB Networks Limited that recorded the terms on which the parties had agreed that ESB Networks Limited would manage ESB Networks Business Unit in discharging the Board's functions as Distribution Asset Owner and Transmission Asset Owner. He submitted that while it was not clear whether ESB Networks DAC and/or ESB Networks division dealt with an AIE request made to ESB in relation to matters relating to Distribution Asset Owner and Transmission Asset Owner functions, it was clear that ESB Networks, under the management of ESB Networks DAC, was responsible for all TAO and DAO activities and functions including those which were the subject matter of the information sought at Q3. He noted therefore that a request to ESB for reports, studies and analysis carried out by or on behalf of ESB might not yield any results if the Internal Reviewer was not authorised or was otherwise unable to access the requested information from ESB Networks division and/or from ESB Networks DAC. The appellant also referred to a decision of the Single Electricity Market Committee which referred to ESB's

Protocol for the Disclosure of Commercially Sensitive Information. This Protocol "requires that ESB have in place necessary ring-fencing and business separation requirements approved by the [Commission for Energy Regulation (now the Commission for the Regulation of Utilities)], including arrangements in respect of accounting separation, complete and effective management separation, premises separation, a code of conduct for the transfer of staff, IT and systems access separation, communication of licence obligations to staff, protection of commercially sensitive information and the requirement for specific trust and confidence agreements where appropriate". He submitted that the SEM Committee also required that all communications between ESB and ESB Networks Limited be in writing and copied to the Compliance Officer - for review by the Commission for Energy Regulation as required. The appellant noted that the Original Decision-Maker had responded to his request on ESB Networks headed paper and had also referred to a 2014 request dealt with by ESB Networks Limited as the basis for refusing his request. He submitted that, the Original Decision-Maker, being a person within ESB Networks, could have searched for the information within the ESB Networks/ESB Networks DAC IT systems but did not do so, whereas the Internal Review appeared to be located in ESB's head office and issued his decision on ESB headed paper. He submitted that the Internal Reviewer may have been limited in his ability to search for the requested information as a result of the ring-fencing applied between ESB and ESB Networks/ESB Networks DAC. He therefore requested that the Internal Reviewer be asked to provide details of the searches carried out and to confirm whether those searches included searches of information held by ESB Networks division and/or ESB Networks DAC as the entity which manages ESB's TAO and DAO functions.

54. My Investigators made enquiries with ESB as to the steps it took to identify and locate documents relating to Q3. This included enquiries as to the impact of the separation of responsibilities referred to by the appellant in his submissions. ESB submitted that it would not be correct to suggest that the Internal Reviewer could not effectively search for records held within the ESB Networks business unit by or for ESB due to the separation of functions carried out by ESB and ESB Networks. ESB explained that while ESB's obligations as Distribution Asset Owner and Transmission Asset Owner are carried out by the Networks business unit under the supervision and direction of ESB Networks DAC, acting as ESB's asset manager, there is nothing in that arrangement preventing the Internal Reviewer from conducting a search of (or causing a search to be conducted on) records that are held within the Networks' business unit. ESB confirmed that a search had been conducted as noted in the Internal Review Outcome of 18 October 2019 and that the scope of that search included records held by ESB Networks DAC for ESB in its capacity as ESB's asset manager.

55. In response to queries on the steps taken to identify and locate information relevant to Q3, ESB provided details of its record storage practices and the searches conducted in response to the appellant's request. ESB submitted that a search was conducted in two areas: the Conflicts and Arbitration Team in the Engineering & Major Projects Directorate and the Landowner Engagement Team in the Strategy and Engagement, Network Assets division of ESB Networks. ESB submitted that these are the two relevant areas for dealing with landowners claiming compensation as a result of infrastructure placed on their lands. ESB noted that a search was carried out in the Conflicts & Arbitrations Team archive but no relevant records were found. All members of the Conflicts & Arbitration Team were contacted to ascertain whether they were aware of any information which might come within the scope of Q3. All team members confirmed that they were

not. Finally, the previous team leader of the Conflicts & Arbitration Team was contacted to ascertain whether he was aware of any relevant information and he confirmed he was not. The search in the Landowner Engagement Team, Strategy and Engagement, Network Assets, ESB Networks was carried by the manager of that Team who checked with both team members whether any files of that type were stored within the area and both confirmed that they did not have any such files.

56. When asked to provide information of the types of records which might be expected to exist with respect to Q3 and evidence of consideration of anywhere else in ESB where such information might be (as opposed to ought to be), ESB noted that no records of this type would be expected to exist. It submitted that a report, study or analysis carried out on the effects of electricity lines, poles and/or pylons on land and property values would be a specialised piece of work. It noted that such a report would be specially commissioned to address a specific need and that there were a very small number of specialists within ESB who could have requested such a report to be produced or who would have use for such a report. Those specialists were consulted and none were aware of any such reports having been commissioned or received by ESB. ESB also indicated that the managers of the relevant areas spoke with each of their team members to ascertain whether it may have been the case that relevant information had been misfiled or misplaced.

57. I am satisfied, on the basis of the above, that reasonable steps were taken by ESB to identify and locate environmental information held by or for it within the scope of Q3.

58. With regard to Q4, the appellant submitted in his appeal form that a copy of the 1976 Building Rules requested "has been identified but has not been released". The basis of the appellant's assertion is unclear. In his subsequent submissions to this Office he noted that the Internal Reviewer "released the minutes of the board meeting wherein the 1976 Building Rules were approved" and "also released an information note summarising the 1976 Building Rules but did not release the Building Rules documentation". The appellant requested "that the 1976 Rules documentation is released in full as it is Environmental Information relating to activities and measures likely to affect land and landscape".

59. As noted above, at Internal Review stage ESB provided the appellant with two documents in response to his request at Q4. Following the acceptance of this appeal, my Office, in accordance with its normal practice, wrote to ESB seeking copies of the information at issue in this appeal. In its response on 20 December 2019, ESB noted the appellant's assertion that a copy of the 1976 Buildings Rules had been identified but not released. ESB noted that "having reviewed the released record again, and the language therein, it may be the case that further records are held by ESB that might satisfy this part of the request" and indicated that it would "carry out a further search to clarify". On 6 March 2020, ESB indicated that it had found a document "containing information that may satisfy [Q4] of the request" and that a copy of this document had been provided to the appellant. The document is entitled **Rules for Buildings near High Voltage Overhead Lines, excluding 10kV.** It is referred to by ESB as the "Briefing Document" which ESB says is not the ultimate 1976 Rules document but "contained environmental information which might have satisfied this part of [the appellant's] original request.

60. The initial Investigator wrote to the appellant on 25 March 2020 to enquire whether he wished to continue with the aspects of his appeal relating to Q4 given that he had been provided with further

information. The appellant confirmed he had been provided with additional information but noted that "ESB has heavily redacted information from the document which, given the subject matter of the document in relation to ESB activities and the sterilisations and restrictions imposed around electricity lines of varying sizes, would appear to be environmental information". He argued that the document in its entirety fell within the scope of his request and should be released in full.

61. When asked to explain the basis for the redactions, ESB's original response was that the ultimate version of the 1976 Rules could not be located and so, instead, ESB had provided the appellant with the environmental information contained in the **Rules for Buildings near High Voltage Overhead Lines, excluding 10kV** (referred to in paragraph 59 above) as that document was considered to contain information which might have satisfied Q4 of his request. It noted that the other parts of the document, which did not contain information that might have formed part of the 1976 Rules, were redacted. The issue of redactions will be dealt with in the next part of my decision. However, I must firstly consider whether ESB took reasonable steps to search for the ultimate version of the 1976 Rules.

62. The initial investigator asked ESB to detail the steps taken by it to locate a copy of the ultimate version of the 1976 Rules, and to provide details as to the status of the 1976 Rules. In response, ESB submitted that the 1976 Rules were replaced by evolving international standards starting in the early 1980s. It noted that a comprehensive new standard has been in place since around 1997, providing details on that standard. It also noted that an updated edition to the revised standard is pending. ESB therefore submitted that the 1976 Rules progressively became outdated since 1980 and have ceased to have any relevance for at least 23 years.

63. ESB noted that searches had been carried out in two relevant functional areas within ESB Networks Asset Management (i.e. overhead lines and landowner engagement). ESB explained that it exercises strict document control with respect to rules documents given the safety considerations involved. It noted that such documents have been controlled electronically through online versions since the late 1990s. It also noted that offices and filing systems would have been reorganised many times since the 1976 Rules were replaced by international standards and that the organisation has relocated since 1997. It was therefore of the view that the only chance of locating a copy of the superseded rules was to request that a search be conducted within the functional areas of ESB Networks Asset Management where a copy might have been retained for reference purposes although it was not expected that such a document would have been retained for such a long period after it had become obsolete. ESB noted that the searches within the relevant functional areas yielded no results. At this point, the Secretary of the ESB Board was contacted to see if records of Board meetings from 1976 and copies of any associated submissions were available but the response received indicated that the Secretary did not hold records for Board meetings that long ago.

64. A search of the ESB Archive was then conducted, although ESB notes that the archive is not a business facility and is maintained in order to preserve and maintain access to documents relating to the history of ESB given its relevance to the history of Ireland. Through those searches, copies of the three documents provided to the appellant were located.

65. ESB explained that by the time these documents had been located the one-month timeframe for response to the appellant's internal review request had almost expired and the Internal Reviewer

mistook the Introductory Memo for the 1976 Rules which the appellant had sought. ESB clarified that although the Introductory Memo referred to the fact that a copy of the 1976 Rules were attached to it, no such document was found as part of the searches conducted. ESB noted that while it conducted further searches following receipt of the appellant's appeal form, it did not locate any further documents.

66. As outlined above, while it may have been the case that the documents referred to above were located at the same time, only two documents were provided to the appellant at internal review stage. The third was provided to the appellant in March 2020. My finding on this point is concerned with whether, as at the date of my decision, I am satisfied that ESB has taken reasonable steps to identify and locate information within the scope of Q4. I should also emphasise that it is outside my remit as Commissioner to adjudicate on how public authorities carry out their functions generally, including with respect to their environmental information management practices. I have no role in assessing how public authorities collect, maintain and disseminate environmental information. My role concerns reviewing appeals of requests for access to environmental information within the scope of the request, which is held by or for the relevant public authority. However, I wish to make it clear that it is not satisfactory that further information was discovered and/or provided to the appellant only after ESB's decision was appealed. The onus is on a public authority to carry out satisfactory searches in the first instance and to provide all environmental information located as a result of such searches unless grounds for refusal can be applied in accordance with the Regulations. If such steps are only taken at appeal stage, this increases both the likelihood of appeals to my Office and the delays incurred in bringing those appeals to a satisfactory conclusion, neither of which are desirable outcomes. I would therefore encourage ESB to ensure in future that adequate steps are taken at the outset to identify and provide all environmental information held by or for it which is the subject of an AIE request unless grounds for refusal apply.

67. That being said, I am satisfied, at this juncture, that adequate steps have been undertaken to identify and locate all relevant environmental information within the scope of Q4. While it is perhaps unfortunate that a copy of the 1976 Building Rules was not available in the ESB archive, I note ESB's position that document control is particularly important given that the Rules in question deal with the proximity of electricity lines to buildings and thus involve safety considerations of paramount importance. This factor, along with the fact that the 1976 Building Rules have long been superseded, contributes to my conclusion that reasonable searches have been undertaken to locate a copy of the Rules. I am therefore satisfied that article 7(5) of the AIE Regulations applies.

68. It is also worthy of note that ESB took a broad approach to the appellant's request for "a copy of the 1976 Rules" and sought to provide the appellant with information contained in another document relating to those Rules in the absence of the 1976 Rules document itself. ESB's position is that the document referred to at paragraph 64(c) above was a "Briefing Document", which contained all of the measures requiring approval of the Board and that preparation and publication of the Rules themselves would have been expected to take place after such Board approval was received. Parts of the Briefing Document were therefore provided to the appellant on the basis that the ultimate version of the 1976 Rules could not be located. ESB's position is that while this is not the ultimate version of the Rules document, it appears to contain all of the relevant information that would have appeared in a 'Rules' document. In light of my conclusion above that adequate

steps were taken to locate the 1976 Rules document, I welcome such an approach, which I consider to demonstrate compliance with the spirit of the AIE Regulations and would encourage ESB, and other public authorities, to continue to adopt such an approach.

69. That being said, ESB have redacted certain information from the "Briefing Document" referred to at paragraph 64(c) above and, as such, the final question to be addressed in my decision is whether it was entitled to do so on the basis that such information was outside the scope of the appellant's request.

Is ESB entitled to redact information from the documents provided to the appellant in response to Q4 of his request in accordance with the AIE Regulations?

70. As noted above, the Briefing Document was provided to the appellant by ESB during the course of this appeal. The appellant has objected to the redactions made to that document and submits that the document, in its entirety, is environmental information within the scope of his request. ESB's argument is that this information is not within scope.

71. ESB submitted that although the Briefing Document was not the 'Rules' document originally requested, it appeared to be the only document containing rules information that was approved by the Board on 8 June 1976. ESB therefore decided, having regard to the wording of the request, that it should release the parts of the Briefing Document that contained the information approved for inclusion in any 1976 Rules document. Ancillary information, which informed the basis for introducing the rules was redacted in the document that was released, as this was determined not to be in the nature of information that would form part of the Building Rules that were adopted by ESB. This ancillary information included the introductory section, the sequence of thought that led to the adoption of the 1976 Rules, the reference to experience from other countries and the description of the pre-existing situation.

72. It appears to me from a review of the Briefing Document that it was designed to provide the Board of ESB with a rationale for the changes being proposed in the form of the 1976 Rules rather than a copy of the Rules themselves. As such, I am not convinced that the additional information in the Briefing Document comes with the scope of Q4(i) of the appellant's request which sought a copy of the 1976 Rules. However, Q4(ii) of the appellant's request sought a copy of "the minutes of the meeting of the Electricity Supply Board wherein the 1976 Building Rules were adopted". The document provided to the appellant in response to this request was a copy of an agenda of the Board Meeting of 8 June 1976, which records the approval of the 1976 Rules. It is accepted by ESB that the Briefing Document was presented to the Board at the meeting of 8 June 1976 and I think it is reasonable to interpret the appellant's request for the Board minutes as seeking information on the process by which Board approval for the change of Rules was provided, in the same way as someone seeking an email on a certain matter might assume their request would include the attachments to that email. I consider that the Recitals to the AIE Directive would lend support to the position that the approach envisaged by the AIE Regulations is that requests should be interpreted broadly rather than narrowly. As the Briefing Document formed part of the process of Board approval, I consider it to be within the scope of Q4(ii) of the appellant's request.

Decision

73. Having carried out a review under article 12(5) of the AIE Regulations, I vary ESB's decision and remit the matter to ESB to be processed in accordance with the AIE Regulations on the basis that the information sought at Q1 and Q2 is "environmental information" and the redacted information in the "Briefing Document" referred to at paragraph 64(c) is within the scope of Q4(ii) of the appellant's request.

74. I affirm ESB's effective reliance on article 7(5) of the AIE Regulations in relation to Q3 and Q4 of the appellant's request on the basis that adequate and reasonable searches have now been carried out to identify and locate information within scope of these parts of the request.

Appeal to the High Court

75. 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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Peter Tyndall
Commissioner for Environmental Information
15 December 2021